PhD-FDEF-2023-036
The Faculty of Law, Economics and Finance

Faculty of Law of the University
of Turin (XXXV cicle, Corso di dottorato'Diritti e Istituzioni')

# DISSERTATION

Defence held on 30/10/2023 in Luxembourg

to obtain the degree of

# DOCTEUR DE L'UNIVERSITÉ DU LUXEMBOURG

# EN DROIT

# AND

# DOTTORE

# IN DIRITTO

by

Bianca NALBANDIAN
Born on 31 March 1989 in Rome (Italy)

# SOVEREIGN INVESTORS INC.', OR SOVEREIGN WEALTH FUNDS IN INVESTMENT ARBITRATION AND IN AWARD ENFORCEMENT PROCEEDINGS

# Dissertation defence committee

Dr Hélène Ruiz Fabri, dissertation supervisor

*Professor of International Law at the University Paris 1 – Pantheon Sorbonne*

Dr Annamaria Viterbo, dissertation supervisor

*Professor of International Law at the University of Turin*

Dr Lorenza Mola

*Associate Professor of International Law at the University of Turin*

Dr Pierre-Henri Conac, Chairman

*Professor of Financial Markets Law at the University of Luxembourg and Max Planck Fellow,*

Dr Sergio Puig

*Chair in International Economic Law at the European University Institute and Evo DeConcini Professor of Law at the University of Arizona*

Dr Attila Massimiliano Tanzi, Vice Chairman

*Professor of International Law at the University of Bologna*

*A colei cui devo l'inizio di questo percorso,*
*che mi ha insegnato la perseveranza nell'autodeterminazione,*
*alla mia ineguagliata nonna Anna*

## TABLE OF CONTENTS


ACKNOWLEDGMENTS ..... I

ABSTRACT ..... II

ABBREVIATIONS ..... III

TABLE OF CASES ..... VII

TABLE OF DOCUMENTS ..... XXV

**GENERAL INTRODUCTION ..... 1**

A. SOVEREIGN WEALTH FUNDS IN INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM ..... 1

B. THE IDENTIFICATION PROBLÉMATIQUE OF SWFS IN INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM ..... 7

C. SCOPE AND STRUCTURE OF THE THESIS ..... 10

D. METHODOLOGY AND CONTRIBUTION TO THE FIELD ..... 16

**CHAPTER I – THE STATE AS INTERNATIONAL INVESTOR: THE RISE OF SOVEREIGN WEALTH FUNDS . 17**

A. THE RISE OF STATE CAPITALIST INVESTORS ..... 17

B. SOVEREIGN WEALTH FUNDS: THE STATE OF THE AFFAIRS ..... 23

C. SOVEREIGN WEALTH FUNDS: ORIGINS AND DEVELOPMENT ..... 28

D. SOVEREIGN WEALTH FUNDS: COMMON REGULATORY FRAMEWORKS ..... 33

E. SOVEREIGN WEALTH FUNDS: TAXONOMY AND CLASSIFICATIONS ..... 38

1. DEFINITIONS ..... 38

4. CLASSIFICATIONS ..... 45

3. MACROECONOMIC OBJECTIVES ..... 46

4. LEGAL STRUCTURES AND GOVERNANCE FRAMEWORKS ..... 49

5. DIFFERENCES BETWEEN SWFS AND OTHER SOVEREIGN INVESTORS AND FINANCIAL INSTITUTIONS ..... 58

6. PROVIDING A WORKING DEFINITION OF SWFS ..... 63

F. SOVEREIGN WEALTH FUNDS AND HOST STATES' REGULATORY REACTIONS ..... 64

1. STATE CAPITALIST INVESTORS AND HOST STATES CONCERNS ..... 64

2. HOST STATES' INVESTMENT RESTRICTIONS: FOREIGN INVESTMENT SCREENINGS MECHANISMS .. 70

3. FDI SCREENINGS DEVELOPMENTS ..... 72

I. FDI SCREENING REGULATIONS WORLDWIDE ..... 75

II. THE EU FDI REGULATION AND EU MEMBER STATES MECHANISMS ..... 80

4. THE FDI SCREENINGS IMPLICATIONS ON INTERNATIONAL INVESTMENT LAW OBLIGATIONS: A GATEWAY FOR INVESTMENT DISPUTES? ..... 86

**CHAPTER II. SOVEREIGN WEALTH FUNDS AS INSTRUMENTALITIES OF THE STATES IN INVESTOR-STATE DISPUTE SETTLEMENT ..... 91**

A. INTRODUCTION ..... 91

B. THE CUSTOMARY LAW OF STATE RESPONSIBILITY AS CODIFIED BY THE ARSIWA ..... 95

C. SOVEREIGN WEALTH FUNDS AS STATE ORGANS IN ISDS ..... 100
1. ARSIWA ARTICLE 4 ..... 100
I. INTRODUCTION ..... 100
II. ARTICLE 4 IN ISDS CASE LAW ..... 103
2. DE FACTO ORGANS ..... 112
3. INTERIM REMARKS: WOULD SWFS BE CONSIDERED AS STATE ORGANS IN ISDS? ..... 122
D. SOVEREIGN WEALTH FUNDS AS ENTITIES EXERCISING GOVERNMENTAL AUTHORITY IN ISDS ..... 123
1. ARSIWA ARTICLE 5 ..... 123
I. INTRODUCTION ..... 123
II. ISDS CASE LAW ..... 127
2. THE CONTENT OF 'GOVERNMENTAL AUTHORITY' ..... 137
3. THE EXERCISE OF 'GOVERNMENTAL AUTHORITY' ..... 145
4. INTERIM REMARKS: WOULD SWFS BE CONSIDERED AS ENTITIES ENTRUSTED WITH GOVERNMENTAL AUTHORITY IN ISDS? ..... 148
E. SOVEREIGN WEALTH FUNDS AS STATE AGENTS IN THE ISDS JURISPRUDENCE ..... 153
1. ARSIWA ARTICLE 8 IN ISDS JURISPRUDENCE ..... 153
I. INTRODUCTION ..... 153
II. ISDS CASE LAW ..... 159
2. STATE INSTRUCTIONS ..... 163
3. STATE DIRECTIONS OR CONTROL ..... 167
4. ARSIWA ARTICLE 8 THRESHOLD: THE 'EFFECTIVE CONTROL TEST' IN ISDS ..... 174
5. THE 'PARTICULAR RESULT' REQUIREMENT IN ISDS ..... 179
6. INTERIM REMARKS: ARE SWFS TO BE CONSIDERED AS STATE AGENTS IN ISDS? ..... 183
F. PARALLEL PERSPECTIVES: THE NOTION OF 'PUBLIC BODIES' AS CONSTRUED BY THE WTO DISPUTE SETTLEMENT MECHANISM ..... 186
1. FROM A CONTROL-BASED NOTION OF 'PUBLIC BODIES' TO THE FOCUS ON GOVERNMENTAL AUTHORITY ..... 187
2. PARALLEL STRUGGLES ..... 198
G. INTERIM CONCLUSIONS ..... 200
**CHAPTER III – SOVEREIGN WEALTH FUNDS AS CLAIMANTS IN INVESTOR-STATE DISPUTE SETTLEMENT ..... 207**
A. INTRODUCTION ..... 207
B. JURISDICTION RATIONE MATERIAE: SWFS 'INVESTMENT' ..... 212
1. SWFS 'INVESTMENT' UNDER IIAS ..... 212
2. SWFS 'INVESTMENT' UNDER INSTITUTIONAL RULES DEFINITIONS AND ARBITRAL JURISPRUDENCE: THE CASE OF THE ICSID CONVENTION ..... 214
3. SWFS AND PRE-ESTABLISHMENT RIGHTS ..... 218
C. JURISDICTION RATIONE PERSONAE: SWFS AS 'INVESTORS' UNDER INVESTMENT TREATY DEFINITIONS ..... 222

D. JURISDICTION RATIONE PERSONAE: SWFS AS 'INVESTORS' UNDER ARBITRAL INSTITUTIONAL RULES' DEFINITIONS AND ARBITRAL JURISPRUDENCE ..... 233
1. ICSID CONVENTION AND ICSID CASE LAW: ARON BROCHES' STATEMENT ..... 233
2. THE BROCHES EXCEPTIONS IN LIGHT OF THE ARSIWA ..... 235
I. THE FIRST EXCEPTION: THE TERM 'AGENT OF THE GOVERNMENT' ..... 237
II. THE SECOND EXCEPTION: 'DISCHARGING ESSENTIALLY GOVERNMENTAL FUNCTION' ..... 240
E. THE BROCHES TEST APPLIED ..... 243
F. NON-ICSID ARBITRATION ..... 249
G. APPRAISAL OF TRIBUNALS' ANALYSIS ..... 253
H. INTERIM CONCLUSIONS ..... 264
**CHAPTER IV. SOVEREIGN WEALTH FUNDS AS ASSETS OF THE STATE IN AWARD ENFORCEMENT PROCEEDINGS AND IN THE LAW OF STATE IMMUNITY FROM ENFORCEMENT ..... 269**
A. INTRODUCTION ..... 269
B. STATE IMMUNITY ..... 275
1. NATURE AND ORIGINS ..... 275
2. DEVELOPMENTS UNDER INTERNATIONAL LAW ..... 285
C. STATE IMMUNITY FROM ENFORCEMENT AND ITS BENEFICIARIES ..... 291
1. STATE IMMUNITY FROM ENFORCEMENT UNDER THE ECSI AND UNCSI ..... 291
2. LOCATING SOVEREIGN WEALTH FUNDS WITHIN THE NOTIONS OF 'STATE' AND 'SEPARATE ENTITIES' UNDER THE LAW OF STATE IMMUNITY FROM ENFORCEMENT ..... 294
I. DIFFERENT APPROACHES ON THE QUALIFICATION OF 'STATE' AND STATE ENTERPRISES: ZOOM IN ON CENTRAL BANKS ..... 301
D. EXCEPTIONS TO STATE IMMUNITY FROM ENFORCEMENT ..... 311
1. THE COMMERCIAL EXCEPTION ..... 313
2. THE NATURE AND THE PURPOSE TESTS ..... 316
I. DIFFERENT APPROACHES ON THE QUALIFICATION OF THE COMMERCIAL EXCEPTION: ZOOM IN ON CENTRAL BANK ACTIVITIES ..... 327
E. INVESTMENT ARBITRATION AND STATE IMMUNITY FROM ENFORCEMENT ..... 331
F. AWARD ENFORCEMENT PROCEEDINGS AGAINST SOVEREIGN WEALTH FUNDS: THE KAZAKHSTAN'S SAGA ..... 333
1. INTRODUCTION ..... 333
2. KAZAKHSTAN'S SWFS: THE NATIONAL FUND AND SAMRUK-KAZYNA ..... 335
G. CASE STUDY N. 1: THE AIG V. KAZAKHSTAN CASE OR ENFORCEMENT AGAINST NFK IN THE UNITED KINGDOM ..... 338
1. THE ARBITRAL PROCEEDING ..... 338
2. THE UK FRAMEWORK ON STATE IMMUNITY FROM ENFORCEMENT ..... 339
3. THE ENFORCEMENT PROCEEDING AGAINST NFK OR IMMUNITY OF SWFS MANAGED BY CENTRAL BANKS IN THE UNITED KINGDOM ..... 345
H. CASE STUDY N. 2: THE STATI V. KAZAKHSTAN CASE OR ENFORCEMENTS AGAINST NFK AND SAMRUK-KAZYNA IN SWEDEN, BELGIUM AND THE NETHERLANDS ..... 347
1. THE ARBITRATION PROCEEDING AND THE POST ARBITRATION PHASE ..... 347

I. ENFORCEMENT PROCEEDINGS AGAINST NFK: IMMUNITY OF SWFS MANAGED BY CENTRAL BANKS ..... 350
II. ENFORCEMENT IN SWEDEN ..... 350
A. SWEDEN DOMESTIC FRAMEWORK ON STATE IMMUNITY FORM ENFORCEMENT ..... 350
B. THE AWARD ENFORCEMENT PROCEEDINGS IN SWEDEN ..... 352
III. ENFORCEMENT IN BELGIUM ..... 359
A. BELGIUM DOMESTIC FRAMEWORK ON STATE IMMUNITY FROM ENFORCEMENT ..... 359
2. AWARD ENFORCEMENT AGAINST SAMRUK-KAZYNA: IMMUNITY OF SWFS STRUCTURED AS SOES ..... 367
I. ENFORCEMENT IN THE NETHERLANDS ..... 367
A. THE NETHERLANDS DOMESTIC FRAMEWORK ON STATE IMMUNITY FROM ENFORCEMENT ..... 367
B. THE AWARD ENFORCEMENT PROCEEDING IN THE NETHERLANDS ..... 368
3. REMARKS ON ENFORCEMENT PROCEEDINGS IN AIG V. KAZAKHSTAN AND STATI V. KAZAKHSTAN ..... 373
J. INTERIM CONCLUSIONS ..... **378**
**GENERAL CONCLUSIONS** ..... 384
TABLE 1 - LARGEST FUNDS BY DATE OF ESTABLISHMENT ..... 392
TABLE 2 - SWFS CHARACTERISTICS AND DIFFERENCES FROM OTHER INSTITUTIONS ..... 394
TABLE 3 - SWFS TYPES AND LEGAL STRUCTURES ..... 396
ANNEX I - SWFS DEFINITIONS ..... 397
ANNEX II - SWFS RANKING PER ASSETS UNDER MANAGEMENT (AUM) ..... 409
**BIBLIOGRAPHY** ..... **415**

## ACKNOWLEDGMENTS

This work could not have been started or completed without the input and feedback of my two supervisors, Professors Hélène Ruiz Fabri and Anna Maria Viterbo. I owe them countless lessons that will stay with me. In particular, I want to express my gratitude to Professor Ruiz Fabri for selecting me to be part of the amazing research team at the Max Planck Luxembourg and teaching me the value of persistence and unapologetically expressing myself and my opinions. To Professor Viterbo, I am immensely thankful for her continuous support in shaping and articulating my raw ideas.

I would also like to extend my heartfelt gratitude to the other components of my CET committee, Professors Conac, and Happold for their valuable comments and insights shared throughout our meetings. Additionally, I want to express my sincere appreciation to the reviewers from the University of Turin, Professors Gustavo Preito and Stefano Saluzzo, for their thoughtful comments and support towards my thesis. Their feedback has been valuable in shaping the outcome of my work.

The past four years of work have been filled with moments of joy, as well as doubts and anxiety. Throughout it all, I have found unwavering support from the friends I made at the Max Planck Institute, who have become my academic family. I extend my thanks to them, as they have been the source of laughter and meaningful discussions, making these years fly by.

My heartfelt gratitude goes to Alessandra, my foremost supporter, for her belief in me, for being the one person I could confide in, and for setting an inspiring example of how to engage with academia passionately every day. To Olivier and Edoardo: I am deeply thankful for your guidance as senior colleagues and friends, which have played a crucial role in bringing my thesis to a fulfilling conclusion (also thank you for patiently enduring numerous conversations about China's global leadership). And to Anna: thank you for choosing a PhD topic so closely aligned with mine, making my journey less lonely, and enriching it with fruitful debates.

To my 'Addams' family, particularly my grandmother, I owe my presence here. Thank you for always being there when it mattered most and for teaching me to trust my intuition. Lastly, to Dino, my ultimate proofreader and speech prep, I am deeply thankful for your unwavering support and going above and beyond to accompany me on this journey. Without you, it would not have been the adventure it has been and will continue to be.

**ABSTRACT**

*This dissertation critically examines the intricate challenges surrounding the identification and characterization of State capitalist Sovereign Wealth Funds (SWFs) and State-Owned Enterprises (SOEs) within the realm of international investment arbitration and award enforcement proceedings. The study conducts an in-depth analysis of how investment tribunals and domestic courts navigate cases involving SWFs and SOEs, with a primary focus on elucidating the interplay between these entities' structural affiliations with their host States, their operational activities, and their roles as claimants or respondents in investment disputes and as assets of the State in award enforcement proceedings.*

*Framed against this backdrop, the research addresses the complexities arising from the dual nature of SWFs and selected SOEs, which straddle both sovereign and private attributes. This dual identity challenges the conventional demarcations between public and private power structures. The work highlights the pivotal role of instruments such as the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the law of State immunity and the conceptual frameworks of governmental and commercial activities in shaping the characterization of SWFs.*

*The study posits that the conventional paradigms of the public/private and sovereign/commercial divides, entrenched in international public and economic law, inadequately capture the intricate essence of SWFs and State capitalist investors. By delving into these nuanced legal and conceptual dimensions, this dissertation advances a comprehensive understanding of the challenges associated with identifying and characterizing State capitalist ownership in the domain of international investment law. The insights offered in this study prompt a re-evaluation of prevailing analytical frameworks, which may be of guide in addressing the intricate realities of SWFs and State capitalist investors within investment arbitration and award enforcement proceedings.*

## ABBREVIATIONS

| | |
|---|---|
| AB | Appellate Body |
| ARSIWA | Articles on the Responsibility of States Internationally Wrongful Acts |
| ASEAN | Association of Southeast Asian Nations |
| BIT/BITs | Bilateral Investment Treaty/Treaties |
| CFIUS | Committee on Foreign Investment in the United States 1975 |
| ECJ | Court of Justice of the European Union |
| DSU | Dispute Settlement Understanding |
| EC | European Communities |
| ed/eds | editor/editors |
| ECHR | European Court of Human Rights |
| ECR | European Court Reports |
| edn. | edition |
| EEC | European Economic Community |
| e.g. | exempli gratia (for example) |
| EU | European Union |
| FINSA | The Foreign Investment and National Security Act of 2007 |
| FIRRMA | The Foreign Investment Risk Review Modernization Act of 2018 |
| FSIA | Foreign State Immunity Act of 1976 |

| | |
|---|---|
| FTA | Freed Trade Agreement |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| IIA(s) | International Investment Agreement(s) |
| ICC | International Chamber of Commerce |
| ICSID | International Centre for Settlement of Investment Disputes |
| i.e. | id est (it is) |
| IIL | International Investment Law |
| ILC | International Law Commission |
| IMF | International Monetary Fund |
| IMF Agreement | Articles of Agreement of the International Monetary FundInc. |
| Inc. | Incorporated |
| ISDS | Investor-State Dispute Settlement |
| SWF IWG | International Working Group on Sovereign Wealth Funds |
| LCIA | London Court of International Arbitration |
| Ltd | Limited |
| MFN | Most-favoured Nation |
| NAFTA | North American Free Trade Agreement |

| | |
|---|---|
| NT | National Treatment |
| OECD | Organisation for the Economic Co-operation and Development |
| OUP | Oxford University Press |
| PPF/PF | Public Pension Fund/Pension Fund |
| PRC | People's Republic of China |
| SCC | Stockholm Chamber of Commerce |
| SIA | Sovereign Immunity Act |
| SCE | State-controlled entity |
| NOC | National oil companies |
| SOE | State-owned enterprise |
| SSRN | Social Science Research Network |
| SWF/SWFs | Sovereign Wealth Fund/Funds |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UK | United Kingdom of Great Britain and Northern Ireland |
| US | United States of America |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |

| | |
|---|---|
| UNCSI | United Nations Convention on Jurisdictional Immunities of States and Their Properties |
| UNCTAD | United Nations Conference on Trade and Development |
| UNTS | United Nations Treaty Series |
| VCLT | Vienna Convention on the Law of Treaties |
| vol/vols | volume/volumes |
| WTO | World Trade Organization |

## TABLE OF CASES

### Arbitral Cases


- *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015
- *ADF Group Inc. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003
- *Aguas del Tunari v. Bolivia Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 Oct 2005
- *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003
- *AMT v. Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997
- *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013
- *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Statement of Claim, 7 October 2019
- *Almås v. Poland Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016
- *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005
- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009
- *Beijing Urban Construction (BUCG) v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017
- *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015

- *Bilcon of Delaware et al v. Canada*, PCA Case No. 2009–04, Award on Jurisdiction and Liability, 17 March 2015
- *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017
- *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012
- *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019
- *Ceskoslovenska Obchodni Banka A.S. v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999
- *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001
- *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 Award, 4 April 2016
- *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/2, Award, 31 October 2012
- *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August
- *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009
- *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000
- *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006
- *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004

- *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1988
- *Eureko BV v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005
- *Flemingo Duty Free Shop Private Limited v the Republic of Poland*, UNCITRAL, Award, 12 August 2016
- *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 11 March 2016
- *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006
- *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003
- *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2020
- *Güriş İnşaat ve Mühendislik A.Ş. v. Libya*, ICC Case No. 22137/ZF/AYZ, Partial Award on Jurisdiction and Liability, 4 February 2020
- *Güriş İnşaat ve Mühendislik A.Ş. v. Libya*, ICC Case No. 22137/ZF/AYZ, Final Award, 23 November 2021 (unpublished)
- *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, 17 October 2006
- *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005
- *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006
- *Italian Republic v. Republic of Cuba*, ad hoc State-State arbitration, Final Award (in French), 1 January 2008; Dissenting Opinion of Attila Tanzi, 2008 (French), 1 January 2008

- *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008
- *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012
- *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020
- *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017
- *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017
- *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award, 12 November 2008
- *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008
- *Maffezzini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000
- *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015
- *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018
- *Mason Capital LP and Mason Management LLC v Republic of Korea*, Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019
- *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016
- *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010

- *Mohammad Reza Dayyani, et al. v. The Republic of Korea*, PCA Case No. 2015-38, Award (unpublished)
- *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016
- *Mr. Franz Sedelmayer v. The Russian Federation*, SCC, Award, 7 July 1998
- *Nykom Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003
- *Noble Ventures, Inc v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005
- *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction, 28 September 2010
- *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015
- *Ortiz Construcciones y Proyectos SA v People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 April 2020
- *Oschadbank v. Russia Oschadbank and Russian Federation*, PCA Case No. 2016-14, Award, 26 November 2018
- *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 5 February 2005
- *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015
- *Ras al-Khaimah Investment Authority v. India*, UNCITRAL, PCA, 2016
- *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, 26 November 2009

- *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016
- *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award 29 July 2008
- *RWE Innogy GmbH and RWE Innogy Aersa S A U v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, Quantum, 30 December 2019
- *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2020
- *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Jurisdiction and Liability
- *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007
- *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2000
- *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004
- *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985
- *Stabil LLC and Others v. Russian Federation*, UNCITRAL, PCA Case no. 2015-35, Final Award, 12 April 2019
- *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No. ARB/15/43, Award 13 August 2019
- *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/28, Award, 28 February 2020
- *Ministry of Land and Property of the Republic of Tatarstan v. Ukraine* (unpublished)

- *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017
- *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017
- *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion, 29 April 2004
- *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009
- *TMR Energy Limited v. The State Property Fund of Ukraine*, SCC Case No. 062/2000, Final Arbitral Award, 22 January 2001
- *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28 Award, 10 March 2014
- *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017
- *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL PCA Case No. 2009-19, Award, 12 June 2012
- *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, *ICSID Case No. ARB/14/4*, Award, 31 August 2018
- *United Parcel Service of America Inc (UPS) v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007
- *Vento Motorcycles v. Mexico Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020
- *Waste Management, Inc v United Mexican States* (Waste Management II), ICSID Case No. ARB(AF)/00/3, Award 30 April 2004
- *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003

- *William Ralph Clayton and others v Government of Canada*, PCA Case No. 2009–04, Award on Jurisdiction and Liability, 17 March 2015
- *Wintershall AG, et al v. Government of Qatar*, Partial Award on Liability, 5 February 1988

**European Court of Human Rights**

- *Loizidou and Cyprus (intervening) v. Turkey* [GC], Merits, Application No. 15318/89, Case No 40/1993/435/514, 18 December 1996
- *Catan v. Moldova and Russian Federation*, Merits and just satisfaction, Applications No. 43370/04, 8252/05, 18454/06, 19th October 2012
- *Chiragov and Others v. Armenia*, Application No. 13216/05, Judgment, 16 June 2015
- *Transpetrol v. Slovakia*, Appl. no. 28502/08, Judgment,15 November 2011
- *Ljubljanska Banka D.D. v. Croatia*, Application No. 29003/07, Judgment, 12 May 2015
- *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], Application No. 60642/08, Decision, 16 July 2014
- *Slovenia v. Croatia*, Application No. 54155/16, Decision 18 November 2020
- *Yershova v. Russia*, Application No. 1387/04, Judgment, 8 April 2010
- *Islamic Republic of Iran Shipping Lines v. Turkey*, Application No. 40998/98, Judgment, 13 December 2007
- *R. Kačapor and Others v. Serbia*, Applications No. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, Judgment (Merits and Just Satisfaction), 15 January 2008
- *Municipal Section of Antilly v. France*, Application No. 45129/98, Decision, 23 November 1999

- *Mykhaylenky and Others v. Ukraine*, Applications No. 35091/02, 35196/02,35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, Judgment, 30 November 2004

- *Cooperativa Agricola Slobozia-Hanesei v. Moldova*, Application No. 39745/02, Judgment, 3 April 2007

**International Court of Justice**

- *Armed Activities on the Territory of the Congo, the Democratic Republic of the Congo v. Uganda*, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19th December 2005

- *Arrest Warrant of 11 April 2000, Congo, The Democratic Republic of the v. Belgium*, Judgment, Merits, Preliminary Objections, ICJ GL No 121, [2002] ICJ Rep 3, [2002] ICJ Rep 75, ICGJ 22 (ICJ 2002), 14th February 2002

- *Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v. Spain*, Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3, (1970) 9 ILM 227, ICGJ 152 (ICJ 1970), 5th February 1970

- *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary objections, ICJ GL No 164, [2019] ICJ Rep 7, ICGJ 536 (ICJ 2019), 13th February 2019

- *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment, 30 March 2023, ICJ GL No 164, [2019] ICJ Rep 7, ICGJ 536 (ICJ 2023)

- *Case Concerning Ahmadou Sadio Diallo, Guinea v. the Democratic Republic of the Congo*, Judgment on compensation, ICJ GL No 103, [2012] ICJ Rep 324, ICGJ 435 (ICJ 2012), 19th June 2012

- *Jurisdictional Immunities of the State, Germany v. Italy*, Judgment, ICGJ 434 (ICJ 2012), 3rd February 2012

- *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States*, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICGJ 111 (ICJ 1984), 26th November 1984

**International Criminal Tribunal for the Former Yugoslavia**

- *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999

**Iran-United States Claims Tribunal**

- *Alavi Foundation for the Oppressed, Iran Touring and Tourism Organization v. Iran*, Case No. 134, 17 September 1985, Award No. ITL 54-134-1, 9 IRAN-US CTR 72, 88-97 (1985-II) (*Hyatt International Corporation v. Iran*)

- *Yeager v. Iran*, Partial award, Case No 10199, Award No 324-10199-1, (1988) 17 Iran-US CTR 92, (1988) 82 AJIL 353, (1990) 82 ILR 178, 2nd November 1987, Iran-United States Claims Tribunal

**WTO Cases**

- *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Appellate Body Report, WT/DS103/33, adopted on 13 October 1999

- *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Panel Report, WT/DS316/R, adopted on 30 June 2010

- *Korea – Measures Affecting Trade in Commercial Vessels*, Panel Report, WT/DS273/R, adopted 11 April 2005

- *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS/188, Panel established, but not yet composed on 18 May 2000

- *Russia – Measures Concerning Traffic in Transit*, Panel Report, WT/DS512/R, adopted on 26 April 2019
- *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, Appellate Body Report, WT/DS296/AB/R, adopted 20 July 2005
- *United States – Countervailing Duty Measures on Certain Products from China* ('*US-Countervailing Measures (China)*'), Appellate Body Report, WT/DS437/ARB, adopted on 16 January 2015
- *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Appellate Body Report, WT/DS436/AB/R, adopted on 19 December 2014
- *United States – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*, WT/DS523/R, adopted 18 December 2018; See also WTO Dispute Settlement: One Page Case Summary
- *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ('*US – AD/CVDs (China)*'), Panel Report, WT/DS379/R, adopted on 22 October 2010
- *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ('*US – AD/CVDs (China)*'), Appellate Body Report, WT/DS379/AB/R, adopted on 11 March 2011
- *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
- *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/, Panel lasped 22 April 1988
- *United States – Trade Measures Affecting Nicaragua*, Panel Report, L/6053, dated 13 October 1986

**Domestic Cases**

**Austria**

- *Hoffmann v. J Dralle, Re, Hoffmann v. Czechoslovakia*, Austria, Supreme Court of Justice [OGH], OGH 1 Ob 167/49, OGH 1 Ob 171/50, ILDC 2833 (AT 1950), SZ 23/143, (1950) 17 ILR 155, 10 May 1950

**Belgium**

- *Republic of Kazakhstan v Stati and Others*, Belgium, Brussels Court of appeal 2018/AR/1209
- Belgium, Court of Appeal, Brussels, 17th District-Civil Matters, 2021/5536, 29 June 2021
- *Leica AG v. Central Bank of Iraq et Etat irakien*, Belgium, Brussels, Cour d'Appel, 15 February 2000
- *Société pour la fabrication de cartouches v. Colonel Mutkuroff*, Belgium, Tribunal civil of Brussels, Ministre de la Guerre de Bulgarie, 1888

**Brazil**

- *Recurso Extraordinário com Agravo 954.858 Rio de Janeiro*, Brazil, Supremo Tribunal Federal, ARE 954858/RJ, Judgment, 23 August 2021

**Canada**

- *Canfi corp Overseas Projects Ltd. v. Asbestos Plastic Industries Public Enterprise*, Canada, Superior Court of Quebec, 7 March 1995

**France**

- *Administration des Chemins de fer du Gouvernement Iranien v. Société Levant Express Transport*, France, Court of Cassation, 1968
- *Etat d'Ukraine c/ société Pao Tatneft*, France, Paris Court of Appel, Case No. 14/17964, Judgment, 29 November 2016
- *Gamen Huvert v. Etat Russe*, France, Paris, Court of Appeal, 30 April 1912
- *Guggengeim v. State of Vietnam*, France, Court of Cassation, 19 December 1961

**Finland**

- *Yrityspankki Skop Oy v. Republic of Estonia District Court of Helsinki*, Finland, District Court of Helsinki, Case No. 95/1997, Judgment, 21 January 1998

**Germany**

- *Claim against the Empire of Iran Case*, Germany, Federal Constitutional Court, 30 April 1963, 45 ILR 57
- *National Iranian Oil Co. Revenues from Oil Sales Case*, Germany, Federal Constitutional Court, Judgment, April 12, 1983

**Italy**

- *Borri v. Argentina*, Italy, Court of Cassation, Request for a Ruling on Jurisdiction, Case No. 11225, 2005
- *Condor and Filvem v. Ministry of Justice*, Italy, Constitutional Court, Case No. 329, 15 July 1992
- *Hamspohn v. Bey di Tunisi*, Italy, Lucca Court of Appeal, Hearing, 14 March 1887, l Foro Italiano, 1887, Vol. 12

- *Libya v. Rossbeton SRL*, Italy, Case No. 2502, 25 May 1989
- *Mallavel v. Ministère des affaires étrangères français*, Pretore (lower court judge) of Rome, Decision, 29 April 1974
- *Sindacato UIL-Scuola di Bari v. Istituto di Bari del Centro internazionale di studi agronomici mediterranei*, Italy, Supreme Court of Cassation, 4 June 1986
- *Società immobiliare Corte Barchetto v. Morocco*, Italy, Tribunal of Rome, 29 April 1977

**Japan**

- *J/3, X et al. v. the United States of America*, Japan, Supreme Court, Judgment, Hanrei Jihou No. 1786, 2002, 14 March 2002

**Sweden**

- *Ascom Group and Others v. Republic of Kazakhstan and National Bank of Kazakhstan* Sweden, Högsta domstolen Ö 3828-20, Decision of 18 November 2021
- Högsta domstolen, 2011-07-01
- *Svea Court of Appeal v Ascom Group and Others*, Sweden, Svea Court of Appeal, Case No. T 12462-19, 2020

**Switzerland**

- *Kuwait v. X*, Switzerland, Swiss Federal Supreme Court, 24 January 1994, RSDIE 1995
- *République Arabe d'Egypte v. Cinetel*, Switzerland, Federal Tribunal, 20 July 1979, 65 ILR

**South Korea**

- South Korea, Seoul Central District Court, Joint Case No. 2016/505092, 34th Civil Division, Judgment, 8 January 2021, South Korea, Seoul Central District Court, Judgment of 8 January 2021

**The Netherlands**

- *Cabolent v. NIOC*, The Netherlands, The Hague Court of Appeal, 28 Nov. 1968, 1 NYIL 1970
- *Morningstar International Corporation v Republic of Gabon, Staat der Nederlanden*, The Netherlands, Supreme Court, ECLI:NL:HR:2016:2236, 30 September 2016
- *The Republic of Kazakhstan v. Stati et al.*, The Netherlands, Supreme Court, Judgment, No. 19/03142 and 19/03144, 18 December 2020
- *United States of America v. Havenschap Delfzijl/Eemshaven* (Delfzijl/Eemshaven Port Authority), The Netherlands, Supreme Court, 12 November 1999, NJ 2001, No. 567, Netherlands Yearbook of International Law (2001)

**United Kingdom**

- *AIC Ltd. v. Federal Government of Nigeria*, United Kingdom, England and Wales High Court, Case Nos. S/ 03/ 0056 and S/ 03/ 005, 13 June 2003, 129 ILR 571.
- *AIG Capital Partners Incorporated and CJSC Tema Real Estate Company Limited v Kazakhstan and National Bank of Kazakhstan* (*intervening*), Enforcement decision, United Kingdom, England and Wales High Court 2239 (Comm), 2005, 2006 1 WLR 1420, IIC 9 2005
- *Alcom Ltd v Republic of* Colombia, United Kingdom, House of Lords, 1984, 74 ILR 180
- *Botas Petroleum Pipeline Corporation v. Tepe Insaat Sanayii*, United Kingdom Privy Council, AS, 2018, 31

- *In re Banco Nacional*, England, 2001, 3 All ER 923, 932, 124 ILR 550, 559
- *Kensington International Ltd v Republic of Congo*, England and Wales, High Court (Comm), 2331, Judgment, 16 April 2003
- *Kuwait Airways v. Iraqi Airways*, United Kingdom, 1 Lloyd's Rep, 2003, 126 ILR
- *Kuwait Airways Corporation v. Iraqi Airways Company and the Republic of Iraq*, England and Wales, High Court, 1992, 103 ILR 344
- *Kuwait Airways Corporation v. Iraqi Airways Company and the Republic of Iraq*, England and Wales, Court of Appeal, Judgment, 1993, 103 ILR 367
- *Kuwait Airways Corporation v. Iraqi Airways Company and the Republic of* Iraq, UK, House of Lords, 1995 103 ILR 391
- *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC*, United Kingdom, Privy Council 164 ILR 347
- *Littrell v. United States of America*, No 2, United Kingdom, England, Court of Appeal, 1993, 100 ILR 438
- *Ministry of Trade of Iraq v. Tsavliris Salvage (International) Ltd (The Altair)*, England and Wales, High Court 612 (Comm), Judgment, 1 April 2008
- *NML Capital Limited v. Republic of Argentina*, United Kingdom, Supreme Court, 2011, 147 ILR 575
- *Orascom Telecom Holding SAE v. Republic of Chad and others*, United Kingdom, England and Wales, High Court, 1841 (Comm), 2008
- *Playa Larga (Owners of Cargo lately laden on board) v. I Congreso del Partido (Owners)*, United Kingdom, House of Lords, 1981, 64 ILR 307
- *Propend Finance Pty Ltd v. Sing and others*, England, Judgment, 17 April 1997, 111 ILR
- *Taurus Petroleum Limited (Appellant) v. State Oil Marketing Companyof the Ministry of Oil, Republic of Iraq* (Respondent), UK Supreme Court, 2017

- *Trendtex Trading Corporation v. Central Bank of Nigeria*, England and Wales, Court of Appeal (civil division), 1977, 64 ILR 122

**United States of America**

- *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, United States, 813 F.3d 98 (2d Cir. 2016)
- *Argentina v. Weltover*, United States, 504 US 607, 614 (1992); 119 L.Ed.2d 394, 405; 100 ILR 509, 515
- *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009)
- *Banco Central de Reserva del Peru v. Riggs National Bank of Washington, DC*, United States, US District Court for the District of Columbia, 1994, 919 F Supp 13
- *Bank of Credit and Commerce Int'l Ltd v. State Bank of Pakistan*, United States, District Court for the Southern District of New York, 1999, 46 F Supp 2d 231, 239
- *Bank Markazi, aka Central Bank of Iran v. Peterson et al*, United States, Supreme Court, 2016, 136 S. Ct. 1310
- *Banque Compafina v. Banco De Guatemala*, United States, District Court for the Southern District of New York, 1984, 583 F Supp 320
- *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007)
- *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, United States, 462 US 611, 629 1983
- *Genny de Oliveira v. Embassy of the German Democratic Republic*, Appeal No. 9.696-3
- *Saudi Arabia v. Nelson*, United States, 507 US 349, 360 (1993); 123 L.Ed.2d 47, 61; 100 ILR 544, 553.
- *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011)

- *NML Capital, Ltd v. Banco Central de la República Argentina*, United States, Court of Appeals, Second Circuit, 2011, 652 F3d 172  188, 194
- *NML Capital, Ltd. v. Banco Central de La República Argentina*, 680 F.3d 254 (2d Cir. 2012)
- *Ralph Janvey v. Libyan Investment Authority*, No. 15-10548 (5th Cir. 2016)
- *Rubin et al v. Islamic Republic of Iran*, United States, Supreme Court, 138 S Ct, 2018, 816, 823
- *Weston Compagnie v. La Republica Del Ecuador*, UNited States, District Court for the Southern District of New York, 1993, 823 F Supp 1106, 1112

**Other Cases**

- *Dahanayake v. De Silva and others*, Sri Lanka, [1978] 1 SLR 41, 10 September 1979
- *FG Hemisphere v. Congo*, Hiong Kong, Court of Final Appeal, ACV 5-7/2010
- *Monopole des tabacs de Turquie v. Régie co-intéressée des tabacs de Turquie* 5 AD 123, Case No. 79, Egypt, Mixed CA, 1930
- European Court of Justice, *Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter* (Case C-106/22), 13 July 2023

## TABLE OF DOCUMENTS

**Investment Agreements**

- Agreement between the Czech Republic and the State of Kuwait for the Promotion and Protection of Investments (Czech Republic-Kuwait BIT), signed 8 January 1996, entered into force 21 January 1997

- Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, (Morocco–Nigeria BIT), signed 3 December 2016

- Agreement between The Government Of the People's Republic Of China and the Government of The Republic of Uzbekistan on The Promotion And Protection of Investments (China-Uzbekistan BIT), signed 13 March 192, entered into force 4 October 1994

- Agreement between the Government of the People's Republic Of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments (China - Ghana BIT), signed 12 October 1989, entered into force 22 November 1990

- Agreement between the Government of The Republic of India and the Government of the United Arab Emirates on the Promotion and Protection of Investments (UAE-India BIT), signed 12 December 2013, entered into force 21 August 2014

- Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (Rwanda – UAE BIT), signed 1 November 2017, entered into force 17 January 2020

- Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia-Iran BIT), signed on 19 January 2016, entered into force 30 August 2017

- Agreement between the United States of America, the United Mexican States, and Canada (USMCA), signed 30 November 2018, entered into force 1 July 2020

- Bahrain - United States of America BIT, signed 29 September 1999, entered into force 30 May 2001
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed 8 March 2018, entered into force 30 December 2018
- Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA), signed 30 October 2016
- EU – Viet Nam Investment Protection Agreement (EU-Vietnam FTA), signed 30 June 2019
- Free Trade Agreement between Singapore and the United States of America US-Australia FTA (AUSFTA), signed 6 May 2003, entered into force 1 January 2004
- Free Trade Agreement between the United States and Oman ('US-Oman FTA'), signed 19 January 2006, entered into force 1st January 2009
- Free Trade Agreement between the United States and Oman (US-Oman FTA), signed 19 January 2006, entered into force 1st January 2009
- Free Trade Agreement between the United States of America and the Republic of Korea (US-Korea FTA), signed 30 June 2007, entered into force 15 March 2012
- North American Free Trade Agreement between Canada, The United States and Mexico (NAFTA), signed 17 December 1992, entered into force 1 January 1994
- Treaty between the Government of The United States of America and the Government of the State of BahRain concerning the Encouragement and Reciprocal Protection of Investment (US-Bahrain BIT), signed 14 September 2004, entered into force 11 January 2006
- Treaty between The United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment (US-Ukraine BIT), signed 4 March 1994, entered into force 16 November 1996
- Treaty of Amity, Economic Relations, and Consular Rights (United States-Iran), 284 U.N.T.S. 93, signed 15 August 1955, entered into force 16 June 1957

**United Nations – International Law Commission**


- Institute of International Law, 'Draft International Regulations on the Competence of Courts in Suits against Foreign States, Sovereigns, or Heads of States', 1891
- International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, Report of the International Law Commission on the work of its forty-third session, UN Doc A/46/10, 29 Apr–19 July 1991
- International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, 1991, UN General Assembly, Report of the International Law Commission, A/54/10, 23 July 1999
- International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Supplement No. 10 (A/56/10), chp.IV.E.1, 2001
- International Law Commission, Report of the ILC on the Work of its twenty-fifth Session, Draft Articles on State Responsibility with Commentaries, 1973
- International Law Commission, Report of the International Law Commission on the Work of its forty-second Session, UN Doc A/45/10, 1 May–20 July 1990
- International Law Commission, Third Report on Jurisdictional Immunities of States and their Property, by Mr. Motoo Ogiso, Special Rapporteur, UN Doc A/CN.4/431, 11 April 1990
- UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV), 24 October 1970
- United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc A/59/508, adopted 2 December 2004, not yet in force


**Multilateral Treaties**


- Convention on the Settlement of Investment Disputes between States and Nationals of

Other States (ICSID Convention), signed 18 March 1965, entered into force 14 October 1966

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 330 UNTS 3, entered into force 7 June 1959
- European Convention on State Immunity 1495 UNTS 181, adopted 16 May 1972
- Vienna Convention on the Law of Treaties, 1155 UNTS 331, adopted 23 May 1969, entered into force 27 January 1980

**World Trade Organization**

- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 15 April 1994, 1868 U.N.T.S. 201, entered into force 1 January 1995
- Agreement on Subsidies and Countervailing Measures (SCM Agreement), 15 April 1994, 1867 U.N.T.S 14, entered into force 1 January 1995
- General Agreement on Tariffs and Trade (GATT 1994), 15 April 1994, 1867 U.N.T.S 187, 33 I.L.M. 1153, entered into force 15 January 1995
- Protocol on the Accession of the People's Republic of China, WT/L/432 23 November 2001

**Domestic Legislations**

- Australia, Australian Government, Foreign Acquisitions and Takeovers Regulation 2015
- Australia, Foreign States Immunities Act (1985)
- Belgium, Code judiciaire, (Law of 10 October 1967)
- Canada, 'Policy Regarding Foreign Investments from State-Owned Enterprises in Critical

Minerals under the Investment Canada Act' (30 November 2022)

- Canada, State Immunities Act (1985)
- China, Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures (2005)
- China, letter addressed by the Office of the Commissioner of the Ministry of Foreign Affairs of China in Hong Kong to the High Court (20 November 2008)
- France, Code monétaire et financier' (2005)
- France, Code des procédures civiles d'exécution (2012)
- France, Law No. 2005-842 for the confidence and modernisation of the economy (26 July 2005)
- France, Law No. 2019-486 (22 May 2019),
- France, Decree No. 2019-1590 (31 December 2019/amended 27 April 2020)
- Pakistan, State Immunity Ordinance (1981)
- Russian Federation, Federal Law on Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation, No. 297- FZ 3 November 2015 (2016)
- Singapore, State Immunity Act (1979)
- South Africa, Foreign States Immunities Act (1981)
- United Kingdom Government, Notice - National Security and Investment Act 2021: Statement for the purposes of section 3 (2021).
- United Kingdom Government, National Security and Investment Act (2021)
- United Kingdom, Sovereign Immunity Act (1978)
- United States, Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)
- United States, Foreign Sovereign Immunities Act (1976)

**European Union**

- European Commission, 'Communication from the Commission 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)', 25 March 2020

- European Commission, 'Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions: (2022/C 151 I/01)', 6 April 2022

- Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I.

**Soft Law and Miscellaneous**

- International Forum of SWFs, The International Working Group of Sovereign Wealth Funds (IWG), Sovereign Wealth Funds Generally Accepted Principles and Practices (GAPP or Santiago Principles), 2008

- OECD, OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015

# GENERAL INTRODUCTION

*'Old pictures of a political and legal scene remain current long after it has been dramatically altered'*[1]

## A. SOVEREIGN WEALTH FUNDS IN INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM

Does the Reader know what Paris Saint-German Football Club, Disney, Pfitzer and Morgan Stanley have in common? We can even provide a hint: the answer is not that they are all big Western corporations.

What they have in common is one of their shareholders, which is a sovereign investor, in this case, a Sovereign Wealth Fund (SWF).

Sovereign Wealth Funds are cross-border sovereign investors that have accumulated extraordinary wealth in the last few years. Indeed, in the last three decades, State entities, traditionally used by States to operate domestically, have assumed an essential role in the international financial markets.[2] State entities such as SWFs and State-owned enterprises (SOEs) have become some of the world's most prominent cross-border investors, prompting a 'reshuffle' in the plethora of international investors.[3] By way of example, the 2020 Fortune Global 500 featured 124 Chinese companies, compared to 121 from the United States.[4] In the

[1] Felix Frankfurter, 'The Final Report of the Attorney General's Committee on Administrative Procedure. Foreword' (1941) 41(4) Columbia Law Review 585.

[2] See Hans-W Micklitz, 'Rethinking the public/private divide' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law* (Cambridge University Press 2014).

[3] Di Wang and others, 'Leviathan as Foreign Investor: Geopolitics and Sovereign Wealth Funds' (2021) 52(7) Journal of International Business Studies 1238.

[4] Hence, already in 2020, China was home State to the second largest number of Fortune 500 companies in the world. See Rupa Subramanya, 'How Fortune 500 reveals long-term showdown between US and China: Not yet an economic superpower status, India's significance remains geopolitical' *NIKKEI Asia* <https://asia.nikkei.com/Opinion/How-Fortune-500-reveals-long-term-showdown-between-US-and-China> accessed 12 February 2023.

most recent Forbes listing of the world's ten most prominent companies, five State-owned Chinese companies have entered the rankings, and three now sit at the very top.[5]

Such a phenomenon reflects a global geopolitical shift consisting of Asian and Middle Eastern countries ascending as leading international traders and capital exporters.[6] The politico-economic model of such countries is usually a statist one, where the central State remains the major economic player. This model is often referred to as 'State capitalism'. This model can be preliminarily seen as a politico-economic paradigm whereby States own shares in transnational enterprises and investment funds and manage most of the means of production in industry, natural resources, and foreign trade. In turn, this entails the governments operating internationally via an SOEs and financial investment vehicles such as SWFs.

On the one hand, these features show that, although many countries are said to be living in an age of economic (neo-)liberalism, the State has not disappeared as a central economic actor. Quite the opposite, the State has gone 'international' by liberalising the markets. On the other hand, they also illustrate a complete redesign of the balance of global geopolitical powers between Global North and Global South countries, one that sees the latter becoming massive capital exporters.[7]

---

[5] Namely the Industrial and Commercial Bank of China, the China Construction Bank and the Agricultural Bank of China. See on the issue of Chinese State capitalism, Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 261.

[6] International Monetary Fund, 'Chapter 3 State-Owned Enterprises: the Other Government', *Fiscal Monitor 2020, April 2020: Policies to Support People during the COVID-19 Pandemic*.

[7] Mark Thatcher and Tim Vlandas, *Foreign States in Domestic Markets: Sovereign Wealth Funds and the West* (First edition, Oxford University Press 2021). It bears noticing how the concepts of the Global North-Global South have been employed with a post-national perspective. The Global North–Global South divide is a socio-economic and political division of Earth popularised in the late 20th century and early 21st century. Specifically, the Global North concept refers to Western and generally economically developed countries. The Global South concept encompasses regions and populations adversely affected by the current capitalist globalisation. In this interpretation, the term Global South encompasses a borderless portrayal of the repercussions of capitalism, extending beyond geographical confines. The term 'global' is appended to 'South' in order to detach it from a strict one-to-one geographical correlation. See Anne Garland Mahler, 'Global South', in O'Brien E (Ed) *Oxford Bibliographies in Literary and Critical Theory*, Oxford University Press, New York, USA, 2017. This analytical construct, often used by critical scholarship, builds upon a long-standing analytical tradition focused on the Southern regions within the Northern context, wherein the South symbolizes an internal periphery and a

In this context, we submit that international investment law (IIL) and investor-State dispute settlement mechanism (ISDS) have not been insulated from the 'State capitalism' phenomenon. Quite the contrary, these fields have been exposed to the effects that the paradigm of State capitalism poses.

It is indeed interesting to note how, from a structural viewpoint, IIL was mostly designed to regulate commercial relationships between those Western (usually private) investors and the developing (usually Southern and Eastern) host States in a 'depoliticised' fashion, i.e. by side-stepping international diplomacy. IIL and ISDS may be broadly depicted as a public international law branch and a dispute resolution mechanism deeply entrenched in international economic policy and, in a way, international diplomacy.[8]

One can also hardly miss how IIL – *rectius*, international economic law at large – is a creature of liberal market capitalism. IIL and ISDS are the product of the second half of the twentieth century developed as, some may say, 'colonial law', partially displacing the domestic laws on the treatment of foreign capitals of the newly emerging independent developing

subordinate relational position. See Sebastian Haug, 'The "Global South" and research on world politics', *The Loop* <https://theloop.ecpr.eu/the-global-south-and-research-on-world-politics/?_thumbnail_id=4582> accessed 8 August 2023. Nevertheless, the adoption of this terminology has faced challenges due to its potential to be interpreted as condescending towards economically less prosperous nations. Additionally, the ascent of China as a major global force has further complicated the once-clear North-South divides. Thirdly, the increasing recognition of the worldwide scope of various developmental issues, such as climate change and pandemics, has also given rise to dissenting voices among critics. See Nikita Sud and Diego Sánchez-Ancochea, 'Southern Discomfort: Interrogating the Category of the Global South', Development and ChangeVolume 53, Issue 6: FORUM 2022, 1121-1439. In this work we are going to refer to this division to refer to the addressing global power asymmetries between Western capitalist countries and the rest of the World.

[8] Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology' in Christina Binder (ed), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009)

States.[9] The implied ideology was the State's retreat[10] at the international level serving the free movement of capital.[11] In that context, the liberal world order assumed that

> *capital would flow from private investors of the North and West into the developing countries of the South and East; it also assumed that the economies of the South and East would transition towards the market economy system and privatise government-owned assets and enterprises to private investors of the North and West.*[12]

Thus, to come to the point, in the conventional IIL accounts the 'foreign investor' is traditionally identified as a Western private company seeking international legal protection from the political risks related to the establishment of business abroad.[13] In this equation, the host State of the Western investment is classically identified as a Global South country.[14] In a concise and simplified way, this is the classic binary account surrounding the structure in investment law and arbitration. The traditional Western-based investment law narrative sets a

[9] *Ex multis*, David Schneiderman (ed), *Investment Law's Alibis* (Cambridge University Press 2022); Karen J Alter, 'From Colonial to Multilateral International Law: A global Capitalism and Law Investigation' [2021] International Journal of Constitutional Law; Amr Shalakany, 'Arbitration and the Third World: Bias under the Scepter of Neo-Liberalism', (2000) 41 Harvard International Law Journal 419, 430. See also Sergio Puig, 'Social Capital in the Arbitration Market', (2014) 25(2) European Journal of International Law, 387.

[10] See Peter Muchlinski and Ebbe Rogge, *Multinational Enterprises and the Law* (The Oxford international law library, Third edition, Oxford University Press 2021); Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton university press 2018).

[11] Panagiotis Delimatsis, Georgios Dimitropoulos and Anastasios Gourgourinis, 'State Capitalism and International Law - An Introduction' in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023), 1. However, for a different viewpoint see Josef Ostranský, 'State Capitalism, 'Normal' Capitalism and Other Capitalisms? A Discreet Place of the State in Neoliberal International Investment Law' in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023).

[12] Delimatsis, Dimitropoulos and Gourgourinis (n 11) 3.

[13] Ideally in a less economically developed country.

[14] As also, of course, the host State of the investor.

dividing line between, on the one hand, the international investors and, on the other, the sovereigns.

Yet, the Global South countries are not only investment recipient markets anymore, having risen as capital exporters streamlining investments towards both the Southern and the Northern hemispheres alike. As a result, cross-border investments are growingly publicly funded by State capitalist institutional investors, such as pension funds, SWFs and different types of SOEs injecting capitals into Western markets.[15]

In light of this, can we still uphold the classic IIL understanding? One may be drawn to think in the negative as this 'archetypical understanding underpinning the foundations of IIL' has been visibly crumbling down in the last decades.[16] Indeed, the backlash against the value system upheld by global market capitalism and its international legal corollary, international economic law, is nowadays more than palpable in societal concerns, critical academic works and States' political agendas.[17] It is in this context that one may dare to say that the institutions of State capitalism are redefining the twenty-first-century world economic order and, therefore, also international economic law.[18]

As we will see, this phenomenon so strictly linked to the mentioned geopolitical shift is also intertwined with a surge in protectionist investment measures adopted by governments on a global scale. Indeed, many countries have introduced restrictions on foreign investments to

[15] See for instance also State-controlled entities (SCEs) and national oil companies (NOCs). Delimatsis, Dimitropoulos and Gourgourinis (n 11) 4.

[16] ibid 3.

[17] Michael Waibel and others, 'The Backlash against Investment Arbitration: Perceptions and Reality' [2010]. See in particular, Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (First edition, Oxford University Press 2019); William I Robinson, *Global Capitalism and the Crisis of Humanity* (Cambridge University Press 2014); Alter (n 9); Bhupinder S. Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14(1) Oregon Review of International Law 17. Also see, Sergio Puig and Gregory C Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law', (2018) 112 American Journal of International Law 361.

[18] The authors say, 'based on the new premises of polycentricity and pluralism' Delimatsis, Dimitropoulos and Gourgourinis (n 11) 4.

protect national security interests, especially, as mentioned, when the investor is a State-owned vehicle from State capitalist countries.

SWFs (and SOEs) 'overt aim' is invariably the pursuit of conventional investment objectives. However, they also pursue inherently public policy goals. In this last regard, scholars have shared competing views on whether such investors might be influenced by geopolitics and interstate relations in their investment strategies and management.[19] This is one of the reasons why such investors spurred geopolitical concerns and regulatory reactions by host States tackling their economic force or potentially vested political interests.[20]

State capitalist SOEs and SWFs acting as transnational investors was not a situation forecasted by international lawmakers when drafting the international investment framework of reference. Indeed, while State enterprises were not per se a new economic phenomenon when investment treaties were first drafted[21], lawmakers designed them considering Western private companies rather than government-owned entities.[22] Truth be told, this situation was

[19] Di Wang and others (n 3), 1239.

[20] Julien Chaisse and Georgios Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order' (2023) 22(1) World Trade Review 1.

[21] SOEs acting as investors do not constitute a new phenomenon, not even in international investment arbitration. However, State enterprises were often previously nationalized legal entities undergoing liberalization processes, such as the Ex URSS State-owned entities. See also Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?' (2011) 6(2) Journal of International Law and International Relations 1-52.

[22] Sonia Chen, 'Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration' (2013) 6(2) Contemporary Asia Arbitration Journal 299; Grant Hanessian and Kabir Duggal, 'The Role of Sovereign Wealth Funds and National Oil Companies in Investment Arbitrations' J William Rowley (ed), The Guide to Energy Arbitrations; Locknie Hsu, 'The role and future of sovereign wealth funds: A trade and investment perspective' (2017) 52(4) Wake Forest Law Review 837 <https://ink.library.smu.edu.sg/sol_research/2489>; Behrad Nazarian, 'Sovereign Wealth Funds and Their Rights under the Current Investor-State Arbitration System' (2017) 9(1) Bocconi Legal Papers <https://blp.egeaonline.it/en/21/magazine-archive/rivista/3432410/articolo/3432414> accessed 20 March 2021; Carrie Shu Shang and Shen Wei, 'When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: Is There Still a Black Hole in International Law?' (2018) 31(4) Leiden Journal of International Law 915; Elizabeth Whitsitt and Todd Weiler, 'Sovereign Wealth Funds and Bilateral Investment Treaties' New Models: Issues, New Trends and

not foreseen by public international law makers at large as it is visible, for instance, in the law on international State responsibility, whereby State entities were largely overseen.

## B. THE IDENTIFICATION *PROBLÉMATIQUE* OF SWFS IN INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM

Given this background, we want to examine how State capitalist investors such as SWFs and, to a certain extent, SOEs, are framed by IIL and ISDS operators, that is, States and investment arbitrators, as also by domestic judges in award enforcement proceedings.

We believe this inquiry to be important as ISDS, much like SWFs, is at the *milieu* between commercial and inter-State arbitration. In ISDS, one party to dispute, the claimant, has to be an investor, namely a seemingly private party (or a non-sovereign one). Conversely, the respondent party must be a State. This entails that tribunals must first exclude whether both parties are private or sovereign. Visibly, this means that the public/private divide is a *problématique* that lies at the very centre of IIL and ISDS.

In turn, this issue connects with the focus of legal scholarship that seeks to identify the proper degree of involvement of State enterprises in the global economy.[23] The ambivalent social identity of the operators and overseers of State-owned capital spurs the question of whether SOEs and SWFs are to be seen as private or sovereign actors in investment arbitration and award enforcement proceedings.[24] This is so as the State has a 'dual position' in a SWF. On the one hand, the State is the sovereign owner of the fund using it to pursue social and macroeconomic functions. On the other hand, the State is a cross-border investor using the corporate fund vehicle for profit maximization. A SWF range of activities may be diverse through the public and the private spheres, with its legal status remaining quite ambiguous.

State Practice' in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015).

[23] Paul M Blyschak, 'State-Owned Enterprises in International Investment' (2016) 31(1) ICSID Review - Foreign Investment Law Journal 5.

[24] Nathan Sperber, 'Servants of the State or Masters of Capital? Thinking through the Class Implications of State-Owned Capital' (2022) 28(3) Contemporary Politics 264, 264.

Transposed in the ISDS context, the need to ascertain SWFs (and SOEs) 'identity' as either sovereign or private nature would occur almost in every phase of an investment dispute and in the award enforcing phases. Specifically, this would pose a testing exercise for arbitral tribunals[25] and domestic courts, being SWFs at the intersection between the public and the private sector spheres. In other terms, the *problématique* derived from placing sovereign investors such as State capitalist SWFs[26] in the ISDS context originates from the conceptual and practical difficulty of ascertaining where the sovereign ends and the investor begins and whether the activity they perform is private or, rather, sovereign.[27]

In practice, neither the SWFs common framework of reference[28], international investment agreements' (IIAs), academic and institutional analysis nor any other endeavour has definitively established whether SWFs are essentially private or public actors.[29] Such an assessment necessarily depends on the case's specific circumstances, such as the exact SWF features and activities, and it also links to the methods employed to distinguish what qualifies as 'sovereign' and what falls under the umbrella of private or commercial.[30]

Absent specific IIAs provisions allowing or denying sovereign investors access to ISDS and IIAs substantial treatments, arbitrators are left to determine what qualifies as a 'sovereign' and what qualifies as 'private' or 'commercial'. Tribunals must discern State entities and

[25] As for domestic courts and scholars.

[26] Especially the ones from some State capitalist markets.

[27] In addition, some State capitalist SOEs, for instance. See, Giulio A Cortesi, 'Icsid Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law' (2017) 16(1) The Law & Practice of International Courts and Tribunals 108.

[28] The Santiago Principles are the main collective regulatory framework for SWFs. See *infra* Chapter I.

[29] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs, 'Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution' (September 2021) <https://www.biicl.org/documents/144_sovereign-wealth-funds-regulation-dispute-resolution-.pdf> accessed 23 September 2022.

[30] Again, the only provisional answer one would be compelled to give to the above raised questions would be the unfortunate sentence 'it depends'. Indeed, whilst tempted to treat SWFs as a whole unite category of actors, one has to bear in mind that the answer to these questions are influenced by a whole number of factors which can only be assessed on a case-by-case analysis.

governmental acts from private actors and commercial conducts.[31] In other words, arbitrators have been left to fill the gaps in distinguishing sovereign investors' identities and the character of their activity. Nevertheless, the case-by-case application of such an identification process may potentially be quite diverse in investment arbitration due to the lack of a central judiciary body and a broad consensus regarding what constitutes a sovereign entity or a sovereign activity in the first place.[32]

We therefore ask ourselves, to put it in Sperber's words, whether these sovereign investors are to be seen as servants of the States or as masters of capital in ISDS?[33] In answering this question one may have to disentangle the classic dichotomy between the State and the market, the public and the private, which, as we will see in the present work, greatly affects how we look at the character of State capitalist investors. Without this exercise, the risk of upholding Western-centric views to the potential detriment of a critical yet unfettered valuation and discussion around their position in the public/private spectrum is high.[34]

Against this backdrop, this thesis is dedicated to analysing the study of the above-cited issues flowing from SWFs acting as parties in ISDS and as State assets in the context of award enforcement proceedings. We wonder about the characterisation by investment law operators of the 'true nature' of State capitalist investors and of their activities. Ultimately, we inquire about the hermeneutical methods or instruments used in this assessment by investment tribunals and domestic courts to address 1) the private or sovereign character of the entity and 2) the character of its activities.

---

[31] When so doing, arbitrators usually also refer to the classic division between *acta jure imperii* and *acta jure gestionis* developed in the law of State immunity and also consider several different particular features of SOEs and SWFs in the international investment context in which they operate. Yet, the question remains as to whether we can clearly discern the commercial aims from the underlying political drives in SWFs or other SOEs with complex corporate structures.

[32] In turn, sidestepping the challenging question of whether an arbitral determination might or might not be the desired venue to settle the matter, we can preliminarily say that such assessment has become an increasingly complex exercise.

[33] Sperber (n 24).

[34] See *ex multis*, Burkhard Hess, *The private-public divide in international dispute resolution* (Pocketbooks of The Hague Academy of International Law, Brill/Nijhoff 2018).

Depending on the answers to such inquiries, one would be able, in principle, to determine whether SWFs could act as claimants and/or respondents in ISDS, and/or as assets of the States potentially covered by immunity in award enforcement proceedings – and whether they could even be all at once. Getting ahead with our conclusions, we ought to anticipate that there seems to be no single – nor simple – answer to such questions. Quite the contrary, the answer may vary depending on several factors, among which also the eye of the beholder.

### C. SCOPE AND STRUCTURE OF THE THESIS

Given the above, it can be inferred that the issues flowing from placing SWFs in the context of ISDS are connected by the *file rouge* that is the analytical process of recognising sovereign entities' identity as actors of either private or sovereign character.[35]

Our research questions call for an enquiry of whether there is a 'uniform' perception of SWFs and SOEs throughout the different phases of an arbitral proceeding and between the arbitral proceedings and the post-arbitration phases. In other words, we try to evaluate how arbitrators and enforcement judges categorise State capitalist investors such as SWFs (and *mutatis mutandis* SOEs). Moreover, we study the instruments, methods and reasonings employed in such a characterisation exercise. Thus, we compare results evaluating how arbitrators (within different phases and stages of ISDS proceedings) and enforcement judges (in different enforcement seats) classify the nature and functions of such actors. This means surveying ISDS cases whereby sovereign investors (SWFS and SOEs) acted as defendants (States' instrumentalities) and as claimants (foreign investors). Also, it entails studying enforcement proceeding cases whereby SWFs were seized as assets of the States and whereby such actors have pleaded immunity from enforcement.

In this context, we attempt to verify whether arbitral tribunals and domestic courts consistently employ such methods in the different instances where their application is required. By consistent classification, we mean whether the characterisation made by arbitrators is steadily upheld, regardless of whether sovereign investors act as claimants or as respondents, and whether it is compatible with the treatment of SWFs in the context of the application of

[35] Then, the subsequent question might be whether international investment arbitration is to be intended as ultimately aimed at being public or a private dispute mechanism. Depending on which aspect we are referring to and on the answer to the question, different legal consequences would follow.

State immunity form enforcement. We also critically discuss whether these methods may capture the identity of SWFs in their contemporaneity. We evaluate this efficiency based on whether and, if so, to what extent the current hermeneutical instruments allow arbitrators and judges to effectively go beyond the legal *fictio* of the opposing spheres of the public vs private dichotomy.

As we will notice, the vast majority of investment cases where such an analysis by investment tribunals is traceable rarely involves SWFs directly but, instead, addresses other sovereign entities such as SOEs. As we will further explain, we nonetheless attribute an analogical value to the analysis of tribunals in disputes involving parastatals and SOEs. These arbitral assessments can indeed apply *mutatis mutandis* to several SWFs or at least indicate how tribunals would, *prima facie*, address SWFs characterization in investment cases.

Following the reflections above, the thesis develops into four chapters and a general conclusion.

To address the core of this work's legal analysis, one should take a step back and start from the foundations. This means discussing what SWFs are and their uniqueness as actors defying the separation between the public and private dimensions. Hence, Chapter I sets the scene and discusses the subjects of this enquiry, namely SWFs, their origins, structures and functions. Moreover, it provides an overview of the geopolitical issues attached to these actors and their cross-border investment activities.

Chapters II, III, and IV study the presence of SWFs in investment arbitration cases and award enforcement proceedings.[36]

Chapter II investigates how SWFs would be treated when acting as instrumentalities of respondent States in investment proceedings. Indeed, when investing abroad, investors frequently enter into agreements with State-owned enterprises and funds of the host States that

[36] Specifically, as mentioned, they inquire about the methods arbitral tribunals and domestic courts employ to analyse the nature of SWFs and the character of their activities.

might be the immediate and direct tools through which States administer several segments of their economy.[37]

In such a context, if a SWF or another sovereign entity were to breach the agreement it had entered into with a foreign investor, the latter could well resort to international protection afforded by ISDS clauses embedded in the relevant investment treaty applicable to the case. In turn, the investor would have to demonstrate the host State's responsibility for the commission or omission of acts by the State fund or enterprise. This is a question of jurisdiction and of attribution of wrongful conduct. Indeed, as said, investment tribunals hold jurisdiction *ratione personae* over the claim if the Respondent is a sovereign State. Hence, SWFs conduct allegedly in breach of the investor's rights under the IIA should *prima facie* be attributable to the State, or the dispute would not amount to investor-State arbitration. Then investment tribunals also assess the link between the enterprises and the owner-State to see if the violation of the investor's right might be attributable to the State, giving rise to the latter responsibility under international law.[38]

Chapter III studies the procedural question of whether sovereign entities may have *locus standi* as claimants in investment arbitral disputes and how tribunals have addressed it. While it may be clear that SWFs can act as instrumentalities of the respondent State in ISDS, we wonder if, in principle, SWFs could also resort to ISDS to challenge host States' measures that may damage or destroy their investment.[39] However, it bears repeating that ISDS tribunals' jurisdiction depends on the legal heterogeneity between the parties, one to be a private investor[40] and the other a State.[41] Therefore, similarly to what said for SWFs acting as

[37] It can also be said that the creation of economic actors by capital-importing countries matches a strategic policy aimed at enhancing the attraction of FDI 'while interposing between them and foreign investors the corporate veil of a formally independent, separate, and business-oriented economic actor'. Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020) 150.

[38] Which should be the 'real' respondent in ISDS proceedings. However, while these entities are, to a different degree, tied with the sponsoring State, they usually do not form part of the organic apparatus of the State.

[39] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29).

[40] For 'private' we refer to 'acting as private'.

[41] Pierre-Marie Dupuy, 'Are States Liable for the Conducts of Their Instrumentalities? Concluding Remarks' in Emmanuel Gaillard and Jennifer Younan (ed), *State Entities in International Arbitration* (IAI series

instrumentalities of the respondent States, this entails querying whether sovereign entities such as SWFs are the *alter ego* of States and whether they have standing in investment disputes.[42] Indeed, in such a context, if an entity bears a pervasive connection with the owner-State in terms of structure, management, funding and organisation that cannot be seen as detached from the State, the characterisation of that entity as an investor equated to a private company for an arbitration proceeding may be not always as straightforward. Given the specific features of SWFs,[43] in the lack of an expressed intention of the contracting States to the contrary, some voices have been raised in favour of distinguishing them from private juridical persons when evaluating their access to investment arbitration as claimants. This concern is grounded in the consideration that some sovereign investors, such as SWFs, could be '*de facto* emanations of the State' potentially able to generate imbalances and asymmetries in the use of ISDS if treated as plane investors.[44]

Nonetheless, the 'inviolability' principle of the separateness of the corporate personality from its shareholders is the general rule in international and domestic law.[45] Furthermore, it is largely endorsed that international investment law and investment arbitration should be open to sovereign entities as long as they are not instrumentalities of the State and operate in their commercial capacity. Indeed, the liberal assumption is that States may enter the market as

on international arbitration no. 4. Juris Publishing 2008) See, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment, 3 July 2002, para 95-96.

[42] This is peculiar to systems such as ICSID whereby the claimant has to be expressly a private investor and not a contracting party. Hence, tribunals usually employ such articles to investigate whether the relationship between the State enterprise and the sponsoring State is one of an organic character or not.

[43] Such as State-owned banks, especially from capitalist States.

[44] In the light of the often unknown geopolitical motives and circumstances underlying the activities of such sovereign investors, as mentioned, for arbitrators, regulators and international institutions, this has been a conundrum. Which has now become even more intricate when considering the status of Chinese SOEs. See Alessandro Spano, 'State-Owned Enterprises in ISDS: European Perspective', in Yuwen Li, Tong Qi and Cheng Bian (Eds), China, the EU and International Investment Law – Reforming Investor-State Dispute Settlement (2020) Routledge, 184-197, 248.

[45] See, Yaraslau Kryvoi, 'Piercing the Corporate Veil in International Arbitration' (2011) 1(2) The Global Business Law Review 169.

privates to pursue profit maximization, exactly as a private corporation do. Notwithstanding, two questions remain. First, how does one establish if a sovereign entity such as a SWF or an SOE is or is *not* a *longa manus* of the State for the purposes of the claimant standing? Secondly, how does one differentiate commercial from governmental (or political) conduct by such sovereign entities for the same purposes?[46]

Finally, Chapter IV addresses issues of award enforcement against SWFs and their pleas of immunity from enforcement. If a SWF enjoys State immunity, bringing claims against it or enforcing a court decision or arbitral award against its assets will be difficult.[47] However, for reasons which are similar to those described in the previous passages, whether a SWF enjoys State immunity is a much debated and complex topic. In this connection, a SWF may be managed via different institutions, from private corporations to ministries and even central banks, rendering the identification of SWFs immunity even more complex.[48]

Even though the application of immunity from enforcement occurs in the post-award phase, our research should also encompass the appraisal by domestic courts of SWFs characterisation for State immunity application.[49] This is so because, on the one hand, domestic courts usually perform a structural analysis of SWFs, which may help us understand their categorisation as international economic actors and their relationships with their sponsoring States. On the other hand, courts also analyse the nature and purposes of SWFs activities and assets in the context of State immunity application. In turn, this evaluation would assist us in mapping the overall perception of SWFs activities as either sovereign or commercial. Ultimately, we want to establish whether there is a consistent characterisation of SWFs (and their activities) in the arbitral practice and domestic case law (vis-à-vis State immunity application).

[46] id. 192.

[47] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 30.

[48] Ingrid Wuerth, 'Immunity from Execution of Central Bank Assets' in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).

[49] In this vein, we will describe the general trends for domestic courts and domestic legislation vis-à-vis the characterisation of SWFs as either private or public actors. Alberto Oddenino and Diego Bonetto, 'The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law' (2020) 20(3) Global Jurist.

Considering the wide range of a sovereign's activity and their development and changes, 'the problem only starts with the distinction between *acta iure imperii* and *acta iure gestionis*'.[50] As Van Aaken rightly points out, this is even more so given that no consensus is reached on what a State act, task or public function exactly is.[51] Moreover, wide grey areas exist in terms of activity classification; while a non-commercial activity may or may not have a 'public function', such an activity does not necessarily employ sovereign authority as a legal instrument to achieve its purposes.[52] As a result, not surprisingly, the confluence of SWFs and sovereign immunity has been viewed as a legal 'black hole'.[53]

As it will be shown, all the aforementioned questions have more than a single juridical connotation and bear a highly charged political value. Indeed, depending on which economic theory of the State is endorsed, the answer to the aforementioned questions may vary. This is to say, sovereigns are historically accustomed to using sovereign entities to pursue mere financial and economic return objectives and beyond. Yet, the extent to which this might be seen as lawful, legitimate, or embedded in the contemporary economic tenets depends on the economic ideology one embraces, whether, for instance, it is (Western) liberal capitalist or State capitalist.

---

[50] Anne van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution' in Anne Peters, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015). See, David Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors' [2010] SSRN Electronic Journal, 19. See also, Andrea Spagnolo, 'A European Way to Approach (and Limit) the Law on State Immunity? The Court of Justice in the RINA Case' (2020) 5(1) European Papers 645, 658 <https://www.europeanpapers.eu/en/europeanforum/european-way-to-approach-and-limit-law-on-state-immunity-rina-case#_ftn59> accessed 16 December 2021. See also, Hazel Fox and Philippa Webb, *The Law of State Immunity* (The Oxford international law library, Revised and updated Third edition, Oxford University Press 2015) 292, and Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 108.

[51] Anne van Aaken (n 50).

[52] Anne Peters, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015), 132. Cameron Miles, 'State Debts and State-owned Corporations: Trans-Atlantic Perspectives: Searching for an Identity: Sovereign Wealth Funds between their Private and Public Nature in International and Domestic Litigation' (2021) 81(7) Questions of International Law.

[53] Carrie Shu Shang and Shen Wei (n 22).

## D. METHODOLOGY AND CONTRIBUTION TO THE FIELD

Regarding the methodology of the thesis, this work builds partly on both scholarly works on the topic of SWFs and international economic law and, for the most part, on an empirical analysis of arbitral and domestic cases. The relevant cases have been selected based on three factors. First, the presence of a sovereign investor such as a SWF or an SOE. Second, the emergence of the legal issues attached to the State ownership of such an entity (namely standing, attribution of international responsibility to States or State immunity from enforcement). Third, the relevance of the legal reasoning addressing such issues, namely the illustrative value of tribunals and courts' standpoint on SWFs nature and functions.

Finally, the originality of this thesis lies in the analysis of SWFs in the context of the investment arbitral and litigation dimension. Indeed, while substantial and exhaustive work has been carried out on the regulative dimension of sovereign investors in international trade and investment treaty law, not as much can be said vis-à-vis their interaction with the arbitral and domestic law legal dimension. A mapping of the legal characterisation of SWFs and their activities in the public/private discourse in the context of investment arbitration and award enforcement proceedings has not been realised yet. Indeed, the existing stream of research on the topic has predilected a sectorial approach, either focusing on arbitration or domestic proceedings. Furthermore, this work attempts to provide a critical understanding of how legal hermeneutical methods and instruments in the hands of arbitrators and judges may, in the end, be seen as a result not only of a legal will of regulators (and interpreters) but also of a political intention which, however, might have been at least partially expression of past times and geopolitical orders.

## CHAPTER I – THE STATE AS INTERNATIONAL INVESTOR: THE RISE OF SOVEREIGN WEALTH FUNDS

### A. THE RISE OF STATE CAPITALIST INVESTORS

As seen, State capitalist investors have become behemoths of international financial markets. As mentioned, such investors are usually sponsored by so-called State capitalist countries. Nevertheless, what State capitalism means is far from settled in political science and economic literature.[54]

The 'State capitalism' paradigm has been seen as a new globalised approach to statism. Such a concept has gained currency in recent years as scholars have sought to address the importance of State-backed companies in the post-financial crisis global economy[55] and the related geopolitical shift in which 'developmentalist States are reshaping the global hegemonic order'.[56] This phenomenon has attracted wide attention in academic and policy circles, which have focused, among other things, on the notion of State capitalism as an economic-political paradigm, its impact on countries' national security, protectionist policies, and the international investment/investor composition.[57]

---

[54] In this regard, many have singled out China's economic model, as other Asian or Middle Eastern countries', as a different breed of statism, prompting a new scale of State intervention cross-border.

[55] Milan Babic, Javier Garcia-Bernardo and Eelke M Heemskerk, 'The Rise of Transnational State Capital: State-led Foreign Investment in the 21st Century' (2020) 27(3) Review of International Political Economy 433. See also, Jing Gu and others, 'Chinese State Capitalism? Rethinking the Role of the State and Business in Chinese Development Cooperation in Africa' (2016) 81(9) World Development 24 and Aldo Musacchio Farias and Sérgio G Lazzarini, *Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond* (Harvard University Press 2014).

[56] Callum Ward, Frances Brill and Mike Raco, 'State capitalism, Capitalist Statism: Sovereign Wealth funds and the Geopolitics of London's Real Estate Market' (2022) 51(5) Environment and Planning: A-Economy and Space 1-18, 2.

[57] Aldo Musacchio and Sergio G Lazzarini, 'Chinese Exceptionalism or New Global Varieties of State Capitalism' in Benjamin L Liebman and Curtis J Milhaupt (eds), *Regulating the visible hand?: The institutional implications of Chinese state capitalism/ edited by Benjamin L. Liebman and Curtis J. Milhaupt* (Oxford University Press 2016); Joshua Kurlantzick, *State Capitalism: How the Return of Statism is Transforming the World* (Oxford University Press 2016). Musacchio Farias and Lazzarini (n 61); Ian Bremmer, *The End of the Free Market: Who Wins the War between States and Corporations?* (Portfolio 2012); Ilias Alami and Adam D Dixon, 'State capitalism(s) redux? Theories, tensions, controversies' (2020) 24(1) Competition & Change 70; Kurlantzick

One should take a step back to specify that statism – the State's economic intervention – is not a new or entirely non-Western phenomenon. On the contrary, it is a well-known fact that, throughout history, States have been intervening in their economies, even in (supposedly) free-market societies. Indeed, it has been argued that even in highly liberalised markets such as the Anglo-Saxons, the State 'does not simply vanish but rises, often finding new forms of actions' with sovereigns who have acted as privates for decades.[58] It has been argued that State capitalism is a modern version of statism.

In this regard, in 2012, *The Economist* surveyed the contemporary form of (non-European) statism known as State capitalism and compared it with the earliest forms of statism.[59] Compared to previous State-interventionist economic models, contemporary State capitalism looks multifarious, far less protectionist and positively inclined towards international free trade. Thus, in a way, modern State capitalism melds the powers of the State 'with the power of capitalism' and globalisation, whereas governments may also maintain an autocratic hold on societies producing a standalone economic model.[60] In a way, what has changed is *how* and *to what degree* the State intervenes in the economy. In this regard, Schmidt argues that there had been a moving away from *faire* – the most directed form of State action, typical of

(n 63); Bremmer (n 63). See also See Alvaro Cuervo-Cazurra and others, 'Governments as Owners: State-owned Multinational Companies' (2014) 45(8) Journal of International Business Studies 919 and Sergio G Lazzarini and Aldo Musacchio, 'State Ownership Reinvented? Explaining Performance Differences between State-Owned and Private Firms' (2018) 26(4) Corporate Governance: An International Review 255.

[58] Jonah D Levy (ed), *The State after Statism: New State Activities in the Age of Liberalization* (Harvard University Press 2006). See Thatcher and Vlandas (n 7) 16.

[59] Referred to as the 'old State-capitalism' (i.e., Soviet Russia, China and Third-Reich Germany). The Economist, 'The Rise of State Capitalism' *The Economist* (21 January 2012). Martin C Spechler, Joachim Ahrens and Herman W Hoen, *State capitalism in Eurasia* (World Scientific 2017) 4.

[60] Wooldridge Adrian, 'The Visible Hand' *The Economist*, Special Report - State Capitalism (21 January 2012). Mark McLaughlin (n 60). Kurlantzick (n 5); Joshua Kurlantzick, *State capitalism: How the Return of Statism is Transforming the World* (Oxford University Press, New York 2016) 278, 9. Also see, Mike Wright and others, 'State Capitalism in International Context: Varieties and Variations' (2021) 56(2) Journal of World Business 1.

the old statist model – to *faire faire*, i.e., the State stirring other actors to pursue certain actions, and *faire avec*, 'where the States coordinate with private actors'.[61]

In this context, Alami and Dixon have rightly stressed that State capitalism is still a concept in flux.[62] On the one hand, the term's recent resurgence may be reflecting 'the increasing prominence of direct State involvement in the global economy'.[63] On the other hand, it holds true that State capitalism as a notion still lacks a uniform definition as it refers to a vast array of practices, policy instruments and vehicles, institutional forms, relations and networks that involve the State to a different degree and a variety of levels, time frames and scales. Moreover, as it first developed in the late nineteenth century in socialist circles and debates, this expression might come across as ideologically charged and politically driven. As a result, these commentators question this notion's analytical reach as its conceptual use might be limited by 'a lack of State theory, ahistoricism in which the novelty of the contemporary period is not specified'.[64]

In addition, State capitalism has been traditionally employed as a term of reference to China's economic model alone. However, one could well go beyond China when referring to State capitalism. As Musacchio and Lazzarini argue, thinking about Chinese State capitalism as a unique system might be misleading. By contrast, they argue that we should consider Chinese State capitalism a system similar to other countries' State capitalism model.[65] Indeed,

[61] Thatcher and Vlandas (n 7) 16, where they cite Vivien A Schmidt, 'Putting the Political Back into Political Economy by Bringing the State Back in Yet Again' (2009) 61(3) World Politics 516 <http://www.jstor.org/stable/40263493> accessed 17 January 2023.

[62] Alami and Dixon (n 57); Spechler, Ahrens and Hoen (n 59); Bremmer (n 57); Ward, Brill and Raco (n 56).

[63] Ward, Brill and Raco (n 56).

[64] '[A]nd methodological nationalism that fails to account for the transnational, multiscalar, nature of contemporary states' ibid, 2. Alami and Dixon (n 57). See also, Adam D Dixon, 'Variegated Capitalism and the Geography of Finance: Towards a Common Agenda' (2011) 35(2) Progress in Human Geography 193.

[65] Indeed, according to these two authors, Chinese State capitalism 'has a lot in common with state capitalism in other parts of the world, both in developing and developed countries'. The authors continue by saying that '[t]he industrial organization and the ownership schemes used across countries, we maintain, bear much resemblance to the industrial organization in China, and raise important questions for the existing literature on state-owned enterprises (SOEs)'. Musacchio and Lazzarini (n 57) 403.

the ‘other’ BRICS countries (Brazil, Russia, India and South Africa) are striking examples of these similarities.

These authors stress that the varieties of State capitalism existing today significantly differ from how State capitalism worked in the Soviet paradigm. More specifically, they argue that new frameworks are required to consider the implications of new forms of State ownership. Understanding the new forms of State ownership, control, and support of firms may shed some light on why State capitalism in China and worldwide has been so resilient.[66]

By contrast, Mark Wu warns that non Chinese commentators might often be drawn to apply conceptual frameworks developed elsewhere to the Chinese context. This author maintains that even if China is to be seen as a State-capitalist country, one must acknowledge China as a unique variant of the general pattern. It bears a political-economic model that stands alone from other State capitalist models, which Wu named ‘China Inc.’. According to Wu, several features render China’s economy distinct from all others as they allow the Party-State to be ‘all-powerful’ while at the same time granting space to the significant economic activity by private enterprises. Wu identified and categorised them into six elements or categories. The first element is identified in the Chinese State acting as a corporate holding entity of its SOEs. The second element is the control exercised by the Chinese State over financial institutions. The third element differentiating China from other economies is how the latter coordinates its controlled economy to fulfil its objectives. Nested corporate group structures are another element characterising China’s system from other State-capitalist countries. The fifth element regards the role played by the Chinese Communist Party within the Chinese economy. Finally, the sixth element identified by Wu concerns the intertwined nature of private enterprises and the Party-State in the Chinese system.

[66] ibid. Moreover, it is worth noticing how State capitalism can also be seen in Western countries. Musacchio and Lazzarini maintain that there are many reasons to reinclude the Western European experience in the analysis of the state capitalism in its modern form. In this regard, SOEs are a very spread phenomenon in Europe. Moreover, as a consequence and an effect of the COVID-19 crisis and of its economic impact, one can appreciate several episodes of renationalization of former privatized companies in several Western countries, as, for instance, it happened in the recent case of the Italian motorways network. As Andrea Colli explains, ‘Western Europe’s state capitalism, in sum, is far from being dead. Simply, it has changed its clothes’. See Andrea Colli, ‘State Capitalism in Western Europe’, in Mike Wright and others (eds), *The Oxford Handbook of State Capitalism and the Firm*, Oxford Handbooks (2022), 722.

In turn, such uniqueness is exactly what, according to Wu, has created systemic challenges for the WTO.[67] Indeed, many contemporary legal issues arose because 'the contours of today's China Inc. include elements that many outsiders did not anticipate at the time of China's WTO accession'. [68] Yet, in a span of fifteen to twenty years, China's economic model has undergone a substantial transformation with the surfacing of structural elements that were not present twenty years ago.

These features, in turn, make it challenging to determine specific legal issues under the international economic regime at large. For instance, the issue of the characterisation of whether an entity is associated with the State or how to characterise the overall form of China's economy is puzzling the contemporary international economic regime. More broadly, such features may also explain the complex application of labels such as 'market vs non-market and 'private-led vs State-led to the Chinese model. In turn, this may draw us to think that the present economic regime under WTO and investment law might not be fully equipped 'to handle the range of economic problems associated with China'.[69] To a certain extent, we agree with this author in submitting that specificities of overseas socio-economic paradigms are often left untackled by Western-based international economic law hermeneutical instruments.

Coming to additional critical views on State capitalism, it is worth mentioning how, to Ward, Brill and Raco, the main problem with this term is that it has been used to draw a contrast

[67] One can observe how the shift in the composition of the international economic actors is already challenging the theoretical premises upon which international economic law is built. By way of illustration, the WTO Appellate Body crisis is one example of international organisations' stalls in addressing sovereign economic actors, in this case, Chinese SOEs. Indeed, WTO jurisprudence of what constitutes a public body has provoked one of the most controversial debates in international trade law as dispute settlement panels and Appellate Body disagreed on interpreting the public body concept, especially when applied to Chinese SOEs.

[68] When, for instance, China accessed the WTO in 2001. Mark Wu (n 5), 265.

[69] ibid.

with liberal free market economies.[70] This, in turn, 'rests on a State/market dichotomy which even critical political economy remains in thrall to'.[71]

Who, if not the State, can be seen as the structural designer of markets and the regulator of 'their social embeddedness'?[72] Is it not the State who mediates the non-market aspects necessary for seemingly 'free' market relations?[73] In other terms, one could hardly disagree with the assertion that there is no real free market without State intervention. Therefore, it seems that the question is one of where and how the capitalist State intervenes rather than only of whether or not it intervenes.[74] In other words, it is not just about how much the State is in the economy but also about the 'quality' of the State in the economy.

Fascinating as this debate may be, in the context of the present research, we ought to refrain from indulging in this discussion regarding the soundness of the concept of State capitalism. This is not the focus of our inquiry. We do not aim to challenge or confirm the theoretical or epistemic value of the 'State capitalism' notion. By contrast, we assume it as a factual background to our enquiry.

This work draws from researches on State capitalism and State capitalist actors. It infers that the increase in numbers and sizes of sovereign investors might directly result from the rise as global exporters of countries such as China, United Arab Emirates (UAE), Kuwait, Qatar, Saudi Arabia (or even Singapore), all which adopt a form of such a politico-economic paradigm.[75] One could say that the emergence of State capitalism in contemporary power

[70] Usually of the Anglo-Saxon countries. See Andrea Colli, 'State Capitalism in Western Europe', in Mike Wright and others (eds), *The Oxford Handbook of State Capitalism and the Firm*, Oxford Handbooks (2022).

[71] Ian Bruff, 'Overcoming the State/Market Dichotomy' in Stuart Shields, Ian Bruff and Huw Macartney (eds), *Critical International Political Economy: Dialogue, Debate and Dissensus* (Palgrave Macmillan; [distributor] Not Avail 2011); Mike Wright and others (n 60).

[72] Ward, Brill and Raco (n 56), 3.

[73] ibid, 3. See also Fred Block, 'Problems with the Concept of Capitalism in the Social Sciences' (2019) 51(5) Environ Plan A 1166;

[74] Mike Wright and others (n 60), 10–11.

[75] Adopting a socio-economic model where the State has a pervasive control over sovereign investors and the whole economy. See Mike Wright and others (n 60), 2-3.

balance may ultimately prompt a radical redistribution of political and economic power. Indeed, State capitalist countries might use their sovereign investments in infrastructure and public utilities to create political leverage in various regions of the world. However, as some authors remind us, 'whether this spells disaster or a desirable realignment of power is, of course, a matter of opinion'.[76] Against this background, this research can be seen as crosscutting many of the above-cited studies with a primary emphasis on one specific aspect: the (increased) sovereign nature of international investors and investments. Amongst such sovereign investors, we set our gaze on SWFs, which, as we will see, are not easy to define nor to categorise.

## B. SOVEREIGN WEALTH FUNDS: THE STATE OF THE AFFAIRS

Providing a definition of a SWF can prove challenging. Tentatively, one could see SWFs as State entities that invest their home (or 'sponsoring') countries' budgetary surpluses abroad through mergers and acquisitions and securities purchases. Overall, they are institutional investors aimed at achieving the sponsoring country's interests[77], bearing a public status and an (often) intergenerational-developmental nature.[78] According to the Sovereign Wealth Fund

[76] See Leonardo Borlini and Stefano Silingardi, 'The Foundations of International Economic Order in the Age of State Capitalism' in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023), 27. See also Maya Steinitz, 'Foreign Direct Investment by State-Controlled Entities at a Crossroad of Economic History' in Karl P Sauvant, Lisa E Sachs and Jongbloed, Wouter P.F. Schmit Jongbloed (eds), *Sovereign investment: Concerns and policy reactions* (Oxford University Press 2012).

[77] Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke, 'Preface' in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke (ed), *The Oxford Handbook of Sovereign Wealth Funds* (Oxford handbooks, First edition. Oxford University Press 2017).

[78] The International Working Group of Sovereign Wealth Funds (IWG), 'Sovereign Wealth Funds Generally Accepted Principles and Practices (GAPP) "Santiago Principles"' (October 2008) <https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> accessed 21 February 2021; William L Megginson and others, 'Sovereign Wealth Fund Investment Patterns and Performance' (Working Papers, 2009) 2009.22 <<https://EconPapers.repec.org/RePEc:fem:femwpa:2009.22>> accessed 25 March 2021. See also Abdullah Al-Hassan and others, 'Sovereign wealth funds: Aspects of governance structures and investment management' (Washington, DC). IMF working paper <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Sovereign-Wealth-Funds-Aspects-of-Governance-Structures-and-Investment-Management-41046> accessed 26 March 2021; Xenia E Karametaxas, 'Sovereign

Institute (SWFI), one of the leading research organisations on such actors, there are now (at least) 100 SWFs worldwide, as shown in Annex I.[79] As we will see, SWFs source of capital often derives from oil or other commodities[80] or trade surpluses.[81] Specifically, for 55 of the 100 world's largest SWFs, the investable wealth is derived from the home country's production and export of commodities. Most of the remaining non-commodity-based SWFs derive wealth from trade and balance of payment surpluses, foreign exchange or privatisation transactions.[82]

As mentioned, over the past years, SWFs have experienced a sharp increase in the total number of funds and total assets under management (AUM). Indeed, their total AUM reached more than 10 trillion USD in 2023, growing by an annualized eleven point three percent between 2018 and 2020 as compared to 5.5% over previous years.[83]

According to the Global SWF Institute[84], another prominent SWF-centred research institution, the largest single SWF in terms of assets under management is the Chinese SWF China Investment Corporation (CIC) with more than a billion USD, closely followed by the Norwegian SWF Government Pension Fund Global (GPFG)[85] and Abu Dhabi Investment

Wealth Funds as Socially Responsible Investors' in Giovanna Adinolfi and others (eds), *International economic law: Contemporary issues* (Springer Nature 2017) 271.

[79] See, <https://www.swfinstitute.org/fund-rankings/sovereign-wealth-fund> accessed 17 January 2023.

[80] Abu Dhabi, Kuwait, Saudi Arabia SWFs for instance.

[81] China, Singapore, Hong Kong SWFs for instance.

[82] Di Wang and others (n 3). Clifford Chance (Firm), 'The UK as a Leading Centre for International Sovereign Wealth Funds' (June 2021) 1-34 <https://www.thecityuk.com/media/1igjhdz5/the-uk-as-a-leading-centre-for-international-sovereign-wealth-funds.pdf> accessed 20 February 2023.

[83] Which is a staggering increase if one takes into account that their total AUM in 2008 was not more than 4 trillion USD. See, <https://www.statista.com/statistics/1267499/assets-under-management-of-swfs-worldwide/> accessed 5 February 2023. However, in the last year it seems their AUM has decreased as an effect of, among other things, the war in Ukraine. See CNBC, 'Market Misery Deals Sovereign Wealth Funds Historic Setback in 2022: Study' (1 January 2023) <https://www.cnbc.com/2023/01/01/market-misery-deals-sovereign-wealth-funds-historic-setback-in-2022-study.html> accessed 9 March 2023.

[84] This is confirmed by other research institute on SWFs such as the SWFI.

[85] Which is managed by the Norwegian central bank's asset management unit, NBIM.

Authority (ADIA). As visible, exception made for the GPFG[86], the largest SWFs are all sponsored by Asian and Middle Eastern countries.[87]

Thatcher and Vlandas report how the most prominent SWFs (as ranked in Annex I) have gone on a shopping spree in Western countries in the 2000s, acquiring landmark buildings and trophy companies. By way of illustration, Qatar Investment Authority (QIA) acquired shares in Harrods or the Paris St Germain football club. ADIA bought the iconic Chrysler building and Kuwait Investment Authority (KIA) a stake in Hudson's Yard development.[88] Moreover, SWFs have been acquiring shares in strategic firms ranging across many sectors. Thus, QIA acquired 20% of the London Stock Exchange Group, CIC purchased shares in Morgan Stanley, and the Saudi PIF acquired shares in BP, Boeing, Facebook, Walt Disney, Cisco Systems, Marriott, Pfizer, and Starbucks.[89] These are only some examples of strategic investments placed by non-Western SWFs in Western-based companies.

Other features can be accounted for regarding SWFs. For instance, SWFs have increasingly deployed more capital, injecting it into fewer deals.[90] Indeed, according to the Global SWF 2023 Report, compared to 2021, SWFs invested 38% more, with 152.5 billion USD in 427 transactions in 2022.[91] SWFs are usually described as patient institutional investors, acquiring minority shares and behaving as passive long-term shareholders, investing capital abroad.[92] Their patient capital is usually welcome by early-stage firms and start-ups in which they invest. Indeed, unlike venture capital and private equity companies, SWFs do not

[86] In addition, the Russia SWF.

[87] Interestingly, until recently, the largest SWF has been the GPFG, which has therefore been surpassed by China.

[88] Thatcher and Vlandas (n 7) 1.

[89] ibid.

[90] 'Global SWF, '2023 Annual Report - State-Owned Investors in a Multipolar World' (1 January 2023) <https://global-swf.s3.amazonaws.com/file-uploads/mhWniVufvncRY1KM2QO7VUAlbBjcy2AEUToA4wVU.pdf> accessed 30 January 2023, 10.

[91] ibid.

[92] See Jerome Engel, Victoria Barbary and Hamid Hamirani, 'Sovereign Wealth Funds and Innovation Investing in an Era of Mounting Uncertainty' in Soumitra Dutta, Bruno Lanvin, and Sacha Wunsch-Vincent (ed), *The Global Innovation Index - Who Will Finance Innovation?* (2020).

have to exit investments to provide liquidity for their stakeholders on a fixed deadline, typically no longer than ten years.[93]

Nonetheless, SWFs seem to have gradually espoused a bolder approach, including significantly more liquidity and equity risk exposure.[94] According to a 2016 survey run by the International Forum of Sovereign Wealth Funds (IFSWF) over 30 SWFs, SWFs changed their asset allocation in foreign markets.[95] SWFs have increased their direct investments, alternative assets, listed equity, private equity, and real estate allocations.[96]

In this context, the Singaporean Government Investment Corporation (GIC) has been the lead investor with 40.3 billion USD in investments in 2022.[97] This does not surprise as GIC often closes among the world's most significant deals, usually in conjunction with other sovereign investors and private equity firms, and 'with a slight bias towards European and North American businesses'.[98] Behind GIC, five Gulf funds confirmed their leading role in the largest deals in the last year.[99] First, the United Arab Emirates SWFs, namely, Mubadala Investment Company PJSC (Mubadala), Abu Dhabi Developmental Holding Company PJSC (ADQ) and the most powerful of them, ADIA. Secondly, the Saudi Public Investment Fund (PIF) and QIA.

[93] ibid.

[94] Mohamed A. El-Erian, 'Sovereign Wealth Funds in the New Normal' (2010) 47(2) FINANCE & DEVELOPMENT <https://www.imf.org/external/pubs/ft/fandd/2010/06/erian.htm#author> accessed 5 February 2023, 44.

[95] IFSWF, 'Trends in Sovereign Wealth Funds' Asset Allocation over Time: A Survey' (2016) <https://www.ifswf.org/trends-sovereign-wealth-funds-asset-allocation-over-time-survey> accessed 5 February 2023.

[96] These increases might have been funded with government and corporate bond portfolio withdrawals. ibid.

[97] According to the same study, 17% more than in 2021.

[98] See, Diego López, 'Preface to 2023 Annual Report - SOIs in a Multipolar World' (1 January 2023) <https://globalswf.com/reports/2023annual> accessed 30 January 2023.

[99] ibid.

Interestingly, yet again, not surprisingly, the regional preferences of the largest ten SWFs seem to react and adapt to the new financial environment and global geopolitical development. In this scenario, such largest and most active funds are invested in Global North countries, with five focusing their capitals on North America, three on Europe, and only ADQ investing substantially in emerging markets.[100]

Similarly to the favourite investment regions, the industries selected by SWFs last year are a reflection of the underlying economic changes. Compared to the pandemic year(s) 2020-2021, SWFs invested less in healthcare and technology (i.e., in venture capital) and took an interest in infrastructure like transportation, but also in energy, industrials and financials, while the real estate sector seemed to have remained relatively constant.[101]

SWFs have also been involved in sixty large deals one billion USD or more, an amount not seen since 2016. By way of example, Temasek has acquired Element Materials Technology, a global leader company in R&D testing, inspection, and certification services, the second biggest SWF deal of all time.[102] In addition, there seems to be a re-emergence of Gulf SWFs trend to serve as essential financiers of Western assets and to invest in renewable energy.

On the other hand, national responses to SWFs investments might be expected to be hostile at times, especially considering SWFs may be investing in sensitive sectors such as artificial intelligence and new technologies related to food security and climatic issues.[103] Nevertheless, before addressing such a topic, one should first attempt to define and classify SWFs, which, as we will see below, remains a complex issue for financial institutions and academics of all backgrounds.

[100] Overall, only 20% of the capital went into developing economies.

[101] See Javier Capapé and others, 'Sovereign Wealth Funds 2021 - Changes and challenges accelerated by the Covid-19 Pandemic' (2022) <https://docs.ie.edu/cgc/SWF%202021%20IE%20SWR%20CGC%20-%20ICEX-Invest%20in%20Spain.pdf> accessed 30 January 2023.

[102] Tamasek has acquired Element Material Technology for about 7 billion USD.

[103] Thatcher and Vlandas (n 7) 1.

## C. SOVEREIGN WEALTH FUNDS: ORIGINS AND DEVELOPMENT

The acronym 'SWF' is relatively recent. Indeed, it was coined only in 2005 by that time State Street manager Andrew Rozanov, who associated it with a 'public-sector player [that is] a by-product of national budget surpluses, accumulated over the years due to favourable macroeconomic, trade and fiscal positions, coupled with long-term budget planning and spending restraint […]'. [104] As will be shown, there are multiple definitions of SWFs provided by the academic and institutional planes.

Like their identification acronym, also SWFs are arguably a relatively recent phenomenon. However, some scholars argue that the oldest SWF dates back to 1816 with the establishment of the French *Caisse des Dépôts et Consignations*.[105] Nevertheless, Capapé and Guerrero Blanco recall that among the largest SWFs, only four were set up before 1970, while over half were established in the 21st century.[106]

Established in 1953 by the State of Kuwait and aimed explicitly at investing excess oil revenues, the Kuwait Investment Authority is generally reckoned as the first 'modern' SWF instituted.[107] Only three years later, Kiribati followed suit and established a fund to hold its revenue reserves.[108] In 1958, a non-commodity SWF was created in the United States, namely

[104] Andrew Rozanov, 'Who Holds the Wealth of Nations?' (2005) 15(4) Central Banking Journal 52.

[105] Phillip Hildebrand, 'The Challenge of Sovereign Wealth Funds' (Geneva, 18 December 2007), 4 <https://www.snb.ch/en/mmr/speeches/id/ref_20071218_pmh/source/ref_20071218_pmh.en.pdf> accessed 30 January 2023. See also, Yi-Chong Xu and Gawdat Bahgat, *The Political Economy of Sovereign Wealth Funds* (International political economy series, Palgrave Macmillan 2010); Zeineb Ouni, Prosper Bernard and Michel Plaisent, 'Sovereign Wealth Funds Definition: Challenges and Concerns' (2020) 8(6) Advances in Economics and Business 362, 363, where they state that the Texas Permanent School Fund established in 1854 can be seen as a SWF frontrunner.

[106] Javier Capapé Tomas Guerrero Blanco, 'More Layers than an Onion: Looking for a Definition of Sovereign Wealth Funds' [2013] ESADE Business School Research Paper 1, 1.

[107] See Table 1.

[108] Therefore in 1956. See Richard C. Wilson and Marguerita Cheng, 'An Introduction to Sovereign Wealth Funds' (31 January 2022) <https://www.investopedia.com/articles/economics/08/sovereign-wealth-fund.asp> accessed 9 March 2023.

the New Mexico State Investment Council. In 1974, it was the turn of Singapore's Temasek Holdings and, in 1976, ADIA, Abu Dhabi's largest SWF.[109]

Since the 1950s, SWFs have been set up essentially in 'two waves'. The first occurred in the second half of the 1970s, while the second began in 1996, starting with the establishment of Norway's GPFG.[110] As described by many scholars, these developments reflect the geopolitical contexts in which States operated.

The first funds between the 1950s and the 1970s were set up as stabilisation funds aimed at offsetting fluctuations in commodity prices and reducing the dependence on fossil reserves by countries rich in such natural resources.

The development of SWFs in Arab countries in the 1970s is strictly linked to the spike in oil prices produced by two energetic crises occurring within a 5-year distance. The first event occurred in October 1973. It was the Arab countries' oil embargo – implemented through the Organization of Arab Petroleum Exporting Countries (OAPEC) – on Israel-supporting States in the Yom-Kippur War.[111] The embargo ceased US oil imports from participating OAPEC nations and began a series of production cuts that altered the world price of oil.[112]

The second event was the 1979 Khomeini Revolution in Iran which sparked the world's second oil shock. Indeed, strikes began in Iran's oil fields in the autumn of 1978, and by January 1979, crude oil production declined by roughly almost 5 million barrels per day or about seven % of world production. Such a disruption prompted fears of further shocks and spurred

[109] However, once again, even though the first SWF dates back to 1950s', SWFs' actual rise as a global phenomenon constitutes a relatively recent phenomenon.

[110] Phillip Hildebrand (n 105), 4. Ouni, Bernard and Plaisent argue that 11% were created between 1950s and 79; 7% during the 80s; 9% in the 90s; 40% between 2000-2009 and 33% between 2010-2020. See Ouni, Bernard and Plaisent (n 105), 366-367.

[111] By Arab oil embargo is usually meant the 'temporary cessation of oil shipments from the Middle East to the United States, the Netherlands, Portugal, Rhodesia, and South Africa, imposed by oil-producing Arab countries in October 1973 in retaliation for support of Israel during the Yom Kippur War'. See, Britannica, <https://www.britannica.com/event/Arab-oil-embargo> accessed 31 January 2023.

[112] See Michael Corbett, 'Oil Shock of 1973–74: October 1973 - January 1974' <https://www.federalreservehistory.org/essays/oil-shock-of-1973-74> accessed 9 March 2023.

widespread speculative hoarding.[113] Consequently, oil prices began to rise rapidly in mid-1979, rising from 13 USD per barrel in mid-1979 to 34 USD per barrel in mid-1980.

The increase in oil prices stemming from such an energy crisis clearly prompted wealth accumulation by Arab oil-exporting countries. Yet, such an accumulation generated domestic inflationary pressure. To counter this trend, these countries opted for investing abroad reserves resulting from the sale of oil. This, in turn, was rendered possible through the institution of SWFs.

Likewise, many see the development of SWFs in Asian countries as a response to the 1997/1998 Asian Financial crisis. Indeed, since the 1980s, Asian countries have attained strong export-led growth, balance-of-payments surpluses and fiscal savings. However, the financial crisis also stemmed from economic growth policies that encouraged investment while creating high levels of debt (and risk) to finance it.[114] Affected economies have since implemented mechanisms to avoid repeating the same misstep. One such counter-mechanisms was to create SWFs to accumulate foreign reserves. Indeed, several Asian countries considered the SWF model a viable approach to investing their surplus reserves. Following this logic, one could say that 'the accumulation of reserves has been, partly, a strategy of crisis prevention: in effect, a policy to bolster the nation-State against the forces of unfettered global capitalism'.[115]

Subsequently, the sharp increase in oil prices since 2000, the widening of global imbalances and the resulting accumulation of foreign exchange reserves prompted the setting up of new SFWs.[116]

Overall, the steep growth in SWFs numbers and sizes can be seen as a by-product of global macroeconomic imbalances between Western and Asian-Middle-East countries in the

[113] See Laurel Graefe, 'Oil Shock of 1978–79' <https://www.federalreservehistory.org/essays/oil-shock-of-1978-79> accessed 9 March 2023.

[114] See Michael Carson and John Clark, 'Asian Financial Crisis: July 1997–December 1998' (9 March 2023) <https://www.federalreservehistory.org/essays/asian-financial-crisis>.

[115] Ebrary.net, 'Reserve Investment Corporations' <https://ebrary.net/122933/political_science/reserve_investment_corporations> accessed 9 March 2023.

[116] Phillip Hildebrand (n 105), 5.

last decades.[117] Specifically, emerging countries shifted from net foreign debt to net foreign asset positions, which El-Erian considered 'the transition from debtor regime to creditor regime'.[118]

It was only in the context of the subprime mortgage financial crisis of 2008 that SWFs became a buzzword in Western financial journals and political debates. In those years, Middle Eastern and Asia SWFs' came into great demand in Western countries.[119] Indeed, SWFs were well positioned to aid distressed Western financial institutions given their long-term investment policy and great management asset capacity, which allowed them to play a stabilising role in Western countries' economies.[120]

[117] Wouter P.F. Schmit Jongbloed, Lisa E. Sachs and Karl P. Sauvant, 'Sovereign Investment: An Introduction' in Karl P Sauvant, Lisa E Sachs and Jongbloed, Wouter P.F. Schmit Jongbloed (eds), *Sovereign investment: Concerns and policy reactions* (Oxford University Press 2012). Bernardo Bortolotti, Veljko Fotak and William L Megginson, 'The Rise of Sovereign Wealth Funds: Definition, Organization, and Governance' [2014] Baffi Center Research Paper 1 <https://ssrn.com/abstract=2538977> or <http://dx.doi.org/10.2139/ssrn.2538977> accessed 2 March 2021. Alan Gelb, Silvana Tordo, Havard Halland with Noora Arfaa and Gregory Smith, 'Sovereign Wealth Funds and Long-Term Development Finance: Risks and Opportunities' (Washington DC May 2014). CGD Policy Paper 41 <http://www.cgdev.org/publication/sovereign-wealth-funds-and-long-term-development-finance-risks-and-opportunities> accessed 25 February 2021.

[118] Considering these states had already established their SWFs. Javier Santiso, 'Sovereign Development Funds: Key Financial Actors of the Shifting Wealth of Nations' (October 2008). OECD Emerging Markets Network Working Paper <https://www.oecd.org/dev/41944381.pdf> accessed 3 February 2023, 4.

[119] Salar Ghahramani, 'Sovereign Wealth and the Extraterritorial Manipulation of Corporate Conduct: A Multifaceted Paradigm in Transnational Law' in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke (ed), *The Oxford Handbook of Sovereign Wealth Funds* (Oxford handbooks, First edition. Oxford University Press 2017).

[120] Indeed, the 2008-2009 global financial crisis paved the way for the grand debut of state capitalist investors in Western markets. By significantly funding distressed financial institutions and broadly investing in diverse economic sectors, SWFs 'came in[to] great demand' in the global north. ibid.

As Gibson and Milhaupt describe, such an intervention resulted in a high-profile boom in SWFs and, at the same time, 'highly controversial investments'.[121] In a span of roughly six months, Middle Eastern and Asia SWFs collectively invested around 60 billion USD in Western banks like Citigroup, Morgan Stanley and Merrill Lynch, considerably buffering the impact of the subprime mortgage crisis.[122]

By way of example, ADIA acquired Citibank's debt, becoming one of the bank's largest shareholders. In 2007, CIC purchased just under 10% of Blackstone's equity and Chinese and Singaporean entities purchased a significant stake in Barclays.[123] Abu Dhabi entity purchased 8.1 % of the common stock of Advanced Micro Devices, a US chipmaker with Defense Department contracts.[124] In the aftermath of the financial crisis, State capitalist ownership has increased in Western financial markets, resulting in SWFs and SOEs ranking among the most prominent international investment vehicles holding shares in Western corporations.[125]

Nevertheless, if, on the one hand, SWFs foreign capital has been welcomed by Western countries as a financial relief, on the other hand, their growth in prominence [126] has been at times perceived as potentially hostile. Host States' reactions have sometimes been defensive, given that many SWFs were sponsored by non-Western State capitalist States with very different political and economic systems. [127] This perception could have also been exacerbated by the fact that SWFs might have invested in strategic assets. This narrative has reverberated in the international and domestic investment legal sector.

---

[121] Ronald J Gilson and Curtis J Milhaupt, 'Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Merchantilism' (2008) 1 SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1095023> accessed 5 February 2023, 4-5.

[122] David Enrich, Robin Sidel and Susanne Craig, 'How Wall Street Firms Reached out to Asia' *Asian Wall Street Journal* (17 January 2008).

[123] Gilson and Milhaupt (n 121), 5.

[124] ibid, 5.

[125] See, Sovereign Wealth Fund Institute (SWFI), 'Top 96 Largest Sovereign Wealth Fund Rankings by Total Assets', available at <https://www.swfinstitute.org/fund-rankings/sovereign-wealth-fund> (last accessed 15 February 2021).

[126] As of other State-backed investors from Asian and Middle Eastern countries.

[127] Thatcher and Vlandas (n 7) 1.

As it will be explored in the following sections, host States have indeed enacted measures blocking and unwinding investments and, over the years, passed domestic provisions targeting investments from foreign State-owned investors, such as foreign direct screening regulations and the negotiation of new investment treaties' provisions in many countries. In this scenario, around 2008-2010, SWFs became a buzzword often used as a synonym for new 'barbarians at the gate shaking the logic of capitalism'.[128]

Confronted with political backlash by host States vis-à-vis their lack of transparency and allegedly hidden geopolitical motives, SWFs convened in 2008 to draft a regulatory framework to boost their legitimacy in the eyes of Western countries.[129] This endeavour culminated in the drafting and acceptance of the Sovereign Wealth Funds Generally Accepted Principles and Practices, also known as 'GAPP' or 'Santiago Principles'. As of today, these principles are the leading international regulation applicable to SWFs.

### D. SOVEREIGN WEALTH FUNDS: COMMON REGULATORY FRAMEWORKS

The Santiago Principles comprise 24 voluntary principles and best practices, each subject to the SWF home country's laws, regulations, requirements, and obligations.[130] They have been negotiated in the framework of the 2008 International Working Group of Sovereign Wealth Funds (IWG), which comprised representatives from 25 member countries mandated by the

[128] Monitor-FEEM, 'Weathering the Storm: Sovereign Wealth Funds in the Global Economic Crisis of 2008 - SWF Annual Report 2008' (April 2009) 4 <https://bafficarefin.unibocconi.eu/sites/default/files/media/attach/2008-SWF-Annual-Report.pdf> accessed 24 January 2023.

[129] To counter such argumentation, SWFs tried to stay 'under the radars' as much as possible with their investment strategy and started joining forces to build a common regulatory framework to foster transparency and legitimacy in the eyes of Western countries. The regulatory endeavour embarked by SWFs in 2008 was primarily set in motion by the political backlash received related to the many concerns of host states regarding their national security vis-à-vis SWFs strategic investment strategies.

[130] The International Working Group of Sovereign Wealth Funds (IWG) (n 78). See, *inter alia*, the definition provided by the Sovereign Wealth Funds Institute (SWFI), 'What Is a Sovereign Wealth Fund?' <https://www.swfinstitute.org/research/sovereign-wealth-fund> accessed 20 February 2021. See OECD, 'Investment Newsletter' (October 2007) issue 5 <http://www.oecd.org/daf/inv/investment-policy/39534401.pdf> accessed 20 February 2021.

International Monetary Fund (IMF) and served as its Secretariat.[131] Such negotiations brought representatives from several SWFs, the OECD, and the World Bank to devise a commonly accepted legal benchmark for SWFs to boost their legitimacy worldwide.[132]

These principles are divided into three key areas relating to SWFs: (i) legal framework, objectives, and coordination with macroeconomic policies (principles 1 to 5); (ii) institutional framework and governance structure (principles 6 to 17); and (iii) investment and risk management framework (principles 18 to 23).[133] This initiative has provided SWFs with a standard international regulatory framework to enhance international transparency. As put by the IFSWF, '[t]he essence of the Santiago Principles is that sovereign wealth funds are run for long-term economic purposes, with appropriate governance and investment disciplines'.[134]

Overall, as mentioned, the Santiago Principles aim to set up a general framework for SWFs in terms of transparency and disclosure. The Principles require governments to share their SWFs legal basis and institutional design. Specifically, Principle 1 States that the legal framework for the SWF should be sound and support its effective operation and the achievement of its stated objective(s) and that the legal framework should ensure the legal soundness of the SWF and its transactions.[135]

---

[131] As of April 2009, in furtherance of the so-called 'Kuwait Declaration', the IWG was replaced by the IFSWF.

[132] Namely: Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Iran, Ireland, South Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, the United Arab Emirates, the United States, and Vietnam. Saudi Arabia, the OECD, and the World Bank participate as permanent observers. See IMF, 'International Working Group of Sovereign Wealth Funds is Established to Facilitate Work on Voluntary Principles' (1 May 2008) Press Release No 08/97.

[133] The 24th principle of the Santiago Principles pertains to their implementation.

[134] IFSWF, 'Implementing the Santiago Principles: 12 Case Studies: From Demonstrating Commitment to Creating Value' <https://www.ifswf.org/sites/default/files/IFSWF_CaseStudies_Nov2016_0.pdf> accessed 20 May 2023.

[135] Santiago Principles number 1. Also is worth mentioning that Principle 3 states that where the SWFs activities have significant direct domestic macroeconomic implications, those activities should be closely coordinated with the domestic fiscal and monetary authorities, to ensure consistency with the overall macroeconomic policies.

By way of example, according to Principle 1, the key features of the SWF legal basis and structure, as well as the legal relationship between the SWF and other State bodies, should be publicly disclosed. Principle 4 establishes clear and publicly disclosed policies, rules, procedures, or arrangements concerning the SWF general approach to funding, withdrawal, and spending operations. Furthermore, the source of SWF funding as the general approach to withdrawals from the SWF and spending on behalf of the government should be publicly disclosed. Principle 5 even establishes that the relevant statistical data pertaining to the SWF should be reported on a timely basis to the owner, or as otherwise required, for inclusion where appropriate in macroeconomic data sets.

Principle 6 States that the governance framework for the SWF should be sound and establish a clear and compelling division of roles and responsibilities to facilitate accountability and operational independence in the management of the SWF to pursue its objectives. Principle 7 requires the owner to set the objectives of the SWF, appoint the members of its governing body(ies) following clearly defined procedures, and exercise oversight over the SWF's operations. Principle 8 sets that the governing body(ies) should act in the best interests of the SWF, and have a clear mandate and adequate authority and competency to carry out its functions.

Notwithstanding their sensible objectives, such principles have been criticised for being discretionary and vaguely drafted, carrying little to no persuasive power over their sovereign drafters.[136] Yet, it must be noted that their vague and broad wording reflects their aspirational character to become universally achievable, regardless of States' level of economic development. Besides, as is often true in international law, a soft law approach is sometimes the only feasible option. Indeed, although such principles have not been drafted as detailed rules, they likewise do not amount to a conventional self-regulatory system or code of conduct.[137] This is precisely why such a framework has been rightly described as 'a *sui generis*,

[136] Jiangyu Wang, 'State Capitalism and Sovereign Wealth Funds: Finding a "soft" Location in International Economic Law' in Chin L Lim (ed), *Alternative Visions of the International Law on Foreign Investment* (Cambridge University Press 2016), 403.

[137] So preserving their ability to serve as a useful framework that could, with time, evolve into a rule-oriented process.

*ad hoc*, multi-level, rule-oriented governance network process'.[138] In other words, the Santiago Principles are at least a first attempt to form an international set of agreed principles and guidelines, aiming to form consensus and establish a common discourse around the activities carried out by SWFs. If seen from a work-in-progress perspective, this is far from meaningless.

At least at the early stage of the Principles enactment, several analyses have pointed to the 'uneven' implementation of the Santiago Principles across their signatories.[139] The Carnegie Endowment's Santiago Compliance Index concluded that it was possible to divide the signatories into four groups of countries based on their implementation of the Principles. According to such Index, democratic countries such as Norway and Australia performed the highest in compliance.[140] By contrast, always in terms of compliance, the bottom 20% were SWFs from countries without solid democratic institutions, such as Russia, Kuwait, and Qatar.[141]

From this, it was inferred that the political framework of the SWFs sponsoring countries 'provided a better explanation of compliance than the maturity of the fund or level of the owner's economic development'.[142] The study also speculated that implementing international guidelines may even prompt democratic feedback results in host counties. DeSouza and Reisman find that one takeaway of such a study might be that international legal regimes are an

[138] Joseph J Norton, 'The 'Santiago Principles' for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes' (2010) 13(3) Journal of International Economic Law 645.

[139] Patrick DeSouza and W. M Reisman, 'Sovereign Wealth Funds and National Security' in Karl P Sauvant, Lisa E Sachs and Jongbloed, Wouter P.F. Schmit Jongbloed (eds), *Sovereign investment: Concerns and policy reactions* (Oxford University Press 2012) 289. See, also SWFI, 'Linaburg-Maduell Transparency Index (LMTI)' <https://www.swfinstitute.org/research/linaburg-maduell-transparency-index#:~:text=The%20Linaburg%2DMaduell%20transparency%20index%20is%20a%20method%20of%20rating,funds%20to%20show%20their%20intentions.> accessed 9 March 2023. See also Sven Behrendt, 'Sovereign Wealth Funds and the Santiago Principles: Where Do They Stand?' [2010] Carnegie Endowement for International Peace 1 <https://www.jstor.org/stable/resrep13033> accessed 9 March 2023, 5.

[140] SWFI (n 139).

[141] ibid.

[142] Sven Behrendt (n 139), 12.

important complement 'to any national security approach in finding the right balance for macroeconomic adjustment processes'.[143]

Lastly, it is important to stress that the Santiago Principles do not directly refer to the concepts such as ethics or sustainable development, which may be sensitive notions and objectives for many SWFs with intergenerational ambitions. However, they mention values other than profit insofar that SWFs can exclude investments based on social, environmental, and ethical grounds, so long as such considerations are clearly explained and publicly disclosed.[144] This entails a deficiency of direct protection of non-commercial considerations within the context of SWFs' international main set of general standards. However, as mentioned, these principles seem structured in such a way as to be open for further development, almost resembling a starting point for discussion rather than a final version of SWFs self-regulation.

This, in turn, may beg the question as to whether interests other than financial maximization might be envisaged as an ongoing dialogue in the context of SWFs' role in the international financial and economic systems. Indeed, as it has been pointed out, further developments in this direction are not to be categorically excluded.[145] This may be inferred by a general trend SWFs have displayed, increasingly addressing sustainable development and sustainability issues in their investment agendas and by promoting international initiatives akin to the 2018 One Planet SWF Summit initiative to scale up climate change concerns within SWFs investment strategies.[146]

[143] DeSouza and Reisman (n 139) 289.

[144] Though SWFs' priority remains the maximisation of risk-adjusted financial returns in a manner consistent with their investment policy, and based on economic and financial grounds, see IFSWF, 'The Origin of the Santiago Principles' (n 130) Principle 19.

[145] See Norton (n 138).

[146] See Bianca Nalbandian, 'The Relevance of the Green Swan Risk: Accounting for Climate Change in the Legal Framework of Sovereign Investors' in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023).

## E. SOVEREIGN WEALTH FUNDS: TAXONOMY AND CLASSIFICATIONS

### 1. Definitions

As pointed out by the Santiago Principles, SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatisations, fiscal surpluses, and/or receipts resulting from commodity exports'.[147] These main SWF characteristics are, in turn, reiterated in the plurality and diversity of existing definitions. Indeed, if one were to attempt to define a SWF, it would have to pick amongst the many provided by international financial institutions as by academics throughout the fields of political science, business and economics and law.[148] As one SWF differs considerably from the other in terms of structure, mandate, purpose, Stated policy objectives, investment strategy, and asset allocation, there is a struggle to find a one-fits-all label.[149]

In the refined words of Bodeau-Livinec, the history of SWFs definitions is 'stuttering' at its best.[150] No single, all-encompassing definition captures the juridical phenomenon of SWFs.[151] Academics from all fields agree that finding a standard definition of SWFs remains

[147] See IFSWF, 'Sovereign Wealth Funds: Generally Accepted Principles and Practices – 'Santiago Principles'' (October 2008) Appendix I, para 2 <https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> accessed 20 September 2019.

[148] We will provide for only some selected definitions in this section. For an exhaustive list of all the most prominent definitions of SWFs please see Annex I.

[149] Bortolotti, Fotak and Megginson (n 117). See also Al-Hassan and others (n 78). See also Andrew Rozanov, 'Definitional Challenges of Dealing with Sovereign Wealth Funds' (2011) 1(2) Asian Journal of International Law 249.

[150] Pierre Bodeau-Livinec (ed), *Les fonds souverains : entre affirmation et dilution de l'État face à la mondialisation* (8, Editions A. Pedone 2014), 10.

[151] ibid.

critical for regulating such entities.[152] Indeed, defining SWFs would assist in adequately designing a regulatory framework for their operations.[153]

In this variegation, we observe how, depending on the specific aspect(s) one decides to focus on, the SWF definition, in turn, may (at least slightly) change.

Prominent scholarship in political science defines SWFs as a mechanism by which the State can directly access global financial markets, thus providing a certain, if relative, financial influence in the international political economy.[154] In other words, SWFs can be seen as special-purpose vehicles that allow governments to tap into the power of global financial markets.[155] Clearly, such a definition seems to focus on the overarching political purpose of these funds vis-à-vis their sponsoring governments.

In the legal field, Bassan defines SWFs based on mainly two elements: the ownership of the fund – which he linked to the fund's legal personality, governance – and accountability and purposes.[156] Specifically, he maintains that SWFs are funds established, owned and operated by local or central governments, 'which investment strategies include the acquisition of equity

[152] '[i]n order to decide if – and how – a phenomenon should be regulated, it must first be qualified' and that '[t]herefore, the definition of SWFs is the pre-requirement for the development of rules governing both their activities and host-state measures', Fabio Bassan, 'Host States and Sovereign Wealth Funds, between National Security and International Law' [2010] European Business Law Review, 165, 170.

[153] Michail Dekastros, 'Sovereign Wealth Funds in International Economic Law' (European University Institute 2016).

[154] Jagdeep Singh Bachher, Adam D Dixon and Ashby H B Monk, *The New Frontier Investors: How Pension Funds, Sovereign Funds, and Endowments are Changing the Business of Investment Management and Long-Term Investing* (Palgrave Macmillan 2016), 5-6.

[155] Gordon L Clark, Adam D Dixon and Ashby H B Monk, *Sovereign Wealth Funds: Legitimacy, Governance, and Global Power* (Princeton university press 2017), 3. See also Karl P Sauvant, Lisa E Sachs and Jongbloed, Wouter P.F. Schmit Jongbloed (eds), *Sovereign investment: Concerns and policy reactions* (Oxford University Press 2012) 25.

[156] Fabio Bassan, 'Sovereign Wealth Funds: A Definition and Classification' in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015), 45.

interest in companies listed in international markets operating in sectors considered strategic by their countries of incorporation'.[157]

It bears noting that such a definition merges the funds' sovereign nature with the commercial character of their purposes.[158] Specifically, Bassan considered 'purposes' instead of 'activities' since, according to this author, purposes influence investment activities. Interestingly, Bassan's define SWFs also by reference to their investment objectives, namely companies operating in strategic sectors of the host State.[159] Therefore, following this line of reasoning, for instance, if a State-owned fund invests in strategic assets, it can be considered a SWF. If *a contrario*, that fund does not invest in companies considered strategic by the host States, it may be excluded from the SWF regulation.

Several of the first definitions provided by academics in business and economics focused on one or more subjective elements of these funds rather than, for instance, on their objectives and institutional framework.[160] This is the case provided by Rozanov, who defined SWFs as 'by-product[s] of national budget surpluses, accumulated over the years due to favourable macroeconomic, trade and fiscal positions, coupled with long-term budget planning and spending restraint'.[161]

Other authors, such as Balding, focused on the sought returns defining a SWF as 'a pool of capital controlled by a government or government-related entity that invests in assets seeking returns above the risk-free rate of return'.[162] In particular, this definition picks out three

[157] ibid, 44.

[158] ibid, 44.

[159] ibid, 46.

[160] See Chao Chen, 'The Theoretical Logic of Sovereign Wealth Funds' [16 June 16, 2009] SSRN Electronic Journal <https://ssrn.com/abstract=1420618 or http://dx.doi.org/10.2139/ssrn.1420618> accessed 20 January 2023. See Annex I.

[161] Andrew Rozanov, 'Who Holds the Wealth of Nations?' (n 104) 52.

[162] Christopher Balding, 'Sovereign Wealth: The Role of State Capital in the New Financial Order' [2011] papersssrncom <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1141531.> accessed 20 January 2021. See also, Stephen Grenville, 'What is a Sovereign Wealth Fund?' in Renée Fry, Warwick J McKibbin and Justin

distinguishing elements of SWFs: (i) the fund's nature as a pool of capital, intended in its broad meaning not excluding entities with separate personality; (ii) the control 'by a government or government-linked entity similar in stature to an independent central bank'; (iii) the quest for 'returns above the risk-free rate of returns'.[163] Of these three elements, Balding sees the third element as the rationale for the existence of SWFs.[164]

Cumming, Wood Filatotchev and Reinecke provide an inclusive definition of SWF. They see SWFs as a category of alternative investors with public institutional status, an intergenerational nature, and aimed at achieving the interests of the sponsoring country.[165] SWFs display two main generic characteristics: (a) they are usually owned by a State or a public body (e.g., a central bank or a ministry); and (b) they adopt investment objectives, strategies and practices typically of private financial institutions. Truman also described them as 'separate pools of government-owned or controlled assets that include some international assets'.[166]

Castelli and Scacciavillani state, as Balding and others, that SWFs may be commonly referred to as investment vehicles or pools of assets owned and managed directly or indirectly by governments.[167]

Beck and Fidora, two ECB researchers, defined SWFs based on three elements: (i) State ownership; (ii) no or only very limited explicit liabilities; and, managed separately from official foreign exchange reserves.[168]

---

O'Brien (eds), *Sovereign Wealth: The Role of State Capital in the New Financial Order* (Imperial College Press; Distributed by World Scientific 2011).

[163] Christopher Balding (n 162).

[164] ibid.

[165] Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke, 'Preface' in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke (ed), *The Oxford Handbook of Sovereign Wealth Funds* (Oxford handbooks, First edition. Oxford University Press 2017).

[166] Edwin M Truman, *Sovereign Wealth Funds: Threat or Salvation?* (Peterson Institute for International Economics 2010)

[167] Massimiliano Castelli and Fabio Scacciavillani (n 17) 10.

[168] Michael Fidora and Roland Beck, 'The Impact of Sovereign Wealth Funds on Global Financial Markets' (2008) 43 Intereconomics 349. Bortolotti, Fotak and Megginson (n 117).

In their survey, Bertolotti, Fotak and Megginson relied on a previous SWF definition employed by the Sovereign Investment Lab.[169] They defined SWFs based on five criteria. Specifically, a SWF is, first and foremost, an investment fund rather than an operating company. Secondly, it is wholly owned by a sovereign government but organised separately from the central bank or finance ministry to protect it from excessive political influence. Thirdly, the fund makes international and domestic investments in various, sometimes risky, assets. Fourthly, the fund is charged with seeking a commercial return. Lastly, the fund is a wealth fund rather than a pension fund, 'meaning that the fund is not financed with contributions from pensioners and does not have a stream of liabilities committed to individual citizens'.[170]

However, these authors warrant that while this definition sounds clear-cut, ambiguities remain. For instance, several funds headquartered in the UAE 'are defined as SWFs, even though these are organised at the Emirati rather than the federal level because the emirates are the true decision-making administrative units'.[171]

In the field of economics, some academic and institutional definitions have focused on the purposes of the funds rather than on their subjective elements. Indeed, Blundell-Wignall, Yu-Wei Hu and Yermo regard SWFs as 'pools of assets owned and managed directly or indirectly by governments to achieve national objectives'. They observed that SWFs are usually set up for several purposes, including the diversification of foreign exchange reserves or commodity revenues' returns, shielding national economies from fluctuations in commodity prices and investing in external assets.[172]

It is evident at this point how many of the characteristics employed by the definitions illustrated above overlap. In this connection, Capape' and Guerrero Blanco analysed 30 studies on SWFs between 2007 and 2012 precisely with the intent of pinning down an overarching

[169] See for instance in the Monitor-FEEM (n 128).

[170] Bortolotti, Fotak and Megginson (n 117).

[171] Javier Capapé Tomas Guerrero Blanco (n 106).

[172] Adrian Blundell-Wignall, Yu-Wei Hu and Juan Yermo, 'Sovereign Wealth and Pension Fund Issues' [2008] OECD Working Papers on Insurance and Private Pensions <https://www.oecd-ilibrary.org/content/paper/243287223503> accessed 20 September 2019.

SWF definition.[173] According to their findings, at least 19 of these provide a concise, systematic definition and identified eleven criteria used by researchers when defining a SWF. Two of these 11 criteria seemed to be the most used or accepted ones. The first is that SWFs are investment vehicles, and the second is that SWFs are 'in the hands of governments'.[174] These two authors stated that these two main characteristics are identified as the core of SWFs.[175] Moreover, their survey addressed the type of entities not to be included in the SWF category (see Table 2).

Nevertheless, they also noticed that despite this general consensus among researchers on these two criteria, 'greater effort needs to be made in pinning down what each of these two concepts mean'.[176] They indeed highlighted how there is still the need to clarify what an 'investment vehicle' and 'government' mean, especially when compared to the notion of State or when touching on the issue of sub-national entities.[177] Interestingly, this also reverberates in the context of arbitrators' assessment on State entities in international investment arbitration disputes.

Coming to institutional definitions, it is worth mentioning the Santiago Principles' approach as it is the definition self-attributed by SWFs. For the Santiago Principles SWFs are

> […] *special-purpose investment funds or arrangements that are owned by the general government. Created by the general government for macro-economic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies that include investing in foreign financial assets* […].[178]

[173] Javier Capapé Tomas Guerrero Blanco (n 106).

[174] ibid 9.

[175] ibid.

[176] ibid.

[177] 'Even the notion of "state/government ownership" is challenged by SWFs which have recently issued debt. Should we still consider them as SWFs, even if their investments are to some extent, private?', ibid.

[178] The International Working Group of Sovereign Wealth Funds (IWG) (n 78).

In this connection, it is worth mentioning how the Santiago Principles put an emphasis on the disclosure of such objectives. Indeed, as mentioned, Principle 2 states that the policy purpose of the SWF should be clearly defined and publicly disclosed.[179]

Another definition is the one provided by the Sovereign Wealth Fund Institute (SWFI) – a research institute monitoring SWFs – which describes SWFs as

> *a State-owned investment fund or entity that is commonly established from balance of payments surpluses, official foreign currency operations, the proceeds privatisations, government transfer payments, and/ or receipts resulting from resource exports*.[180]

The IMF, on the other hand, defines SWFs as special-purpose government funds established

> […] *to hold, manage or administer assets to achieve financial objectives, which include investing in foreign financial assets; (iii) the funds are commonly established out of balance of payments surpluses, official foreign currency operations, the process of privatisations, fiscal surpluses, and/or receipts resulting from commodity exports*.[181]

To conclude, the criteria used to define SWFs are manifold. The approaches also vary depending on the background of the specific author or institution providing the definition. Nonetheless, some standard features may be found. SWFs are regarded as funds owned and

[179] ibid., Principle n. 2.

[180] See SWFI, 'What Is a Sovereign Wealth Fund?' <https://www.swfinstitute.org/research/sovereign-wealth-fund> accessed 20 September 2019. The OECD characterised SWFs as 'government owned investment vehicles funded by foreign exchange assets', see OECD. 'International Investment of Sovereign Wealth Funds: Are New Rules Needed?' (October 2007) 5 Investment Newsletter <https://www.oecd.org/daf/inv/investment-policy/39979894.pdf> accessed 20 September 2019. Although being State-owned, and sometimes characterised by some as 'arms of the States', SWFs seem to be benefit from a certain degree of independence as their assets are *de facto* and *de lege* separate from other public assets so as to pursue their variegated specific objectives. See Castelli and Scacciavillani (n) 11.

[181] IMF, *Balance of Payment Manual 2013* (IMF 2013) para 6.93.

controlled by governments through their shares and which invest sovereign assets to pursue various macroeconomic objectives, injecting capital into foreign assets.

## 4. Classifications

Governments set up SWFs, usually through the ministries of finance, and establish them with specific legal and institutional structures. They are set up using domestic legislation and with mandates, statutes and specific rules following the home State's domestic legal system.

According to a 2015 Harvard Report on SWFs governance, governments must make four key policy decisions when setting up a SWF. These decisions, in turn, affect the entire 'identity' of the fund.[182] The first decision regards the savings rule, namely how the assets should be transferred *to* the fund. The second regards the spending rule, or how the assets should be transferred *from* the fund. The third regards the investment strategy: how should the SWF assets be invested. Lastly, is the decision on the governance and its implementation, how the fund is managed and by whom (i.e., roles and responsibilities).[183]

Based on such direction points, one could infer at least three criteria to classify SWFs, which are the following: (i) the funding sources of sovereign wealth, (ii) their policy (macroeconomic) objectives and (iii) their legal and institutional framework.

To begin with, we can immediately say that SWFs are usually distinguished between commodity and non-commodity funds in terms of their sources of wealth. Commodity-based funds are established through the receipts from commodity exports owned or taxed by the government. According to Truman's listing of SWFs, just about 60 % of SWFs received their financing from non-renewable natural resources.[184] Conversely, non-commodity funds are

[182] Khalid A Alsweilem and others, 'A Comparative Study of Sovereign Investor Models: Institutions and Policies for Managing Sovereign Wealth' (April 2015). Belfer Center for Science and International Affairs and Center for International Development, Harvard Kennedy School Discussion Paper.

[183] ibid.

[184] Truman (n 166). Also see, Jedrzej George Frynas, 'Sovereign Wealth Funds and The Resource Curse' in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke (ed), *The Oxford Handbook of Sovereign Wealth Funds* (Oxford handbooks, First edition. Oxford University Press 2017).

usually financed by a transfer from the official foreign exchange reserves (hence via the country's central bank).[185]

Concerning the classifications based on SWFs objectives – namely what the SWFs assets are spent for – and legal and institutional settings – namely how they are spent and managed – a more detailed account is provided in the following sections.

## 3. Macroeconomic Objectives

According to the 2008 OECD Report by Blundell-Wignall, Hu and Yermo, there are at least seven objectives SWF may aim at. These objectives are the following: (i) diversification of assets; (ii) achievement of a higher return on reserves; (iii) providing for pensions in the future; (iv) offsetting natural and economic resources depletion in favour of future generations; (v) price stabilisation schemes; (vi) promotion of industrialisation; and (vii) promotion of strategic and political objectives.[186] It bears noticing that SWFs can also pursue more than one single macroeconomic objective. The IMF outlined a list of the five main types of SWF, based on the mentioned primary objectives.

The first type of SWFs is *stabilisation funds*. These funds' primary objective is to insulate the budget and the economy against fluctuations in commodities prices, like in the case of the Oil Stabilization Fund of Iran. These are also referred to as 'rainy day' funds because they are usually established 'as a buffer mechanism that can cover fiscal deficits in times of uncertainty and market shocks'.[187] One direct consequence of this policy objective is their investment strategy, which is to usually allocate the vast majority of their capital into highly liquid public stocks and bonds.[188]

[185] Deutsche Bank, 'Commodity and Non-commodity Sovereign Wealth Funds' (18 July 2018). Deutsche Bank Research Paper Series 28 <https://www.oecd.org/dev/pgd/41212577.pdf> accessed 9 March 2023.

[186] Adrian Blundell-Wignall, Yu-Wei Hu and Juan Yermo (n 172), 4.

[187] William L Megginson, Diego Lopez and Asif I Malik, 'The Rise of State-Owned Investors: Sovereign Wealth Funds and Public Pension Funds' (2021) 13(1) Annual Review of Financial Economics 247, 255.

[188] ibid.

The second type is *savings funds.* These funds are also defined as 'future generations' funds because they accumulate wealth for future generations, aiming to convert non-renewable assets into a more diversified portfolio.[189]

As seen, SWFs mainly originated as stabilisation or saving funds in resource-rich countries.[190] Indeed, these kinds of funds were both established by States to help mitigate the so-called 'resource curse' or Dutch disease.[191] This term commonly refers to a paradoxical situation in which a country 'underperforms economically, despite being home to valuable natural resources'.[192] This may happen because the country's capital and labour force are concentrated in just a few or a single primary resource-dependent industry becoming vulnerable to macroeconomic and macropolitical adverse effects.[193] In this way, by not adequately investing in sectors other than oil and gas, countries can suffer from the decline and fluctuation in commodity prices, leading to long-run economic underperformance. The increases in aggregate domestic demand, inflationary pressures, and thus an appreciation of the real exchange rate vis-à-vis trading partners may be an effect of such a 'resource curse'. Those conditions, in turn, may potentially render non-oil sectors less competitive in international markets.[194]

Resource-rich countries saw SWFs as a suitable diversification mechanism to combat such an eventuality. Indeed, SWFs helped mitigating this scenario by increasing the country's

[189] These funds can sustain more risk for short-term liquidity and can afford to invest for the long term. Thus, they are more aggressive and invest more in the private market than stabilisation funds, being amongst the largest investors in the real estate, infrastructure, and private equity markets. ibid.

[190] Jeffrey Davis, Rolando Ossowski, James Daniel, and Steven Barnett, 'Stabilization and Savings Funds for Nonrenewable Resources: Experience and Fiscal Policy Implications' [2001] IMF Occasional Paper 273.

[191] Clark, Dixon and Monk (n 155) 20.

[192] Jason Fernando, 'Resource Curse Definition' (29 September 2023) <https://www.investopedia.com/terms/r/resource-curse.asp> accessed 25 January 2023.

[193] Jedrzej George Frynas (n 184) 124.

[194] Al-Hassan and others (n 78) 8.

net external asset position consistent with economic structure and fundamentals, helping maintain external stability over the long term.[195] This was the case with the Norwegian GPFG.

The third type is *reserve investment corporations*, whose assets are often counted as reserve assets and which are established to increase the return on reserves. They focus on generating returns from their investments and are structured as corporations. CIC, Korea Investment Fund (KIC) and Government Investment Corporation of Singapore (GIC) are examples of this type of SWFs.

The fourth type is *development funds*, which typically help fund socio-economic projects or promote industrial policies that might raise a country's potential output growth. These funds have been in demand in recent years as 'they combine a financial goal with an economic mission – contributing to the development of the domestic economy'.[196] Because of this, many such funds are usually set up with a low initial investment of their own and seek to raise capital from other SWFs. According to Megginson, Lopez and Malik, these funds have many characteristics in common with development banks. However, there is an essential difference between the two types of investors: development banks tend to primarily make loans to projects and companies, whereas SWFs rely on equity investments.

China has set up several development funds, which have been financing several transnational projects, such as, to name one, the Belt and Road Initiative. By way of example, the China Africa Development Fund (CADF) is a vehicle solely funded by the China Development Bank (CDB), which has been financing Chinese businesses' investments and activities in Africa in the fields of power generation, transportation infrastructure, natural resources and manufacturing, among others.[197]

---

[195] ibid. The authors further explain that: 'Furthermore, the accumulation of foreign assets in tandem with changes in hydrocarbon exports would help mitigate macroeconomic—and social—risks associated with the appreciation of the real exchange rate especially under the fixed exchange rate regime and loss of competitiveness in non-hydrocarbon sectors of the economy'.

[196] Megginson, Lopez and Malik (n 187).

[197] Global SWF, 'CADF' <https://globalswf.com/fund/CADF> accessed 9 March 2023. CADF manages the China-Portuguese Speaking Development Fund ('CPD' Fund).

The last typology is the *contingent pension reserve funds*, which provide for contingent unspecified pension liabilities on the government's balance sheet.[198] They aim to enable governments to meet the liabilities of their social welfare and public pension systems. In other words, they serve as backup in case unknown pension liabilities on the government's balance sheet arise. These funds include Ireland's National Pension Reserve Fund, Australia's Future Fund and New Zealand's Superannuation Fund.

Overall, notwithstanding the specific type of reference, SWFs as actors have an essential role in States' macroeconomic management and usually coordinate with other government institutions in this endeavour.[199] Indeed, SWF assets and their produced returns may significantly affect fiscal policy[200], monetary policy[201], and exchange rate variations, which could be mitigated by investing the SWFs resources abroad.[202]

Consequently, a SWF investment strategy and its governance framework should reflect the best way to pursue the fund's objectives. In turn, the legal and institutional structure chosen for the fund is also closely linked to the fund objectives. As we will see in the section below, a SWF can have different governance and legal structures depending on multiple factors.

## 4. Legal Structures and Governance Frameworks

We have come to understand by now that SWFs are creatures of domestic law. Governments establish them, setting up their mandates, statutes and rules following the domestic legal system of reference and the internationally agreed upon principles like the Santiago's.

[198] Mark Allen and Jaime Caruana, 'Sovereign Wealth Funds—A Work Agenda' [2008] International Monetary Fund <https://www.imf.org/external/np/pp/eng/2008/022908.pdf> accessed 5 January 2023. See also Maya Steinitz (n 76), 533.

[199] Al-Hassan and others (n 78) 7.

[200] Which 'might be affected by SWF funding and withdrawal rules that are usually derived from a fiscal rule, often based on Permanent-Income-Hypothesis considerations'. ibid.

[201] Which, 'may be impacted by wide fluctuations in fiscal revenues and procyclical implications for aggregate demand that typically affect inflation and the real exchange rate'. ibid.

[202] ibid.

As a result, SWFs legal and governance frameworks may vary across countries. Depending on their primary functions, sponsoring States may choose different legal and institutional forms for these funds.[203] Countries' legal frameworks may differ regarding the degree of delegation of authority within a SWF and between the fund, its manager, and its owner.[204] In this regard, what remains vital is that the overall legal structure and governance structure would allow for actual delegation of power from the owner to the manager ensuring managerial independence and the optimal operational management of the fund.[205] This, as mentioned earlier, is reflected in the Santiago Principles.[206] The legal structure and the institutional setting of a SWF are crucial as they may affect 'investment capabilities, reporting lines and who has authority over the fund on behalf of the State sponsor'.[207]

A directive principle for governments in choosing the legal structure and governance framework – that is, the operational management – of a SWF is that the formers should be adequate for the optimal pursuance of the fund's objectives. Moreover, they should be appropriate for the typology, complexity and risks of investments made by the fund. The riskier the fund's investment strategy, the 'stronger' the legal and governance apparatus should be.[208] Another consideration is the costs: setting up an independent company bears higher costs than setting a fund within an already existing organ such as a central bank.

Regarding legal structure, SWFs are commonly established as separate legal entities, with separate legal identities from their sponsoring States and full capacity to act[209] (such as

[203] ibid 9.

[204] Moreover, the level of details of primary laws varies considerably depending on the country of reference and their different customs and/or constitutional requirements.

[205] Within the boundaries set by the fund owner Al-Hassan and others (n 78) 10.

[206] The IMF recalls how some nations have primary law that is quite concise, while having a rather detailed secondary legislation. ibid 9.

[207] Alsweilem and others (n 182) 89.

[208] Al-Hassan and others (n 78) 11.

[209] ibid 9. The authors provide the examples of Australia, Kuwait, New Zealand, and UAE (ADIA).

separate State-owned enterprises)[210] or as a pool of assets.[211] The first paradigm is usually referred to as the 'investment corporation model', while the second is called the 'managerial model'.[212]

The corporate investment model consists of a stand-alone entity established outside the traditional State organ perimeter and for the exclusive purpose of managing sovereign wealth.[213] This seems to be the most popular approach. It has been practised by States wishing to save excess foreign exchange reserves, like Korea, China, Singapore, and by States saving natural resource revenues, like Kuwait, Qatar, and Abu Dhabi.[214]

A perfect example of this structure and the overall institutional setting is Tamasek. Here, through the Singaporean Ministry of Foreign Affairs, the Government established an investment company that directly owns the assets to be invested.

The 2015 Harvard Report explains that this model is popular for several reasons. The first factor might be the need for the State to insulate a portion of public wealth from short-term political pressures. Secondly, recruiting professional fund managers with 'more sophisticated investment skills than those required by established bureaucratic agencies' might require a separate corporate form as the public sector's restrictive hiring practices limit the possibility of hiring.[215] Thirdly, a commitment to the intergenerational transfer of this wealth might be best achieved by 'its quarantining in a stand-alone agency mandated to protect and preserve these assets'. [216]

[210] Tamasek, for instance.

[211] Al-Hassan and others (n 78) 9. The authors provide the examples of Botswana, Chile, Norway, and Timor-Leste.

[212] ibid 10.

[213] Alsweilem and others (n 182) 90.

[214] ibid. But also by states wishing to save sources of sovereign wealth such as privatisation proceeds (Australia, Singapore) and fiscal surpluses (New Zealand).

[215] ibid.

[216] ibid.

In the managerial model, the funds structured as a pool of assets are owned by the government but are placed under the management of an entity, which can be an organ of the State. Specifically, the funds can be managed by 'a delegated, constrained operational authority within a central bank, with ministries retaining control over policies'. This is the case with the Norwegian GPFG.[217] The GPFG is therefore owned by the Ministry of Finance, which mandated the central bank to manage these assets on behalf of the government owner. The primary determinant of their institutional placement is that the central bank can handle the operation and implementation of the funds' respective investment policies, which are essentially non-discretionary, benchmark-driven equity/bond investing strategies.

The funds can also be placed in a separate investment portfolio within a central bank under the monetary authority's control.[218] This is the least common institutional setting and it has been referred to as 'diversified monetary authority'.[219] While it is difficult to establish 'precisely which central banks do, and do not, possess such tranches', according to the 2015 Harvard Report, the Investment and Long-Term Growth Portfolios of the Hong Kong Monetary Authority (HKMA) Exchange Fund constitute segregated investment tranches.[220]

States may opt for the managerial model for a different number of reasons. By way of example, there might be a matter of trust toward central banks or fund managers within the treasury or ministry of finance, which could be seen as the appropriate location for sovereign funds, especially when talking about stabilisation funds.[221]

---

[217] See also Botswana and Chile.

[218] Alsweilem and others (n 182) 89.

[219] Rozanov refers to Alastair Newton, senior political analyst at Nomura International, who called such central banks 'Diversified Monetary Authorities' (DMAs), 'emphasizing the return-oriented, broadly diversified, multi-asset-class nature of their portfolios, not that dissimilar in their philosophy and structure to SWFs'. See Andrew Rozanov, 'Definitional Challenges of Dealing with Sovereign Wealth Funds' (n 149) 257.

[220] Moreover, it would also seem that 'the Chinese State Administration of Foreign Exchange (SAFE) has a series of foreign offices pursuing higher return investments, while SAMA is understood to pursue diversified, longer-term investment strategies on a larger portion of its reserves, relative to many central banks'. Alsweilem and others (n 182) 91.

[221] Indeed, central banks and ministries of finances might be seen as a 'good fit with the mission of and investment capabilities' required by the SWF. Also, a government may want 'to limit the discretion of its fund

Moreover, when the SWF investment strategy implicates tracking benchmarks or investing in indexes, mandating an established ministry or central bank might be the most efficient choice for a country.[222]

Additionally, there could be tax advantages and sovereign immunity benefits in placing funds under the management of central banks. Indeed, translated in the language of international law, as we will see in the following chapters, the different legal models may impact the position of SWFs in investment arbitration (as claimants and as respondents) and whether they may benefit from immunity from enforcement. By way of example, it has been argued that investments held through central banks might be protected by sovereign immunity and may enjoy tax privileges in recipient countries.[223] On the contrary, separate legal entities might not benefit from this argumentation, notwithstanding their public composition. However, they may be shielded from enforcement against State debts precisely because of their separate structure.

States may even choose to place SWFs under central banks' management due to 'institutional cooperation'. Indeed, it happened that central banks opposed the establishment of SWFs.[224] This occurred with the People's Bank of China, which fiercely opposed the creation of CIC, resulting in the Chinese government's attempt to appease its central bank by ensuring it retained the management over the SWF.[225]

When discussing a SWF governance framework, it is crucial to distinguish the governing bodies from the supervisory bodies. The first forms 'the system of delegated asset management

---

managers by ensuring operational responsibilities can more easily be transferred to an established bureaucracy'. See Table 3.

[222] Due to these entities hired portfolio managers, IT systems and relationships with external managers.

[223] Taxation of investments through corporate structures may depend on the extent to which these investments are viewed as an integrated part of the government's financial management. Tax treatment of SWFs investments can also depend on provisions in bilateral tax agreements (e.g., Norway has negotiated tax exemptions for its SWF investments in several bilateral tax treaties).

[224] Stephen L Jen, 'Sovereign Wealth Fund Investment Strategies: Complementing Central Bank Investment Strategies' in Udaibir S. Das, Adnan Mazarei, and Han van der Hoorn (ed), *Economics of Sovereign Wealth Funds Issues for Policymakers* (IMF 2010), 126. The author speaks of 'sibling rivalry' between central banks and SWFs.

[225] Alsweilem and others (n 182) 95.

responsibilities'. This means that the top entity of the governance system (usually a State's parliament/ministry of finance) delegates the authority to invest to the individual (internal or external) managers of assets through the various governing bodies down. Specifically, the IMF states that '[t]he delegation implies a gradual increase in the granularity of regulations pertaining to responsibilities as we move down the ladder of the organizational system'.[226]

Coming to supervisory bodies, they should be set up by the SWFs governing body to be assisted in supervising the governing body directly below. Therefore, the role of the supervisory body is 'to verify that the supervised unit is acting in accordance with the regulations set by the governing body immediately above it in the governance structure'.[227]

In terms of governing bodies, the chain of authority delegation is usually the following. The fund's owner, typically the central government, is on top of the chain. Depending on the domestic legal system, the domestic Parliament may have more or less a voice in the matter of the fund's legal structure and investment strategy. Secondly, the Ministry of Finance (or the council of ministers, depending on the domestic legal framework) will practically be carrying out the owner functions, which encompass setting the mandate within the general framework set by the Parliament.[228]

The owner of the SWF is responsible for setting the investment policy after seeking advice from the investment committee (or board).[229] In addition, it is responsible for consultations with stakeholders, namely the parliament, the general public, and nongovernmental organisations, to reduce the risk of unilateral decisions by any single party.[230]

Then there are the executive bodies: the executive board, the chief executive officer (CEO), and the managers. While the government/parliament and the ministries are considered

[226] Al-Hassan and others (n 78) 11.

[227] ibid.

[228] ibid 12–13.

[229] There are broadly two key determinants to the setting of an appropriate investment mandate: (i) the objective of the SWF and (ii) the risk-bearing capacity of the SWF.

[230] Al-Hassan and others (n 78) 15.

'external bodies' as they are not integral to the fund itself, the executive board, the CEO, and the Managers are considered 'internal bodies' placed within the fund's legal structure.

As for the supervisory bodies, the chain of authority delegation is usually as follows: auditor general – external audit – internal audit – compliance unit.[231] The first two are considered external, while the latter are internal bodies. They check whether the governing bodies perform their duties within the established frameworks.

Yet, how much distance is really maintained between the political and the executive levels in a SWF? This highly depends on the specific fund and relative sponsoring country. By way of example, the Norwegian GPFG is generally seen as a frontrunner in terms of transparency and clear division of powers and influence between the different bodies that govern it and its investment policy.

The structure of the GPFG is triadic. In its application of the Government Pension Fund Act,[232] the Parliament delegated the Ministry of Finance with the overall managerial responsibility for the GPFG and its investment strategy. Under the mandate (Management Mandate) laid down by the Ministry of Finance, the Norwegian Central Bank (Norges Bank), and more specifically, the Norges Bank's asset management unit, i.e. the Norges Bank Investment Management (NBIM), retains the operational control of the Fund and exerts its ownership rights.[233] In addition, a 'Council on Ethics' (the Council), an independent body composed of five members, each appointed by the Ministry of Finance, is entrusted with advising the Norges Bank on the exclusion—or observation—of companies that may be in breach of the GPFG's 'Ethical Guidelines'.[234] The Norwegian Parliament superintends these

[231] ibid 12–13.

[232] NBIM, 'Government Pension Fund Act' <https://www.nbim.no/en/organisation/governance-model/government-pension-fund-act/> accessed 20 September 2019.

[233] NBIM, 'Management Mandate for the Government Pension Fund Global' <https://www.nbim.no/contentassets/52e589ff7b2d48afb2e2dcd5aa3464f7/gpfg_mandate_23.04.2019.pdf> accessed 20 September 2019 ('Management Mandate'). Exception made for the Executive Board of Norges Bank, which is supervised by a governing body appointed by the Storting, the Supervisory Council, with each level having its own supervisory unit which receives reports from and in turn supervises its subordinate unit.

[234] See Council on Ethics for the Government Pension Fund Global, 'Guidelines for Observation and Exclusion of Companies from the Government Pension Fund Global'

entities and their activities by overseeing the Fund's investment policy and receiving the Ministry of Finance's annual reports.[235]

As far as the Council is concerned, its main task is to perform due diligence on those companies the Fund targets as investments and, thus, assess whether they abide by the GPFG's Ethical Guidelines and can be deemed sustainable in the eye of the Norwegians.[236] Historically, such guidelines date back to 2004, adopted following the 'Graver Committee' work.[237] Such Guidelines build on the international agreements and conventions regarded 'as sources of ethical precepts' by Norway.[238]

By contrast, the UAE serves as a perfect example of how the boundaries between a SWF managerial structure and the political level, in this case, the private office of the Abu Dhabi regent family, can be rather blurred, if not completely overlapped. Indeed, recently, the new UAE ruler Sheikh Mohamed reshuffled the board of directors of the Emirate's two main SWFs,

---

<https://etikkradet.no/files/2017/04/Etikkraadet_Guidelines-_eng_2017_web.pdf> accessed 20 September 2019 ('Ethical Guidelines'). Originally, the Fund's auxiliary body was the 'Advisory Commission on International Law', which provided assistance on human rights and environmental issues. See Simon Chesterman, 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway's Sovereign Wealth Fund' (2007) 23 American University International Law Review 577, 584.

[235] See Norwegian Government, 'Governance Model: Government Pension Fund' <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/governance-model-for-the government-pens/id699573/> accessed 20 September 2019.

[236] Management Mandate. However, the name 'Guidelines' is deceiving as, notwithstanding their legal classification, they actually have binding legal effect.

[237] The Graver Committee was appointed in 2002. In 2004, the Guidelines were subsequently endorsed by the Storting and came into effect as of 1 December 2004, following the Ministry of Finance.

[238] Heidi Rapp Nilsen and Beate Sjåfjell and Benjamin J. Richardson, 'The Norwegian Government Pension Fund Global. Risk Based versus Ethical Investments' (2019) 88(1) Vierteljahrshefte zur Wirtschaftsforschung 65. See also Benjamin J. Richardson, 'Sovereign Wealth Funds and the Quest for Sustainability: Insights from Norway and New Zealand' [2011] Nordic Journal of Commercial Law 1, 13. Indeed, as the foundation for the Ethical Guidelines, the Graver Committee opted for international agreements on environmental protection and human rights supported by Norway, as opposed to Norwegian domestic culture and policy. Benjamin J Richardson, 'Sovereign Wealth Funds and Socially Responsible Investing: An Emerging Public Fiduciary' [2012] Global Journal of Comparative Law 125 <https://brill.com/view/journals/gjcl/1/2/article-p125_1.xml> accessed 10 March 2023, 137.

ADIA and Mubadala.[239] Sheikh Mohamed passed the chairmanship of ADIA to his brother Sheikh Tahnoon[240] and Mubadala's, to his other brother Sheikh Mansour.[241] Mansour also chairs the Emirates Investment Authority, Abu Dhabi Fund for Development and ADJD, and acts as Deputy Prime Minister of the UAE.[242]

Besides the chairmanships to the brothers, new roles were allocated to the Sheikh's oldest sons, Khalid and Theyab. The former, who many analysts believe could be the next Crown Prince, will join his two uncles in ADIA's board. At the same time, the latter becomes vice-chairman of Mubadala, in addition to his chairmanship of the Crown Prince's Court and of Etihad Rail. Thus, wondering how these political changes play into the Emirate's various SWFs becomes consequential. The Global SWF holds that the boundaries between 'the SWFs, the PPFs, and the private family offices (including Royal Group and its subsidiaries, and AD United Group) may become even blurrier'.[243]

To conclude, given differences in political institutions and different legal backgrounds, SWFs governance models may differ. However, as the IMF stresses, some common principles must be considered essential to any well-governed SWF, such as a good and clear governance structure and transparent operational management of the fund. Accountability should be factored into the fund's framework, which bears massive importance. Indeed, the funds do

[239] See, SWF Global, 'Changes in Abu Dhabi: A Tale of Two Brothers, Two Sons, and Two Key Advisors' <https://globalswf.com/news/changes-in-abu-dhabi-a-tale-of-two-brothers-two-sons-and-two-key-advisors> accessed 10 March 2023.

[240] The Sheikh's brother Tahnoon also chairs ADQ, RoyalGroup, IHC and First Abu Dhabi Bank ('FAB'), and acts as National Security Advisor. Six years later, after the 2004 ethical guidelines and the Norges Bank's legal mandate undergone a government review (which was mostly procedural rather than normative), the Norwegian Parliament approved two sets of guidelines; one for the Council and one for the Norges Bank. See Benjamin J. Richardson & Angela Lee, 'Social investing without legal imprimatur: The latent possibilities for SWFs' in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015).

[241] The Sheik stepped down of both councils.

[242] A role that his older brother Hamdan once played.

[243] SWF Global (n 239).

manage sovereign wealth. That is, their returns are owed to the citizens of the sponsoring countries. In other terms, SWFs are trustees of the people and should always be run as such.[244]

## 5. Differences between SWFs and Other Sovereign Investors and Financial Institutions

After discussing what SWFs are, we should also address what SWFs are not. Indeed, while providing definitions and classifications of SWFs is crucial, it is equally important to distinguish them from similar yet different financial entities and sovereign investors. Specifically, one should distinguish SWFs from central banks, pension funds, and SOEs.[245] In fact, it is not so simple to distinguish between sovereign investors, especially when discussing SWFs and SOEs.

As for the first example, central banks usually hold funds, which can be confused with SWFs. However, they have different goals. Indeed, a central bank holds funds to manage its currency's value, stimulate the economy, or prevent inflation. As described above, SWFs technically aim to earn a high return and achieve other macroeconomic objectives. Besides, central banks are, by mandate, completely independent from governments, given their functions. SWFs, while being in principle autonomous, can still be 'directed' by institutions designated by governments.

SWFs and pension funds share similarities, like being large investors in AUM or being accountable only to governments or public sector institutions. They both invest abroad and in alternative assets. However, they also differ significantly. By way of example, they have different sources of funding. Foreign exchange revenues on commodity exports and/or transfers of foreign reserves from the central bank are the finance sources of SWFs.[246] By contrast, pension funds are more often financed via social security contributions or direct fiscal transfers from the government.

---

[244] ibid 14.

[245] For the differences with development banks see above, section 3.

[246] As seen, SWFs are mainly created through two financial channels: commodities (*e.g.* oil exports) and non-commodities surpluses (*e.g.* foreign exchange reserves). Srinivasa K. Reddy, 'Pot the ball? Sovereign wealth funds' outward FDI in times of global financial market turbulence: A yield institutions-based view' (2019) 19(4) Central Bank Review 129.

They also diverge in terms of objectives as pension funds serve as a long-term financing vehicle for public pensions and other related benefits. At the same time, SWFs are normally established to shield the domestic economy from commodity price fluctuations and diversify foreign reserve holdings into higher-return assets. Thus, pension funds manage assets differently from SWFs to meet clearly defined liabilities.

Another type of sovereign entity, which is close in terms of structure and problematics to SWFs, is the SOE. SOEs are, among other things, the results of a political design. The highly political nature and structural complexity of SOEs are detectable in the way researchers have often taken several divergent political perspectives on the topic, ranging from adopting critical approaches to SOEs inefficiencies to studies supporting their positive socio-economic impacts.[247]

There is no single definition of State enterprises, State-owned enterprises, State-controlled or State-influenced enterprises as these entities acquire different connotations depending on the different legal and policy contexts.[248] The OECD has grouped several definitions and different entities such as State-Invested Enterprises, State-Controlled Enterprises, State-Influenced Enterprises, State-Trading Enterprises, National Champions, Designated Monopolies and Public Bodies.[249]

Such entities are diverse, varying in the sector of operation, size, complexity and extent of government ownership and control. Some may be seen as effectively an arm of the government, whereas others have mixed ownership and greater commercial focus. Therefore, like SWFs, SOEs lack a commonly accepted definition in light of their variety.[250]

---

[247] Jane Lethbridge, 'The Politics of State-Owned Enterprises: The case of the rail sector' in Luc Bernier, Philippe Bance and Massimo Florio (eds), *The Routledge Handbook of State-Owned Enterprises* (Routledge international handbooks. Routledge 2020) 301.

[248] Przemyslaw Kowalski and Daniel Rabaioli, 'Bringing together international trade and investment perspectives on state enterprises' [2017] <https://www.oecd-ilibrary.org/content/paper/e4019e87-en>.

[249] ibid. Specifically, Public Bodies are of particular relevance in WTO jurisprudence. See Chapter III.

[250] Malcolm G. Bird, 'State-Owned Enterprises: Rising, Falling and Returning? A Brief Overview' in Luc Bernier, Philippe Bance and Massimo Florio (eds), *The Routledge Handbook of State-Owned Enterprises* (Routledge international handbooks. Routledge 2020). International Monetary Fund, 'Chapter 3 State-Owned Enterprises: the Other Government' (n 6), 47.

In this regard, in its 2020 Fiscal Monitor, the IMF stated that even though there is no commonly accepted definition of an SOE, some shared elements can be singled out.[251] For instance, the entity usually has its own separate legal personality and engages predominantly in commercial or economic activities. Moreover, the entity has to be at least partially controlled by a government unit.

The OECD defines SOEs as enterprises where the State has significant control through full, majority, or significant minority ownership.[252] Moreover, the OECD defines enterprises with State ownership of between 10% and 50% as partially State-owned enterprises. In the 2015 edition of the OECD Guidelines on Corporate Governance of SOEs, control in SOEs is seen more broadly, by also taking into account control through the board (or other than through bona fide regulation).[253]

In this last connection, one must highlight the critical remark made by the IMF in the 2014 Government Financial Statistics Manual vis-à-vis the concept of 'control'. According to the IMF, control is the ability to determine the general policy or program of an institutional unit. However, when assessing control, one has to exercise judgment as a 'government may exercise significant influence over corporate decisions even when it owns a small number of

[251] International Monetary Fund, 'Fiscal Monitor 2020, April 2020: Policies to Support People during the COVID-19 Pandemic' <https://www.imf.org/-/media/Files/Publications/fiscal-monitor/2020/April/English/ch3.ashx> accessed 17 January 2023. See also, Eurostat - European Commission, 'European System of Accounts - ESA 2010' (Luxembourg 2013) <https://ec.europa.eu/eurostat/documents/3859598/5925693/KS-02-13-269-EN.PDF/44cd9d01-bc64-40e5-bd40-d17df0c69334> accessed 9 March 2023.

[252] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition* (OECD 2015) 14.

[253] In addition, the definition of state in the context of SOEs seems to be an important concept as it may indeed also vary between nations. In particular, state may mean only central governments or also regional or local administrations as in the case of the German *Länder*, which often rimes own and control SOEs, or the Swiss federal cantons. In this connection, the OECD definition limits the concept of SOEs to the entities owned directly or indirectly (through the various holding companies with different rankings, and to all subsidiaries of such entities) by the central government.

shares'.[254] The IMF considers a company as State-owned if the government owns at least 50% of its equity, but it recognises that 'in some exercises, the analysis focuses on cases where the government owns at least 20 per cent'.[255]

As the IMF also highlighted, minority ownerships in listed enterprises and companies with otherwise dispersed ownership could effectively give control of the company to the State. This may happen, for instance, with the ownership of even less than 15 % or 30% of the votes at the annual general meeting. Thus, control remains a highly elusive concept which, it bears repeating, involves judgment of the specific case at hand. This will be more visible in the next chapters on the apprehension of SWFs and SOEs nature in investment arbitration as either private or sovereign entities.

The OECD Guidelines State that any State-owned corporate entity recognised by national law as an enterprise should be considered an SOE. This would include joint stock companies, limited liability companies and partnerships limited by shares.[256] Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered SOEs if their purpose and activities are predominantly commercial. Moreover, the Guidelines State that

> *[w]hether or not to consider other units of general government as SOEs would need to depend on a value judgement, including regarding their degree of market orientation. For example, entities whose primary purpose is to exercise State powers would generally not be considered as SOEs.*

SWFs and SOEs share an essential trait: they do not merely maximise profits as private corporations do, but rather 'must meet various objectives set out by their single [or main] shareholder'.[257] Such actors may then have to strike a balance between commercial and policy

[254] International Monetary Fund, 'Fiscal Monitor 2020, April 2020: Policies to Support People during the COVID-19 Pandemic' (n 251), 47.

[255] ibid 47.

[256] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition* (n 252) 4.

[257] Malcolm G. Bird (n 250).

goals.[258] Nevertheless, albeit deeply interconnected, these actors are not the same thing altogether. First, SWFs differentiate from SOEs in terms of independence from governments. Indeed, SWFs are often structured as pools of assets owned and managed directly or indirectly by governments.[259] Hence, contrary to SOEs, SWFs might be devoid of separate legal personality from their managerial institution.

Moreover, SWFs usually hold mandates setting clear-cut public objectives, whereas SOEs are set up for mainly commercially oriented objectives. Lastly, SWFs are, traditionally, long-term, passive investors who typically operate on the portfolio investment market rather than performing FDI.[260] Conversely, SOEs are more prone to acquire controlling interests in companies adopting a short-term investment horizon. This, in turn, may elucidate why SWFs invest *in* and *through* SOEs, by owning shares in large SOEs operating on the FDI market and also to benefit the funds. In turn, the foreign expansion of SOEs is the 'predominant pathway to internationalise State entities', SWFs included.[261]

Lastly, the vast majority of SWFs have been established in rather recent times. Contrariwise, SOEs are far from being a recent phenomenon in the economic history of States. However, it still holds true that, similarly to SWFs, they grew in numbers and importance in the last decades.

Nevertheless, when a SWF is structured according to the investment corporation model, these differences tend to get so blurred that it might be difficult to actually spot them.

---

[258] ibid.

[259] Massimiliano Castelli and Fabio Scacciavillani (n 167), 10. See Truman (n 166).

[260] However, SWFs are increasingly active in FDI. Behrad Nazarian (n 22).

[261] Cuervo-Cazurra and others (n 57). Marta Götz and Barbara Jankowska, 'Internationalization by State-owned Enterprises (SOEs) and Sovereign Wealth Funds (SWFs) after the 2008 Crisis. Looking for Generalizations' (2016) 50(1) International Journal of Management and Economics 63. In turn, the foreign expansion of SOEs is the 'predominant pathway to internationalise State entities', SWFs included. Salar Ghahramani (n 119). Luke Eric Peterson, 'Oman's sovereign wealth fund is the latest claimant to try to hold a sovereign state – this time, Bulgaria – liable for losses tied to a bank failure' [2015] Investment Arbitration Reporter <https://www.iareporter.com/articles/omans-sovereign-wealth-fund-is-the-latest-claimant-to-try-to-hold-a-sovereign-state-this-time-bulgaria-liable-for-losses-tied-to-a-bank-failure/> accessed 25 May 2021.

## 6. Providing a Working Definition of SWFs

Given the variety of SWFs definitions and the diversity in their legal and institutional frameworks, we believe we ought to provide a clear indication of what SWF means in the context of this study. This study sees SWFs as public institutional investors, which may present some, or sometimes all, of the following characteristics:

1. Being owned and financed by their respective sponsoring governments;

2. Being structured following the 'managerial model' or the 'investment corporation model';

3. Being managed by organs of State such as the Ministry of Finance or central banks or by separate private organisations mandated by a public entity;

4. Financed by the government surplus revenue through either one financial channel: commodities (oil and gas exports) and non-commodities surpluses (foreign exchange reserves, commodity export incomes);[262]

5. Having as one or more objectives: (i) protecting the national economy from income volatility; and/or (ii) balancing the national monetary system from surplus liquidity to control inflationary effects of surplus liquidity; and/or (iii) accumulating assets for future generations; and/or (iv) diversifying government incomes from commodity revenues; and/or (v) using the surplus to transferring new technologies and expertise to support economic and social development.

6. Holding a highly diversified portfolio of investments in income-generating assets spread globally.

7. Being reckoned as SWF by the leading SWF-based research institutions such as Global SWFs and the IFSWF.

[262] Srinivasa K. Reddy (n 262).

## F. SOVEREIGN WEALTH FUNDS AND HOST STATES' REGULATORY REACTIONS

### 1. State Capitalist Investors and Host States Concerns

Thatcher and Vlandas notice that two events usually follow States investing across borders and carrying out economic activities in other countries.[263] The first is the internationalisation of the State economic activities through SOEs by setting up overseas subsidiaries or obtaining ownership of assets allocated abroad.[264] The second is the State's participation in foreign domestic markets, for instance, with SWFs acquiring shares in strategic companies of foreign States. As some States internationalise, other States react, and policymakers in the recipient States find themselves at the crossroads between competing strategies. On the one hand, investment recipient States may opt to close their domestic markets to foreign sovereign investors. On the other hand, they may favour an open market approach accepting them as 'part of strategies to shape their domestic economy'.[265]

A 2017 UNCTAD estimation found that the global investment flow between 1997 and 2017 had been towards the liberalisation of investment flows, which resulted in a global rise of FDI from five billion USD to 31 billion USD.[266] By contrast, the same institution has identified a current reversal of such a trend.[267] Indeed, investment screening mechanisms are becoming increasingly common as States become more concerned about national security and foreign ownership over companies, land and natural resources. In turn, it is inferred from these studies that investment liberalisation decreases when investment screening rises in numbers as a critical foreign investment policy.

---

[263] Thatcher and Vlandas (n 7) 18.

[264] ibid 19.

[265] ibid 20. In turn, both the restrictive and the liberal approach are inherently statist and internationalised at the same time, since they 'involve the state steering or influencing the markets' doing so by adopting international relations with the foreign states.

[266] UNCTAD, 'World Investment Report: Investment and the Digital Economy 2017' (Geneva 2017) <https://unctad.org/system/files/official-document/wir2017_en.pdf> accessed 9 March 2023.

[267] UNCTAD, 'The Evolution of FDI Screening Mechanisms: Key Trends and Features' (2023). Investment Policy Monitor <https://unctad.org/system/files/official-document/diaepcbinf2023d2_en.pdf> accessed 9 March 2023.

Overall, one can say that the recent increase in foreign State-led investments by State capitalist investors has raised several concerns among investment recipient countries. Two sets of risks are associated with State capitalist SWFs and SOEs. These are economic risks and political risks. Precisely, given their financial prowess, SWFs have raised concerns vis-à-vis their impact on recipient States' financial stability and concerning competitive neutrality.[268]

Regarding political risks, SWFs started to be perceived as a threat to many Western countries' economic independence even before the global financial crisis. The widespread fear among such countries was (and still is at times) that sovereign investors such as large SWFs (and SOEs) may serve their sponsoring State's international policies instead of pursuing merely economic purposes. The lack of transparency surrounding these actors also prompts the perceived risks of military and industrial espionage. Indeed, in the eyes of Western host States, SWFs and SOEs controlled by China, Russia, and Middle Eastern countries may acquire control in domestic strategic sectors (infrastructure, energy, and technology, for instance) while serving a potentially hidden geopolitical agenda[269] affiliated with their sponsoring governments.[270]

The deficit of democratic institutions and frameworks in many State capitalist investors' countries of origin substantiates many investment recipient States' concerns. The fear, as mentioned, is that authoritarian regimes could use SOEs and SWFs to 'acquire controlling shareholdings in strategically important companies abroad, thereby pursuing not just ostensible conventional investment objectives but also economic advantage or even hegemonistic aims'.[271] Foreign sovereign investors have already become significant shareholders of sectors

[268] Mark McLaughlin (n 60). See also Bianca Nalbandian, 'State Capitalists as Claimants in International Investor-State Arbitration' (2021) 81(7) Questions of International Law 5.

[269] In other terms hiding their 'true political colours'.

[270] This fear was also fostered by the fact that SWFs and other foreign institutional investors are concentrating their investments in the Global North countries.

[271] Jan K Thomas Junghanns, 'The Potential for a Sovereign Wealth Fund to Acquire and Exert Influence over the Eurozone' (2022) 57(3) Intereconomics 179 <https://www.intereconomics.eu/contents/year/2022/number/3/article/the-potential-for-a-sovereign-wealth-fund-to-acquire-and-exert-influence-over-the-eurozone.html> accessed 13 February 2023.

of a State's economy. An example is provided by the purchase in 2021 of the port of Piraeus by the Chinese State-owned company COSCO under the Belt Road Initiative (BRI).[272]

Yet, are these sovereign investors really all sponsored authoritarian countries? In this respect, *The Economist* Democracy Index may shed some light on this. Published in 2020, this Index provides a (Western-centric, one has to concede) measure of the degree of democracy in each country and, thus, of its government's proximity to democratic principles and the rule of law.[273] It assesses the strength of democratic frameworks in 167 countries and classifies them as either full democracies, flawed democracies, hybrid regimes or authoritarian regimes. As some commentators have noticed, there is a disproportionate share of SWFs (and SOEs) under the control of authoritarian regimes.[274] Therefore, while not all the SWFs are sponsored by authoritarian governments, many of them, and usually the most prominent ones, are. Moreover, political relations between Western countries and some such authoritarian States have been in dire straits at times, like in the case of China and the United States, Russia and roughly all the Western countries.[275]

Consequently, it is not shocking that several recipient countries expressed the need to protect crucial strategic sectors, e.g., defence, energy, finance, infrastructure, and natural resources. Even though foreign SWFs and SOEs might have provided significant benefits to the

[272] Eleni Varvitsioti, 'Piraeus port deal intensifies Greece's unease over China links: Beijing cements control of key EU infrastructure but locals say they have not seen the investment they expected' *Financial Times* (19 October 2021) <https://www.ft.com/content/3e91c6d2-c3ff-496a-91e8-b9c81aed6eb8> accessed 9 March 2023. See also the failed attempt by the China National Offshore Oil Corporation to acquire Unocal, a US oil company Mark Tran, 'Chinese oil firm drops Unocal bid' *The Guardian* (2 August 2005) <https://www.theguardian.com/business/2005/aug/02/oil.money> accessed 9 March 2023.

[273] The Economist Intelligence, 'Democracy Index 2021: The China Challenge' (2022)Thomas Junghanns (n 271).

[274] Thomas Junghanns (n 271), 180.

[275] See for instance the sanctions imposed on the Russia SWF in light of the Ukrainian conflict. SWF Global, 'Russian Sovereign Funds Hammered by Sanctions and Geopolitical Risk' (25th March, 2022) <https://globalswf.com/news/russian-sovereign-funds-hammered-by-sanctions-and-geopolitical-risk> accessed 9 March 2023.

home States of their investments,[276] economic supremacy and national security interests concerns gave way to a more protectionist attitude towards these investors.[277] In this regard, some episodes can serve as an example of how sensitive SWFs and SOEs investments have sometimes been perceived by Western countries, especially in the aftermath of 9/11.

In 2007, Dubai Ports World, a Dubai-incorporated company, withdrew its bid to acquire London-based Peninsular and Oriental Steam Navigation Company, which had operations at six major ports, including New York and Baltimore. While Dubai Ports World was granted authorisation to proceed, political and social attention ultimately prompted Dubai Ports to sell the shares to a US company.[278] The main objections to the deal focused on national security considerations of surrendering control over US ports to a company based in the UAE. Indeed, some even suggested that a Middle Eastern company would be more prone to terrorist infiltrations. In contrast, others were opposed to the mere idea of ceding control of a domestic port to a foreign company.

Western governments have blocked several inbound Chinese investments, primarily in the energy, technology and R&D sectors.[279] For instance, in 2016, Antwerp opposed the sale of a 14 per cent stake in Eandis, a regional grid operator in Belgium of which the city was a shareholder, to the Chinese State-owned company State Grid.[280] This blockage was based on national security considerations, partially due to the protection of customer data.[281]

---

[276] Efraim Chalamish, 'Global Investment Regulation and Sovereign Funds' (2012) 13(2) Theoretical Inquiries in Law 645.

[277] ibid.

[278] Clifford Chance, 'Foreign Direct Investment Regulation Guide' (Great Britain 2022) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/12/gcr_chapter_the%20_evolving_concept_of_national_security_second_edition.pdf> accessed 9 March 2023, 26.

[279] See Alan Hope, 'Antwerp puts end to potential Chinese energy deal' *The Bulletin* (3 October 2015) <https://www.thebulletin.be/antwerp-puts-end-potential-chinese-energy-deal> accessed 9 March 2023.

[280] Carolina Abate and others, 'State ownership will gain importance as a result of COVID-19' (7 July 2020) <https://voxeu.org/article/state-ownership-will-gain-importance-result-covid-19> accessed 26 March 2021.

[281] Mikko Rajavuori and Kaisa Huhta, 'Investment Screening: Implications for the Energy Sector and Energy Security' (2020) 144 Energy Policy 1.

Remaining in Europe, another famous case regarded the attempted acquisition in 2018 of a minority shareholding by State Grid in 50Hertz, one of Germany's largest electricity transmission system operators.[282] To prevent the acquisition, Belgian majority shareholder Elia exercised the right of first refusal. The latter immediately sold the shareholding to the German State-owned development bank, *Kreditanstalt für Wiederaufbau*, in a move arranged by the German government.[283]

In 2022, the German government prohibited the sale of two companies active in the semiconductor industry to Chinese investors. Indeed, Germany's economic ministry barred Elmos Semiconductor, which fabricates chips for the automotive industry, from selling its factory in Dortmund to Silex, a Swedish subsidiary of China's Sai Microelectronics.[284] The decision was taken on the ground of the protection of public order.

While many other cases of blocked investments from State capitalist investors can be listed, it is more important to reflect on the reasons for the State to act in this fashion.[285] The underlying reasons recipient States use to block the investments are all based on national security concerns. This means such screenings assess a proposed investment against its potential threat to abstract notions such as 'national security', 'national interests' or 'public order'. Such triggers reflect the common assumptions about the risks associated with foreign investment built into the operation of any particular screening mechanisms.

The concept of national security has expanded considerably in recent years. The scope of FDI screenings enlarged from the military sector to encompass today's healthcare, supply chain security, data, and privacy protection. This expansion reflects the globalised and interconnected times in which we live in. This is also why national security is and will growingly intersect with

[282] Reuters, 'Germany agrees investment in 50Hertz, fending off China's State Grid' (27 July 2018) <https://www.reuters.com/article/50hertz-ma-kfw-idUSL5N1UN1HU> accessed 9 March 2023.

[283] Carolina Abate and others (n 280).

[284] Anna Cooban and Chris Stern, 'Germany blocks sale of chip factory to China over security fears' *CNN Business* (10 November 2022) <https://edition.cnn.com/2022/11/09/tech/germany-blocks-chip-factory-sale-china/index.html> accessed 9 March 2023.

[285] Sarah Bauerle Danzman and Emily Kilcrease, 'The Illusion of Controls: Unilateral Attempts to Contain China's Technology Ambitions Will Fail' *Foreign Affairs* (30 December 2022) <https://www.foreignaffairs.com/united-states/illusion-controls> accessed 9 March 2023.

climate change and social systemic issues in the future. The attention governments are putting on food and water security and companies working in the R&D developing new technologies, which may help mitigate the adverse impact of climatic degradation, illustrates the changing trend. In turn, the expanded national security concept may include almost every economic and non-economic interest and sector, from defence to water supply.[286] Undoubtedly, the concept of national security has begun to drift into national interest and may be blurred further.

Accordingly, driven by such a mixture of concerns, State development strategies, and increasing geopolitical risk, several States have reinforced restrictive regulatory mechanisms on foreign investments. This has been a steady movement toward increased scrutiny of and controls on foreign investment worldwide which was given 'a shot in the arm by the pandemic'.[287] The global economic shock triggered a fear that strategically essential sectors and assets would be weakened and fall prey to State-owned or affiliated foreign investors.[288] This prompted many countries to rush through measures to protect domestic companies from foreign takeover and ensure a secure supply of business-critical inputs in the public health sector.[289]

The most common FDI restrictive frameworks include foreign equity limitations; investment screening mechanisms; restrictions on the employment of foreigners as key personnel; operational restrictions, e.g., restrictions on branching, capital repatriation or land ownership. Of such restrictive measures, we will mainly focus on investment screenings as they interlock with SWFs rights in investment law and investment arbitration. Such screenings generally involve FDI, investments arising when an enterprise from a country purchases a 'lasting interest' in an enterprise of a foreign country. The lasting interest element is often

[286] See critical infrastructure to artificial intelligence, healthcare, nanotechnology, the media, to new areas such as healthcare, food security.

[287] Preqin, 'Sovereign Wealth Funds in Motion' (May 2021) <https://www.preqin.com/insights/research/reports/sovereign-wealth-funds-in-motion> accessed 14 February 2023.

[288] ibid.

[289] Bianca Nalbandian, 'EU Foreign Direct Investment Screening in Pandemic Times: Between EU Protection and EU' (2020) <https://blogdroiteuropeen.com/2020/04/07/eu-foreign-direct-investment-screening-in-pandemic-times-between-eu-protection-and-eu-protectionisms-by-bianca-nalbandian/> accessed 14 February 2023.

defined as purchasing at least 10% of the voting power.[290] However, screenings are not always limited to investments enabling 'effective participation or control over a company'.[291] Indeed, in some cases, screenings can also capture equity investments with low participation in a company.

## 2. Host States' Investment Restrictions: Foreign Investment Screenings Mechanisms

As said, considering the political sensitivity involved, many countries have established pre-screening procedures which may also be applicable to SWF investments. These screening mechanisms are based on the logic of public order. They are typically carried out under a domestic statute/law/regulation that empowers national governmental agencies to review investments by foreign investors to determine the impact of these investments on interests like national security and public order. As mentioned, foreign investment screening is a comprehensive concept that refers to nation-States' powers to monitor, investigate, assess, condition, prohibit or unwind FDI.[292] An investment screening regards the admission of foreign investment within the territory of the recipient State. Therefore, we are talking about what in IIL is referred to as pre-establishment rights, namely the phase which precedes the establishment of foreign investment in a host country.

Thus, in practice, such mechanisms act as a filter to foreign investments so that States may control the potential acquisition of shareholdings in companies operating in sectors which are deemed to be strategic to national security or, as mentioned, akin to interests such as public order. While there is a wide variety of investment screening worldwide, some aspects are recurrent. For instance, the foreign investor is usually required to notify the host State

[290] OECD, 'OECD Benchmark Definition of Foreign Direct Investment' (2008) 1-254 <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf> accessed 25 February 2023.

[291] Jens Hillebrand Pohl, 'The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms Pages' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer International Publishing 2021), 725, 730.

[292] Jonathan Bonnitcha, 'The Return of Investment Screening as a Policy Tool' (2020) 11(4) 7 <https://www.iisd.org/system/files/2020-12/iisd-itn-december-2020-english.pdf> accessed 9 March 2023. The author states that 'investment screening may be seen as 'the requirement under the law of the host state of the investment that foreign investors attain approval prior to (or concurrently with) making an investment, along with the associated institutional mechanisms by which such approval is granted or withheld'.

governmental agency when investing in one of the sectors deemed to be sensitive and in the percentage deemed to be triggering State attention. Therefore, in these cases, the foreign investor needs prior authorisation by the agency to proceed with the investment.

The investment screening is activated in the presence of 'triggers' which define the scope of the screening mechanism operation and set it into motion. While they may vary from one to the other, it is possible to identify some generic traits common to most investment screening mechanisms.

These triggers usually operate in combination with one another. They can relate to the type of asset being acquired – e.g., purchase of land *vs* purchase of shares in business enterprise and activate only vis-à-vis investments made in specific sectors deemed strategic for national security or public order. The scope of the industries and sectors subject to screening differs from country to country. Depending on the geographies and political aims, intervention may even concern simple portfolio investments and include sectors of activity which are not immediately connected to what are considered the cornerstones of the economic, social and political regime of the jurisdiction in question (namely plurality of the media, prudential rules and national security). In general, investment core infrastructure on which an economy depends, investments that create or consolidate monopoly power and investments by foreign State-owned enterprises are more likely to trigger the operation of investment screening mechanisms.[293]

Triggers can also be *ratione personae*. That is, depending on the passport and shareholding identity of the foreign investor, the notification obligation (or the attention of the State) is triggered. This means that the origin of the proposed investment's home State and the investor's characteristics, specifically whether the investor is a State-owned entity controlled by a foreign government, may qualify as triggers for FDI screenings.[294]

Lastly, the value of the proposed investment and some thresholds of participation (shareholding or voting rights) in a company are identified as triggers. Traditionally, this

[293] ibid.

[294] This is the case, for instance, of state investors of Chinese and lately of Russian citizenship.

participation was deemed around 25% of voting rights, yet many governments have lowered it to 10%, especially during the Covid-19 Pandemic.[295]

Overall, investment screenings may differ in terms of policy criteria. Some, such as the US screening, focus solely on national security considerations, while others, such as the Australian mechanism that applies a 'national interest' test or the Canadian 'net benefit' test. Yet, this very distinction has become almost fictitious because, as seen, the concept of national security and national interests have blurred in light of the gradual expansion of such notions.

### 3. FDI Screenings Developments

These restrictive policies constitute a growing worldwide trend that has expanded in recent years, especially during and after the COVID-19 pandemic. During the Pandemic, State interventions have spurred an uptick in State ownership of assets worldwide. This happened, for instance, with regard to the energy sector, rail transportation, finance, telecoms, manufacturing and services. Simultaneously, States are equally raising barriers against acquisition by foreign States entities through the amendment or enactment of FDI screening mechanisms in almost a surge of renewed investment protectionism.[296] Indeed, as the OECD explains, 'the economic effects of the COVID-19 pandemic, heightened geopolitical tensions, increased protectionism, and the intensification of State-sponsored economic and electronic

[295] This last requirement is particularly relevant in investment screening mechanisms that take into consideration the evaluation of investments on the grounds of competition policy, as is the case in the UK under the Enterprise Act 2002 which is currently undergoing discussion for amendments. See UK Department for Business, Energy & Industrial Strategy and The Rt Hon Sir Alok Sharma KCMG MP, 'New powers to protect UK from malicious investment and strengthen economic resilience' (11 November 2020) <https://www.gov.uk/government/news/new-powers-to-protect-uk-from-malicious-investment-and-strengthen-economic-resilience?utm_source=3296e277-d0a4-44ec-9ff2-d6db10546512&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate> accessed 10 March 2023.

[296] Carolina Abate and others (n 280). See also, Oxford Business Group, 'Covid-19 and Sovereign Wealth Funds: What Does the Future Hold?' (9 September 2020) <https://oxfordbusinessgroup.com/news/covid-19-and-sovereign-wealth-funds-what-does-future-hold> accessed 26 March 2021.

warfare'.[297] These factors spurred concerns amongst countries that adopted or developed stricter foreign investment rules.[298]

Nonetheless, it holds true that investment screenings are not a new phenomenon altogether. For instance, the CFIUS, the Committee on Foreign Investment in the United States, was established in 1976. However, it is not until recent years that this investment screening mechanism has undergone a reform to strengthen its functions.

According to UNCTAD, only a minor fraction of FDI has been blocked or withdrawn due to such investment screening applications in recent years.[299] Nonetheless, the adoption of such protectionist measures shows an increased presence of governments in assessing 'the costs and benefits of foreign investments on a case-by-case basis rather than simply assuming that all foreign investment is beneficial'.[300]

UNCTAD has counted at least 37 countries which have introduced new regulatory frameworks for the screening of investment that include national security considerations from 1995 to 2022 (plus Belgium and Luxembourg have introduced their FDI screenings in July 2023).[301] Moreover, other countries are soon expected to adopt an investment review

[297] OECD, 'The Relationship between FDI Screening and Merger Control Reviews –Note by BIAC' (18 November 2022) <https://one.oecd.org/document/DAF/COMP/WD(2022)115/en/pdf> accessed 25 February 2023, 1.

[298] Beyond the pandemic, such development have been linked with 'the spread of general-purpose technologies' and 'the growing geopolitical rivalry between China and the United States'. Simon J. Evenett, 'What Caused The Resurgence In FDI Screening?' [2021] SUERF Policy Note - The European Money and Finance Forum <https://www.suerf.org/policynotes/24933/what-caused-the-resurgence-in-fdi-screening> accessed 25 February 2023. Tania Voon and Dean Merriman, 'Incoming: How International Investment Law Constrains Foreign Investment Screening' [2022] The Journal of World Investment & Trade 75.

[299] UNCTAD, 'National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments' (December 2019). Investment Policy Monitor - Special Issue <https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf> accessed 10 March 2023.

[300] Jonathan Bonnitcha (n 292).

[301] These countries are Australia, Austria, Canada, China, Czechia, Denmark, Finland, France, Germany, Hungary, Iceland, India, Israel, Italy, Japan, LAO People's Democratic Republic, Latvia, Lithuania, Malta, Mexico, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, the Kingdom of Saudi Arabia, Slovakia, Slovenia, South Africa, Spain,

mechanism.[302] Specifically, 17 countries enacted investment screenings by 2014 and from 2016, while already existing mechanisms in others have been expanded in their scope. [303] In 2017, India, Norway, South Africa and the European Union introduced specific regulations.[304] Yet, as anticipated, it was with the pandemic that a sensible surge in FDI screening regulations occurred.

In this regard, as mentioned, the considerable inflow of Chinese foreign investment by Chinese SOEs has raised foreign policy concerns in many Western nations, especially in the energy, resources and raw materials[305], and telecommunications sectors.[306] Such concerns, which have translated into the adoption of restrictive foreign investment measures, have been intensified by the enactment of China's National Security Law in 2015[307] and National Intelligence Law in 2017[308], as well as the enhanced Military-Civil Fusion strategy that was

Thailand, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. See, OECD, 'The Relationship between FDI Screening and Merger Control Reviews –Note by BIAC' (n 297), 1.

[302] Croatia, Estonia, Greece, Ireland, Sweden, and Switzerland. See ibid.

[303] UNCTAD, 'The Evolution of FDI Screening Mechanisms: - Key Trends and Features -' (February 2023). Investment Policy Monitor 25 <https://unctad.org/system/files/official-document/diaepcbinf2023d2_en.pdf> accessed 25 February 2023, 1.

[304] Voon and Merriman (n 298), 79.

[305] See the recent block of a Chinese (private) fund investment in Australia. Reuters, 'Australia blocks Chinese investment in rare earths producer on national interest grounds' *South China Morning Post* <https://www.scmp.com/news/asia/australasia/article/3211812/australia-blocks-chinese-investment-rare-earths-producer-national-interest-grounds> accessed 10 March 2023.

[306] See Phillip McCalman and others, 'Screening of Chinese investments intensifies' [2022] Investment Treaty News <https://www.iisd.org/itn/en/2022/12/26/screening-of-chinese-investments-intensifies1-phillip-mccalman-laura-puzzello-tania-voon-andrew-walter/#_ftnref6> accessed 10 March 2023.

[307] Rogier Creemers, 'National Security Law of the People's Republic of China' (1 July 2015) <https://digichina.stanford.edu/work/national-security-law-of-the-peoples-republic-of-china/> accessed 10 March 2023. Elsa B. Kania and Lorand Laskai, 'Myths and Realities of China's Military-Civil Fusion Strategy' (28 January 2021) <https://www.cnas.org/publications/reports/myths-and-realities-of-chinas-military-civil-fusion-strategy> accessed 10 March 2023.

[308] Murray Scot Tanner, 'Beijing's New National Intelligence Law: From Defense to Offense' *Lawfare* (20 July 2017) <https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense> accessed 10 March 2023.

also set out in 2017.[309] According to Voon and Walter, these measures adopted by China 'may allow individuals and corporations to be co-opted into supporting national security and intelligence objectives of the State'. In turn, these initiatives undertaken under the leadership of Xi Jinping

> *have contributed to the growing perception of China as a strategic threat to Western democracies and thus to the increased screening of Chinese investments in Australia, Canada, Europe, and the United States. In particular, they have driven innovations in screening policy that focus on investments in so-called critical technologies, infrastructure, and personal data-intensive sectors.*[310]

Lastly, it is worth mentioning that in the wake of the war in Ukraine, more and more countries have been paying attention to investments from Russian and Belarus companies, especially when State-owned.[311]

*i. FDI Screening Regulations Worldwide*

Coming to specific examples of FDI screening regulations, as seen, they may differ in scope and structure, but they have several elements in common.[312] The expansion of the concept of national security has, in turn, changed the physiognomy of the FDI screenings.

Starting from the first wholesome FDI screening in history, namely the United States CFIUS, it underwent several amendments.[313] A rather important one occurred in 2007 when the

[309] Elsa B. Kania and Lorand Laskai (n 307).

[310] ibid.

[311] OECD, 'International Investment Implications of Russia's War against Ukraine (abridged version)' (4 May 2022). Policy Responses: Ukraine - Tackling The Policy Challenges <https://www.oecd-ilibrary.org/deliver/6224dc77-en.pdf?itemId=%2Fcontent%2Fpaper%2F6224dc77-en&mimeType=pdf> accessed 10 March 2023.

[312] One is that the vast majority consider foreign State ownership as a triggering factor. Another one is that the concept of national security has expanded considerably in the last years.

[313] CFIUS is technically an 'interagency committee authorised to review certain transactions involving foreign investment in the United States, in order to determine the effect of such transactions on the national security of the United States'. See US Department of Treasury, 'The Committee on Foreign Investment in the

US Congress adopted the Foreign Investment Security Act (FINSA) to strengthen the CFIUS powers of control over incoming foreign investments. In 2018, another reform, the Foreign Investment Risk Review Modernization Act (FIRRMA), further tightened control over foreign sovereign investments.[314]

Currently, the CFIUS mechanism provides specific rules regarding entities owned or controlled by a foreign government. Indeed, foreign State ownership triggers the investigation of all government-controlled investments concerning US businesses.[315] Specifically, there is a legal presumption that any relevant investment by a State-owned acquirer should be subject to a detailed 45-day review by CFIUS. Currently, it requires a mandatory declaration to CFIUS of investment by an entity in which a foreign government has a substantial interest or investment by any investor in U.S 'critical technology' industries. Moreover, CFIUS has been given additional powers to review transactions that maintains or collects sensitive personal data.

However, this approach is now being extended further to adopt a stricter approach to certain types of investors, against the backdrop of heightened geopolitical tensions. In this connection it is noteworthy howThe United States has also been implementing limitations on chip exports to China within the context of what has been termed a 'chip war'. The initial bans were initiated in 2015, with extensions in 2021 and twice in 2022. These export controls encompass various measures aimed at limiting China's access to semiconductor manufacturing equipment, specific fabrication facilities, and certain types of chips. The controls specifically pertaining to chips were designed to prevent Chinese entities from acquiring advanced AI chips that meet specific performance benchmarks. This prohibition applies not only to chips

United States' <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> accessed 20 September 2019> accessed 22 February 2023.

[314] Among other things, FIRRMA has reframed CFIUS role in the screening process. See, Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) <https://www.congress.gov/115/bills/hr5841/BILLS-115hr5841eh.pdf> accessed 30 January 2021.

[315] Frédéric Wehrlé and Hans Christiansen, 'State-owned Enterprises, International Investment and National Security: The Way Forward' (23 July 2023) <https://medium.com/@OECD/state-owned-enterprises-international-investment-and-national-security-the-way-forward-c21982c9fa8c> accessed 10 March 2023.

manufactured in the US but also to any chips produced using technology, software, or equipment originating from the US.[316]

After all the last legislative amendments, given also the export control measures, one could say that the result is a sensitive expansion of the notion of national security beyond its traditional conception limited to the defence sector and critical infrastructure.

Similar changes have been proposed in other traditional liberalist economies like the United Kingdom, which considerably tightened up its screening rules. Indeed, in 2021 the United Kingdom introduced the National Security & Investment Act (NSIA), which entered into force on 4 January 2022 and significantly expanded the UK government's powers to review the national security implications of transactions.[317] With the NSIA, the UK government is expanding the requirements to notify proposed foreign investment in various technology sectors, communications and 'data infrastructure'.[318]

However, unlike CFIUS, the UK NSIA adopts a rather 'ownership neutral' approach as it tends not to differentiate between public and privately owned and controlled entities. The UK Secretary of State published a final Statement on 2 November 2021 about how the government intends to exercise the call-in power under the National Security and Investment Act 2021.[319] This expressly States that the government does not regard SOEs, SWFs, or other entities affiliated with foreign States as inherently riskier from a national security perspective.[320]

---

[316] Amy Hawkins, 'Chip wars: how semiconductors became a flashpoint in the US-China relationship' *The Guardian* (5 July 2023) <https://www.theguardian.com/world/2023/jul/05/chip-wars-how-semiconductors-became-a-flashpoint-in-the-us-china-relationship> accessed 8 August 2023. It is important to mention how China has been recalling to these bans as well as also the EU and other States like Japan. See Clement Tan 'China slaps export curbs on chipmaking metals in tech war warning to U.S., Europe' *CNBC* (7 July 2023) <https://www.cnbc.com/2023/07/04/china-imposes-export-curbs-on-chipmaking-metals-in-tech-war-with-the-us.html> accessed 8 August 2023.

[317] UK Government, 'National Security and Investment Act 2021' <https://www.legislation.gov.uk/ukpga/2021/25/contents/enacted> accessed 10 March 2023.

[318] Jonathan Bonnitcha (n 292).

[319] UK Government (ed), *Notice - National Security and Investment Act 2021: Statement for the purposes of section 3* (2021)

[320] UK Government, 'National Security and Investment Act 2021' (n 317).

In setting the Investment Canada Act (ICA), the Canadian government had already specified in 2012 that enhanced scrutiny would apply to all foreign investments by State-owned enterprises or private investors assessed as being closely tied to or subject to direction from foreign governments. Indeed, at the time Canadian Prime Minister stated that, especially in the case of an SOE, the screening agency would have paid attention to (i) the degree of control or influence an SOE would exert on Canadian business; (ii) the degree of control or influence an SOE would exert on the industry in which the Canadian business operates; (iii) and the extent to which the foreign government would exercise control or influence over the SOE acquiring the Canadian business.[321]

More recently, in a policy statement issued on 28 October 2022, the Canadian government stated that the ICA would apply to foreign SOEs investments in Canadian entities and assets in critical minerals sectors.[322] After recalling the strategic importance of critical minerals, the policy establishes that foreign SOEs investment in these sectors 'carry a greater inherent risk to Canada's growth, prosperity and security'. The policy sets out a framework for reviewing such investments under the two leading review powers of the Investment Canada Act: the net benefit review and the national security review. The policy set that net benefit approval of acquisitions of control of a Canadian business involving Critical Minerals by a foreign SOE 'will only be approved on an exceptional basis'.[323] The policy also states that investment by SOEs in critical minerals sectors 'will support a finding by the Minister that there are reasonable grounds to

[321] Investment Policy Monitor (7 December 2012) <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/2311/canada-approves-new-guidelines-for-the-screening-of-foreign-investments-by-state-owned-enterprises-soes-> accessed 10 March 2023.

[322] Government of Canada, 'Policy Regarding Foreign Investments from State-Owned Enterprises in Critical Minerals under the Investment Canada Act' (30 November 2022) <https://ised-isde.canada.ca/site/investment-canada-act/en/ministerial-statements/policy-regarding-foreign-investments-state-owned-enterprises-critical-minerals-under-investment> accessed 10 March 2023.

[323] Investment Policy Monitor, 'Increases scrutiny on investment by foreign State-owned enterprises in critical minerals sectors' (28 October 2022) <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4161/canada-increases-scrutiny-on-investment-by-foreign-state-owned-enterprises-in-critical-minerals-sector> accessed 10 March 2023.

believe that the investment could be injurious to Canada's national security' as set out under the Investment Canada Act.[324]

Interestingly, Australia adopted a zero-tolerance approach to foreign investments. Indeed, significant changes were made to its foreign investment framework designed to address any foreign investments, regardless of the amount invested or the sector in which it is invested. Therefore, the Australian agency screens all inbound foreign investments. In addition, in terms of attention given to foreign State ownership, Article 17 defines at great length the concept of 'foreign government investor'.[325] Interestingly, new powers to intervene in transactions on national security grounds were used in January 2021 in Australia. Indeed, the government effectively prohibited a takeover of the building contractor 'Probuild' over concerns that the State-owned China State Construction Engineering Company, which prompted the acquisition, could give access to information about Australian critical infrastructure to the Chinese intelligence services.[326]

Coming to FDI screenings adopted by Asian countries, the Chinese foreign investment screening scope is rather broad. Indeed it covers investments within 'the armaments industry and ancillary to the armaments industry, as well as any other sector deemed related to national defence and national security along with any foreign investment in an area surrounding a military installation or an arms industry facility'.[327] Moreover, it includes critical agricultural products, the energy sector, critical equipment manufacturing, infrastructure, transportation services, essential cultural products and services, information technology and Internet products

[324] Peter Flynn and Laura Rowe, 'Canadian Government Releases New Policy Regarding Foreign Investments from State-Owned Enterprises in Critical Minerals Under the Investment Canada Act' (31 October 2022) <https://www.jdsupra.com/legalnews/canadian-government-releases-new-policy-7536523/?origin=CEG&utm_source=CEG&utm_medium=email&utm_campaign=CustomEmailDigest&utm_term=jds-article&utm_content=article-link> accessed 10 March 2023.

[325] Australian Government (ed), *Foreign Acquisitions and Takeovers Regulation 2015* (2020).

[326] Clifford Chance (n 278).

[327] Jacob Blacklock, 'Foreign Direct Investment Regimes in China' [2022] ICLG <https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/china#:~:text=The%20Foreign%20Investment%20Law%20of,may%20impact%20the%20national%20security.> accessed 10 March 2023.

and services, financial services, critical technology, or any other important field related to national security.[328]

Moreover, a negative list of assets and sectors is provided whereby foreign investors cannot invest. Finally, yet importantly, foreign SOEs are generally not allowed to directly establish private companies or representative offices in the PRC (however, they are allowed to establish subsidiaries that can invest in the PRC).[329]

India introduced restrictions in April 2020. Interestingly, this measure requires any foreign investment by a non-resident based in an Indian neighbouring country to be approved in advance by the government. This applies regardless of the sector into which the investment is made as an exception to the usual sector-by-sector (or *ratione materiae*) criterion.[330]

In Japan, the screening authorities consider, among other factors, the capital structure of the foreign investor, its beneficial ownership and business relationships, and the degree of potential direct or indirect influence by foreign governments and other related parties on the foreign investor.[331]

*ii. The EU FDI Regulation and EU Member States Mechanisms*

It is clear how, as of today, foreign investments are not considered 'equally beneficial' by EU governments and EU institutions.[332] Focusing on maximising the benefits of the FDI inflow rather than the amount of inward FDI has become the EU external investment relations' aim. In this context, the EU Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 (EU FDI Screening Regulation), which establishes a framework for

[328] ibid.

[329] ibid.

[330] Clifford Chance (n 278), 13.

[331] OECD, 'The Relationship between FDI Screening and Merger Control Reviews –Note by BIAC' (n 297), 10.

[332] Jonathan Bonnitcha (n 292).

screening foreign direct investments into the Union, is just one of the tools used to achieve such a goal.[333]

Yet, it was not until the Pandemic that this regulation came into the spotlight. Indeed, while the stronger EU economies had already adopted instruments to control and protect their investment markets, the less advanced economies, like Eastern European ones, being historically FDI importers, have been having a more flexible approach vis-à-vis FDI control. Gradually, the discussion on a common framework was launched with the establishment of the EU internal market and the set in motion of the European integration process. Indeed, EU Member States economies are increasingly interconnected, prompting the need for a more interconnected control system.

This was rendered evident during the Pandemic. Indeed, the risk of acquisition of European healthcare capacities such as medical and protective equipment productions or research establishments dramatically increased in that context, and so did the urgency by EU States to control inward investments.[334] In this vein, nine EU leaders signed a joint letter addressing the President of the European Council and calling for a common debt instrument issuance by a European institution. In that letter, they also expressed other concerns.[335] Indeed, supply chains and strategic assets related to the medical industry might have risked becoming vulnerable targets of 'far-sighted' investors. In that context, the Commission recalled that the Member States could use an already existing tool, namely the EU FDI Screening Regulation.[336]

[333] See Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I.

[334] In 2020, a well renowned German newspaper reported that former United States President Donald Trump allegedly offered a substantial amount of money to 'CureVac', a German company active in the run for searching a COVID-19 vaccine, to move its research branch to the United States and to use the vaccine for US only. See, < Jan Dams, 'Europe will not soon forget this experience' *Die Welt* (15 March 2020) <https://www.welt.de/wirtschaft/plus206563595/Trump-will-deutsche-Impfstoff-Firma-CureVac-Traumatische-Erfahrung.html> accessed 10 March 2023.

[335] Bianca Nalbandian (n 294).

[336] ibid.

On 25 March 2020, the Commission issued the Guidelines for screening FDI in companies and critical assets located in the EU.[337] These critical assets included companies operating in the health sector, medical research, biotechnology and infrastructures deemed essential for security and public order. In practice, specifically aimed at protecting Europe's strategic assets, the EU FDI Screening Guidelines assist Member States regarding FDI screening and the free movement of capital from and to third countries within the context of the FDI Screening Regulation.[338]

The EU FDI Screening Regulation embodies the first EU common framework for screening FDI into Member States' territories and within the EU zone. Indeed, within the scope of such Regulation, Member States may run reviews on FDI and eventually take appropriate measures on the grounds of security or public order.

Differently from the abovementioned investment screening mechanisms like the CFIUS, the FDI Screening Regulation aims to create a system of cooperation and exchange of information between Member States and between Member States and the Commission. This is done vis-à-vis FDI in specific sectors crucial to Member States' (and the EU's) security interests and public policy. In other words, the Regulation provides for a voluntary-based framework screening. The Member States retain the power to decide whether a specific investment operation should be screened and or allowed in their territories.

More specifically, the EU FDI Screening Regulation prescribes that the Commission may issue opinions if investments threaten the security or public order of more than one Member State or if investments may undermine a project or programme of interest to the whole EU.[339] The Commission may also encourage cooperation on investment screening, including sharing experiences, best practices and information on issues of common concerns. It can set specific

[337] European Commission, 'Communication from the Commission 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)' (25 March 2020) <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf> accessed 22 February 2023.

[338] Bianca Nalbandian (n 289).

[339] See, for instance, Horizon 2020.

requirements for Member States wishing to maintain or adopt a screening mechanism at the national level.

So far, Member States have been only requested to notify the Commission of their national investment screening mechanisms. This regulation fully applies as of 11 October 2020, and at the time of writing, 18 Member States have enacted national screening mechanisms, among which, among other things, France, Germany, Italy and Spain.[340]

In determining whether a foreign direct investment may affect security or public order, the EU FDI Screening Regulation envisages that the Member States and the Commission may consider

> *all relevant factors, including the effects on critical infrastructure, technologies (including key enabling technologies) and inputs which are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a Member State or in the Union. In that regard, it should also be possible for Member States and the Commission to take into account the context and circumstances of the foreign direct investment*.[341]

The EU FDI Screening Regulation leaves intact the exclusive responsibility and sphere of competence of Member States concerning their national security (Article 4(2) Treaty of the European Union (TEU)), and their right to protect their vital security interests (Article 346 Treaty of Functioning of the European Union (TFEU)). Article 4(2) of the EU FDI Regulation States that when determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may also take into account whether the government directly or indirectly controls the foreign investor, including State bodies or armed forces, of a third country, including through ownership structure or significant funding.

This criterion seems to have been incorporated into Member States' domestic frameworks. In Austria, for instance, when assessing a possible threat to security or public order, a particular account shall be taken of whether an acquiring person is controlled directly

[340] The list of EU Member States changes by the day as several states are in the process of adapting FDI screening regulations.

[341] EU FDI Regulation, Explanatory Memorandum.

or indirectly by the government of a third country. Also, in Germany, assessing a likely effect on public order or security can consider whether the government directly or indirectly controls the acquirer, including other State agencies or armed forces of a third country.[342]

The French FDI regime is set out in the French '*Code monétaire et financier*' (French Monetary Code).[343] As in many other EU Member States, the scope of its application and specific dispositions have been amended in recent years. The scope of activities subject to prior authorisation from the French Ministry of Economy has been considerably extended.[344]

According to the current drafting of Article R. 151-10 of the French Monetary Code, the Minister of Economy can consider that the investor has links with a foreign government or public body when deciding whether to reject or authorise[345]

In Italy, Article 1, paragraph 3-bis and Article 2, paragraph 6(a) of Law No. 21/2012 provide that if a non-EU public authority directly or indirectly controls the acquirer, the authorities can take it into account to establish whether an investment can threaten national interest and public order. Therefore, the authorities will check to what extent SOEs or SWFs fall within this provision.[346]

In Slovenia, in determining whether foreign direct investments are likely to affect security or public policy, the government authority can consider in particular whether the government

[342] Specifically, if the acquirer has already been involved in activities which have had undesirable effects on the public order or security of Germany or of another member State of the European Union, or there is a significant risk that the acquirer or the persons acting on his behalf have been or are involved in activities which, in Germany, would amount to a certain crime or administrative offence under national legislation.

[343] Government of France, 'Code monétaire et financier' <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006072026> accessed 10 March 2023.

[344] Most recently, law no 2019-486 dated 22 May 2019, décret no 2019-1590 dated 31 December 2019 amended 27 April 2020.

[345] In the Order of 31 December 2019 Article 1(g) Mention of any significant equity relationship or financial support from a State or public body outside the European Union over the last five years.

[346] Gianni & Origoni, 'Snapshot: foreign investment law and policy in Italy' <https://www.lexology.com/library/detail.aspx?g=08d21aba-da6f-4fd9-aa5f-211f49cb6acb> accessed 10 March 2023.

of a third country directly or indirectly controls the foreign investor, including State bodies or armed forces, including through ownership structure or significant funding.[347]

Lastly, there has been widespread attention toward Russian and Belarus investments in the last year in the context of the aggression against Ukraine. This is occurring within the EU as well. Indeed, investments with a direct or indirect connection to Russia or Belarus, especially when the investors are State-controlled, are currently under restrictions in the EU.[348] Moreover, last 9 February 2023, the Commission released a communication in which it foresees a revision of the EU FDI screening regulation in light of two years of experience, 'with a view to identifying […] necessary amendments that would strengthen its functioning and effectiveness'. This will be done by drawing on the experience of the EU export control regime and the implementation of sanctions imposed on Russia and Russian investors. Moreover, the Commission stated that it would examine whether 'additional tools are necessary for outbound strategic investments controls'.[349]

[347] OECD, 'The Relationship between FDI Screening and Merger Control Reviews –Note by BIAC' (n 297), 10.

[348] See, European Commission, 'Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions: (2022/C 151 I/01)' (6 April 2022) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2022:151I:FULL&from=EN> accessed 10 March 2023.

[349] ibid. It may bear noticing that in the recent *Xella* judgment the ECJ held that Member States' investment bans against EU companies with third country-owners may violate the freedom of establishment under the EU treaties. The Court emphasized that its well-established legal precedent regarding the justification of limitations on fundamental freedoms is also relevant to FDI screening measures. In fact, these limitations can only be imposed in situations where there is concrete evidence of genuine and sufficiently serious threat to a fundamental interest of society. This verdict could lead to additional challenges in interpreting FDI screenings. While, on one hand, the Court has firmly stated that constraints on European investments are not imposed casually, on the other hand, it has introduced the possibility of uncertainties regarding whether more organized forms of indirect investment might have greater flexibility under the regulations of the EU FDI. See, *Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter* (Case C-106/22), 13 July 2023.

## 4. The FDI Screenings Implications on International Investment Law Obligations: A Gateway for Investment Disputes?

Foreign investment control was born as an instrument of internal economic regulation to avoid creating dependency on foreign (competing) economic powers. Yet, as a direct consequence, foreign investment control is a regulative practice that also has an unavoidable external component since it governs foreign investments. With the increase in importance acquired by this instrument as a tool for the external relations of States, some commentators have even gone as far as to see it as a tool of potential global economic warfare.[350] Be as it may, one could agree that the very legal morphology of foreign investment control, whether expressed through investment screenings or other forms of control, is strictly linked to developing a specific country's macroeconomic and geopolitical interests. From an internal economic regulation instrument, investment control mechanisms seem to have developed into sovereign States' tools for managing international economic relations in the contemporary polarised geopolitical context.

Moreover, several developing countries had enacted investment screenings before the liberalization process was actioned by signing IIAs.[351] With the dissemination of BITs worldwide in the 1990s, the IIL classical framework that took root was one where the investment pre-establishment phase – where the ability to filter/block foreign investments lies – was usually left unregulated by IIAs and, therefore (indirectly) confined to the sphere of control of national sovereignty.[352] By contrast, the foreign investment post-establishment phase was governed by the substantive and procedural rules of protection of IIAs, by way of example, as in the case of FET or Expropriation clauses. However, it has been noticed by international

[350] Ashley T Lenihan, *Balancing Power without Weapons* (vol 166, Cambridge University Press 2018).

[351] Dirk Willem te Velde, 'Policies Towards Foreign Direct Investment in Developing Countries: Emerging Best-Practices and Outstanding Issues, 2001, 17-18.' (London March 2001) <https://cdn.odi.org/media/documents/5543.pdf> accessed 22 February 2023, 17-18.

[352] Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows/ edited by Karl P. Sauvant and Lisa E. Sachs* (Oxford University Press 2009).

law critical scholars that IIL has progressively expanded into the FDI pre-establishment phase with an aim to liberalise also this stage.[353]

Today, the return of a protectionist trend of regulating the pre-establishment phase with screening mechanisms seems to run counter to the traditional liberalisation approach espoused by IIL. Indeed, this new current wave of investment screening mainly concerns Western countries, which have historically been prone to open market and foreign investments, yet only when Western investors directed the outbound investment flow toward Southern and Eastern countries.[354]

As they are currently being targeted as recipient countries of foreign investments, especially, as said, by developing countries, their position vis-à-vis their openness toward such investments seems to be more protectionist. One could critically see this as a 'double standard' applied by Western developed countries 'preaching' openness yet only toward developing countries' markets.

However, especially from an international legal angle, States, Western and not, do not operate in a vacuum. The spread and expansion of FDI screenings worldwide may 'encounter' States pre-existing international obligations. Indeed, the enactment by States of restrictive measures, such as FDI screenings, still operates in a context whereby States bear an overarching obligation to respect existing legal provisions of international legal character concerning the protection of foreign investments. Most of such obligations are enshrined in IIAs.

Yet, one ought to recall that the rationales and concerns underlying the adoption of such investment screenings were not foreseen even a decade ago, let alone when the overall IIL architecture was designed. The range of transactions and investors seen as potentially impinging

[353] By way of example, Slobodian speaks of the neo-liberal logics of modern international economic law which pushes for the liberalisation of trade and market logics. Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).

[354] Indeed, as seen, this protectionist trend started in the second half of the 2000s and continued between 2006 and 2009. Then, in the aftermath of the global economic and financial crisis and with the growth of FDI flow from developing countries, developed countries increasingly began to introduce investment screening mechanisms.

on national security today was not even remotely on the radar during the peak of the IIAs negotiation and investment law development phase.[355]

Specifically, some IIAs provisions can potentially create legal complications for screening mechanisms. Among these obligations, we may list 'classic' IIL standards such as national treatment (NT), most favoured nation treatment (MFN), prohibitions on the use of performance requirements, expropriation provisions, ISDS, stabilisation and umbrella clauses.

Whether these particular obligations may apply in the protection of an investor whose investment has been captured by an FDI screening depends, first and foremost, on the definition of investor and investment as per the relevant IIA. Secondly, the terms of the obligation in question may more strictly or broadly apply to the case at hand. In general, though, the application of such obligations depends on whether they apply only from the moment the investments have been admitted into the host country (so-called 'post-establishment' phase) or before or during the admission stage (so-called 'pre-establishment' phase).[356]

IIAs can include pre-establishment obligations in several ways, such as by explicitly encompassing it in the NT clause or deriving it from the definitions of covered 'investor' and 'investment'. As explained in Chapter III, IIAs that contain broad, asset-based definitions of 'covered investment' (without reference to the asset already having been admitted as per national law) and define 'investor' as someone who 'seeks to make is making or has made an investment' or who 'attempts to make, is making, or has made an investment' usually provide pre-establishment protections.[357]

A case in point is provided by the UK NSIA, which has introduced the Secretary of State's retrospective 'call-in' powers. As Voon and Merriman call it, this is a form of retrospective screening, as it allows for screening already established investments on UK 'soil'.[358] As the

[355] See for instance the concerns related to the domestic security of supply 'discovered' under the Covid-19 Pandemic.

[356] Vrinda Vinayak, 'The Pre-Establishment National Treatment Obligation: How Common Is It?' [2019] EFILA Blog <https://efilablog.org/2019/01/14/the-pre-establishment-national-treatment-obligation-how-common-is-it/> accessed 10 March 2023.

[357] ibid.

[358] Voon and Merriman (n 298), 86, 87.

authors warn, this feature may, in principle, conflict with IIAs' substantive investment protection.

Nevertheless, the foreign investment control trend might also have an international dimension. Indeed, the phenomenon of renationalisation of the pre-establishment phase can be read in the context of a multiplication of provisions inserted in more recent IIAs, concluded notably between countries of the South, introducing obligations for foreign investors.

For instance, Article 14 of the 2016 BIT between Morocco and Nigeria establishes the obligation for the investor from this pre-establishment phase to respect the most demanding screening and assessment processes in force in the domestic law of the two States.[359] It also requires the foreign investor to respect the verifications in terms of respect for social and environmental standards deriving from international labour and environmental law.[360]

Therefore, governments should adopt a forward-looking approach in anticipating new issues that may arise vis-à-vis international investment flow. This is a serious reflection to consider in other investment treaties negotiations from the perspective of the encroachment between FDI screenings and pre-existing clashing IIAs obligations as well as from the perspective of the new 'renationalisation' of the pre-establishment phase of investments enshrined within IIAs of the new generation.

In this context, our work intersects these issues at a specific point. Indeed, we have not yet spoken about the direct impact of FDI screenings on sovereign investors in the context of IIAS and ISDS. We should now wonder to what extent States might adopt restricting measures to protect national security regarding foreign investments made by SWFs and SOEs under international investment law. More or less explicitly, many restrictive regulations have been adopted to prevent Chinese and Middle Eastern State-owned entities from acquiring domestic

[359] Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, opened for signature 3 December 2016 (Morocco–Nigeria BIT).

[360] Tarcisio Gazzini, 'Nigeria and Morocco move towards a "new generation" of bilateral investment treaties' [2017] Ejil: Talk! <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/> accessed 10 March 2023. See also Okechukwu Ejims, 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019) 34(1) ICSID Review 62.

strategic assets. Yet, for instance, China is not only one of the significant capital exporters worldwide but is also among the countries that have signed the highest number of IIAs.

The answer to such questions is similar to the one given so far, namely that it depends on drafting the substantive obligations under the relevant IIA and, most importantly, on the definitions of 'investment' and 'investor'. In the following parts of our work, we address these questions from the specific perspective of sovereign investors. We address whether and under what circumstances sovereign investors can act as claimants in ISDS disputes and the case of breach of substantive rights contained in IIAs by FDI screening procedures. As will be shown, the core of the issue is whether SWFs (and SOEs) can be, in principle, categorised as investors rather than as direct emanations of their sponsoring States.

However, prior to assess this, we must first discuss the position of SWFs as instrumentalities of respondent States in ISDS. This priority is given since, as it is discussed in the next Chapter, the whole analytical implant used by arbitrators to capture the 'true nature' of SWFs (and of their activities) in ISDS is heavily reliant on the law of State responsibility for the commission of internationally wrongful acts.

# CHAPTER II. SOVEREIGN WEALTH FUNDS AS INSTRUMENTALITIES OF THE STATES IN INVESTOR-STATE DISPUTE SETTLEMENT

## A. INTRODUCTION

As discussed, SWFs stand as gigantic international cross-border investors in sectors that might be of sensible interest to the investment recipient States. In turn, the growth in prominence of SWFs – as of other State-backed investors from Middle Eastern and Asian countries – has reverberated in the international and domestic investment legal sector, with the negotiation of new investment treaties' provisions and the enactment of FDI screening regulations in many countries.

Beyond contributing to spurring geopolitical concerns and regulatory reactions tackling their economic force or their potentially vested political interests, SWFs also raise questions with a broad-spectrum reach, conceptually intertwining with the legal debates on the public/private divide.[361] As a matter of international law, questions can be raised as to the identification of SWFs as either private or sovereign actors and of their investment operations as either commercial or governmental activities. Getting ahead once again with our conclusions, we ought to anticipate that there seems to be no single – nor simple – answer to such questions. Quite the contrary, as it has been already noticed, the answer may vary depending on several factors, among which also the eye of the beholder.

[361] See, *inter alia*, Duncan Kennedy, 'Stages of the Decline of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1349; Morton J. Horwitz, 'The History of the Public/Private Distinction' (1982) 130(6) University of Pennsylvania Law Review 1423; Margaret Thornton (ed), *Public and Private: Feminist legal debates/edited by Margaret Thornton* (Oxford University Press 1995); Susan B. Boyd, *Challenging the Public/Private Divide* (University of Toronto Press 1997); Christine Chinkin (n 361); Julie A. Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54(2) Virginia Journal of International Law 367; Burkhard Hess, *The private-public divide in international dispute resolution* (Pocketbooks of The Hague Academy of International Law, Brill/Nijhoff 2018); Constantijn van Aartsen, 'The End of the Public-Private Divide' (14 September 2016) <https://www.maastrichtuniversity.nl/blog/2016/09/end-public-private-divide> accessed 11 November 2021.

The present chapter addresses how sovereign investors can 'play the part' of respondents in ISDS proceedings.[362] Indeed, in the FDI context, various forms of State power, like legislative, administrative and judicial acts or practices, may negatively affect the value of foreign investments and therefore give rise to ISDS disputes.[363] Against this backdrop, a sovereign entity's conduct may lead to an investment claim directed against the entity's sponsoring State.[364] In such cases, however, for the investor to be successful in the dispute, the sovereign entity's (allegedly) wrongful conduct must be attributed to the entity's sponsoring State.[365] As a result, investment tribunals are called upon to verify the attributability of such conduct to the latter.

Except for a few cases, IIAs do not usually provide specific regimes to attribute international wrongful conduct.[366] Given this, it is only logical that arbitrators have been

[362] Investment treaty arbitration (in the form of State-to-State arbitration) can even serve as a *lieu* for the use of diplomatic protection. Peter Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' in Christina Binder (ed), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009). For instance, see, *Italian Republic v. Republic of Cuba*, ad hoc State-State arbitration, Final Award (in French), 1 January 2008. Also, see Dissenting Opinion, Attila Tanzi, 15 January 2008 on the issue of the characterization of a Cuban State-owned entity. See, Enrico Milano, 'The Investment Arbitration between Italy and Cuba: The Application of Customary International Law under Scrutiny' (2012) 11(3) The Law & Practice of International Courts and Tribunals 499.

[363] *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1988. The tribunal stated at para 66: 'Clearly something other than a law, even something in the nature of a practice, which may not even amount to a legal stricture, may qualify'.

[364] Technically, in investor-State arbitration, the respondent is the State itself, with the notable exception of the ICSID regime, in which designated sub-entities of the State can be parties to arbitral proceedings under ICSID Convention Article 25(1) and (3). See, Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 25.

[365] See, the 2022 ICSID Review Special Issue on the ARSIWA in investment law and, specifically, James Crawford and Freya Baetens, 'The ILC Articles on State Responsibility: More than a 'Plank in a Shipwreck'?' (2022) 37(1-2) ICSID Review 13. Also see, Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31(2) ICSID Review - Foreign Investment Law Journal 457, 467.

[366] James Crawford, *State Responsibility: The General Part* (Cambridge studies in international and comparative law, Cambridge University Press 2013) 36–37. David D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96(4) American Journal of International Law 857, 858. On this topic, see Chapter IV.

resorting to the relevant rules of international law to attribute conduct to States.[367] For such an assessment, investment tribunals refer to the attributive methods provided by the International Law Commission (ILC) Articles on the Responsibility of States for International Wrongful Acts (ARSIWA) in the manner described in the following sections.[368]

Indeed, they codify the relevant rules on international responsibility of States for the commission of wrongful acts and, therefore, the international customary law on attribution, capturing the different rules for identifying the legal and factual relations between a State entity and its sponsoring State.[369] Indeed, as explained by Condorelli and Kress, the term 'attribution' refers to

> *the body of criteria of connection and the conditions which have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State (or other subjects of international law) which has acted in the particular case. In that case (and only for that purpose), the actual author of the act, ie the individual, is, as it were, forgotten, and is perceived as being the means by which the entity acts, a tool of the State (or other subjects of international law) in question.*[370]

[367] Crawford and Baetens (n 365). See also James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review - Foreign Investment Law Journal 127. See also, Jurgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25(1) ICSID Review - Foreign Investment Law Journal 200.

[368] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (November 2001). in II (2) Yearbook of the International Law Commission 40, 1 (2001) <https://www.refworld.org/docid/3ddb8f804.html> accessed 3 August 2021.

[369] Specifically, in the *Armed Activities on the Territory of the Congo* case, the ICJ referred to Article 4 and 8 as codifications of customary international law, but due to the facts of the case, it did not go as far as declaring the same thing for the other provisions of the ARSIWA. As we have seen, however, many other courts and tribunals have referred to them as codification of customary law.

[370] Luigi Condorelli and Claus Kress, 'Part III The Sources of International Responsibility, Ch.18 The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford commentaries on international law. Oxford University Press 2010) 221.

Whenever a dispute connected to a SWF or any other sovereign entity's conduct is started by an investor, the issue of attribution arises at both the jurisdictional and merit stages. In the first case, the constituted tribunal assesses whether the sovereign entity's conduct can be *prima facie* attributed to the sponsoring State for the latter to stand as the Respondent in the dispute. Then, the same issue is addressed on the merits phase when the State's responsibility for the alleged breach of the investor's rights is examined.[371]

As said, in this chapter, we examine how tribunals would regard SWFs and – more broadly – SOEs when addressed as defendants in ISDS, i.e., when identified as instrumentalities of the respondent States by the foreign investors.[372] As anticipated in the General Introduction, this is a question of jurisdiction and attribution. In both such instances, in characterising the relationship between a State and a sovereign entity such as a SWF, tribunals usually evaluate whether the entity can be identified as a State organ, as an entity exercising governmental authority or as a (private) State-instructed, directed or controlled entity.

Considering the above, the objective of this chapter is two-fold. First, it aims to establish whether arbitrators would categorise SWFs as States' instrumentalities and their activities as governmental functions – and if so, under which circumstances – or not. Second, we try to draw some reflection on the legal instruments and interpretative techniques available to arbitrators for addressing the standing and the international responsibility of sovereign entities as instrumentalities of respondent States. Are the analytical tools and arguments used by arbitrators fit for determining the nature of non-Western SWFs and SOEs in the contemporary world? In this regard, we also refer to analogous legal analysis carried out in other international law and dispute resolution fields, such as WTO law.

[371] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30(2) ICSID Review - Foreign Investment Law Journal 449. Micheal Feit, 'Attribution and the Umbrella Clause- Is there a Way out of the Deadlock?' (2012) 21(1) Minnesota Journal of International Law 21. Under Article 3 of the ILC Articles, '[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.'

[372] As explained in the General Introduction, we will use a comparative analysis of cases involving SOEs.

With this in mind, the Chapter overviews the case law of international investment tribunals on the attribution of the conduct of State entities to their sponsoring States, specifically considering the main attribution routes used in ISDS disputes. However, before so doing, one must first introduce the regime of international responsibility for States under public international law, as below.

## B. THE CUSTOMARY LAW OF STATE RESPONSIBILITY AS CODIFIED BY THE ARSIWA

The ARSIWA are regarded as the codification of the body of relevant rules on the international responsibility of States for the commission of wrongful acts.[373] Specifically, these rules have been construed as norms of a secondary character, only applying when a breach of a primary norm of international character has taken place.[374]

They are the product of two reading phases, the first from 1969-1996 and the second from 1996-2001.[375] Hence, these dispositions are the product of long and complex negotiations at the ILC and the result of the work of different rapporteurs. To begin with, Roberto Ago[376], the father of the modern understanding of the regime of international State responsibility, appointed Special Rapporteur in 1963, who directed the ILC in issuing eight reports between 1969 and 1980 and provisionally adopting thirty-five articles.[377] Willelm Riphagen (1979-1986), Gateano Arangio-Ruiz (1987-1996) and James Crawford (1997-2001) followed Ago's work.[378] Late Special Rapporteur Judge James Crawford finalised the ARSIWA in 2001.

[373] David D. Caron (n 373), 858.

[374] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) 31 at para 1. On the relevance of the difference between primary and secondary norms vis-à-vis the ARSIWA see the critical standpoint of Bhupinder S. Chimni, 'The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective' (2020) 31(4) European Journal of International Law 1211.

[375] Narissa K Ramsundar, *State Responsibility for Support of Armed Groups in the Commission of International Crimes* (Queen Mary studies in international law volume 40, Brill Nijhoff 2020), 72.

[376] Actually, the work on the codification on state responsibility began in 1956 under the guidance of García-Amador as Special Rapporteur focusing on substantive law relating to injuries to aliens.

[377] Together comprising Part One (Origin of state responsibility) of the Draft Articles on State Responsibility.

[378] Ramsundar (n 375) 72.

Lastly, it is worth mentioning how during the 2019 session of the Sixth Committee, States have adopted opposing views between those who preferred to keep the text of the ARSIWA as a non-binding instrument and those who considered its transposition into an international convention as necessary.[379]

Be as it may, as mentioned, many of the ARSIWA provisions are regarded as enshrining the customary rules on international State responsibility. This also applies to the rules of attribution of international wrongful acts to States.[380] The rules of attribution have been repeatedly described as a topic of essential importance for international law as a whole. In words used by the Special Rapporteur Ago, the rules of attribution are 'one of the most delicate aspects of the entire theory of responsibility'.[381] They are a cornerstone of the law of State responsibility as international responsibility can only pass through the screen of the State, yet the State as a juridical entity can only act through persons and determining which persons are acting on behalf of the State is the purpose of these rules.[382]

Drawing the line on where the 'State sphere' begins and where it ends is far from a straightforward exercise. Precisely, in the context of State responsibility, on the one hand, undue restraint in attributing conduct would invite States to abuse these rules by veiling their

[379] See the meeting of the General Assembly Sixth Committee held on 11 November 2019, UN Doc A/C.6/74/SR.34 (29 November 2019) 3-4 paras 13-21. See also Maurizio Arcari, 'The future of the Articles on State Responsibility: A matter of form or of substance?' (2022) 93 Questions of International Law, Zoom-in 3.

[380] *RWE Innogy GmbH and RWE Innogy Aersa S A U v. Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability, Quantum, 30 December 2019, para 399. See also *Bilcon of Delaware et al v. Canada*, PCA Case No 2009–04, Award on Jurisdiction and Liability, 17 March 2015.

[381] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Separate Opinion of Judge Ago), 27 June 1986, 1986 ICJ 181, para 19.

[382] Luca Schicho, *State entities in International Investment Law* (Studien zum internationalen Investitionsrecht Bd. 4, 1. Aufl. Nomos; facultas.wuv; Dike 2012) 17–18. For further reading on the issue of attribution in public international law, see *ex multis*, Phillip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29(1) Harvard International Law Journal 1; Also see, James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm D Evans (ed), *International Law* (Fifth edition. Oxford University Press 2018). Georg Nolte, 'From Dionisio Anzillotti to Roberto Ago: The Classical International Law on State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13(5) European Journal of International Law 1083.

actors under the corporate structure and thus circumventing international State responsibility.[383] On the other hand, a tendency to attribute all conduct virtually in any form related to the State would require States to exercise a degree of control over their nationals that would be undesirable and virtually impossible.

Through attribution, a State can be held liable for the internationally wrongful acts potentially committed by its organs, territorial units such as provinces and municipalities, State entities and private entities exerting governmental functions on behalf of the State or under its instructions, direction or control.[384] As per ARSIWA Article 2, two fundamental elements should be established for the international responsibility to rise: 1) A breach of a primary norm in force between two States, i.e. the commission of an internationally wrongful act stemming from the action(s) or omission(s) of one of the two States; 2) Attribution of that wrongful conduct to the responsible State. Therefore, for an internationally wrongful act to cause the responsibility of a State, 'it is necessary and *sufficient* that two elements […] are present': a *breach* of a primary international norm and its *attribution* to the State.

As for the exact definition of 'breach of international law', one should look at ARSIWA Article 12, which establishes that an internationally wrongful act is a breach of an international obligation, regardless of the nature and character of the latter. ARSIWA Article 2, which refers to 'international obligation' in a general term without specifying whether it encompasses both treaty and non-treaty obligations, may suggest a 'rather universal' application of the ARSIWA. Indeed, the ARSIWA cover the breaches of all international obligations, regardless of their origin or character. In this way, they allow their employment as subsidiary rules of a general kind. Therefore, it might be preliminary put forth that, in light of such general application of the Articles, the latter may be invoked and applied in the international investment context, a fact confirmed by the extensive references made to them by investment tribunals.[385]

---

[383] Gregory Townsend, 'State Responsibility for Acts of De Facto Agents' (1997) 635(14) Arizona Journal of International & Comparative Law 635.

[384] Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31(2) ICSID Review - Foreign Investment Law Journal 457, 460. See also other attribution routes such as the ones codified by, *inter alia*, ARSIWA Articles 7, 9 and 11.

[385] Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31(2) ICSID Review - Foreign Investment Law Journal 457, 460. This fact may rightfully suggest that the ARSIWA may be employed in investment cases whenever a breach of an international treaty obligation by a State needs to be established.

Translated into the ISDS context, State responsibility is intended precisely as the 'responsibility of a State party for breach of the substantive international obligations created by the investment treaty', which is a breach of an international obligation as ARSIWA Article 2 conceives it. Then a breach of an IIA has to be attributed to the State in order for it to be held responsible on the international plane.

By reflecting different purposes and entailing distinct legal consequences, the ARSIWA provisions on attribution provide a gradual and alternative usage of different 'linking methods' between persons or entities and the State.

Precisely, the ARSIWA provide for three main rules governing attribution.[386] ARSIWA Article 4 deals with attribution to the State of conduct of its organs and reciting

> *[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*

There is a distinction between the conduct of the State, to which the conduct of State organs is equated, and the conduct of other persons, groups or entities, which, under certain circumstances, can be attributed to the State.

Article 5 is concerned with attribution to the State of conduct of separate entities authorised to exercise governmental authority. Specifically, ARSIWA Article 5 applies to

> *conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular*

[386] Besides these three fundamental rules, see also ARSIWA Article 7 on excess of authority or contravention of instructions and Article 11 comprising conducts acknowledged and adopted by a State as its own. However, for the limited role these rules play in the context of the issues addressed by this piece of work, the analysis will only focus on the three core rules on attribution.

*instance.*

The ILC Commentary recalls that the term 'person or entity' used in Article 4, paragraph 2, as well as in Articles 5 and 7 has a broad sense which includes 'any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority'[…].[387] As Schicho rightly suggests, given this description, it would seem natural to think of State entities as 'their ability to exercise such authority sets them apart from normal private entities and creates a particular link to the State, namely, the ability to take measures or engage in functions usually reserved to the State'.[388]

Article 8 refers to the attribution to the State of conduct of a person or a group of persons and private entities under the State's instruction, direction, or control. This Article recites that 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct'.[389] Specifically, such a provision serves to attribute conduct taken by persons or entities acting under instructions of or under the direction or control of a State. As the ILC Commentary highlights, Article 8 uses the words 'person or group of persons', 'reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis'.[390] Therefore, while a State may authorise conduct by a legal entity such as a corporation, 'it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective'.[391] This entails that entities directed or controlled by the State or acting under its instructions have 'an evident link to the State that distinguishes them from other entities'.[392]

---

[387] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) Commentary to Article 4, at 42, para 12.

[388] Luca Schicho (n 433) 43.

[389] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) Commentary to Article 8, at 49, para 9.

[390] ibid.

[391] ibid.

[392] Luca Schicho (n 382) 44.

As said, the ARSIWA offer a separate and not cumulative application of the attribution rules.[393] Some of these rules call for a structural analysis of the relationship between the entity and the State and/or for a functional analysis of the character of the conduct to be attributed to the State. As it is discussed in the context of this Chapter, these two sets of analysis reverberate in almost every investment arbitral case dealing with a State entity.

## C. SOVEREIGN WEALTH FUNDS AS STATE ORGANS IN ISDS

### 1. ARSIWA Article 4

#### *i. Introduction*

Assessing whether a sovereign entity like an SOE or a SWF is a State organ is the first step to attribute its conduct to a given State. Indeed, ARSIWA Article 4 is regarded as the core rule on attribution in customary international law, for it sets the general responsibility of States for the conduct of their organs. In this vein, a finding excluding an entity is a State organ paves the way for the entity evaluation under the other ARSIWA provisions on attribution, namely Article 5 and 8, which are complementary and residual to ARSIWA 4.[394]

ARSIWA Article 4 is a provision which builds on the principle of State unity, in that State organs form part of the State structure and share its identity. Consequently, the conduct of State organs is susceptible to being attributed to the State no matter what branch or level of State power they belong to.[395] Tribunals recognise the established rule of customary international law of the principle of unity of the State in the context of the attribution of conduct of constituent units or political and territorial subdivisions to States.[396] As illustrated by Dolzer

[393] However, as we will see in the following sections, this is not always been the case in investment arbitration, as tribunals have not always followed the strict separation of those categories. By contrast, tribunals might, at times, have looked at them in conjunction. James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review - Foreign Investment Law Journal 127, 128.

[394] Luca Schicho (n 382) 116.

[395] The application of the customary rule enshrined in Article 4 ARSIWA to lower ranked and provincial officials has not been uncontested. See ibid 84.

[396] *ADF Group Inc. United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para 166: 'The view taken above by the Tribunal is in line with the established rule of customary international law that acts of all its governmental organs and entities and territorial units are attributable to the State and that

and Schreuer, '[t]his principle of attribution follows from the concept of the unity of the State and applies to organs at all levels and regardless of the position of the organ in the State's administrative organization'.[397]

To qualify as a State organ and attribute its conduct to the State under ARSIWA Article 4, an entity has to meet two requirements. First, the entity must have the 'status' of an organ. Second, the entity must act on behalf of the State when carrying out the conduct of interest. As for the first requirement, the second paragraph of ARSIWA Article 4 specifies that domestic law might be decisive in determining an organ's status.[398] That is to say, if domestic law expressly confers the status of 'organ' to the entity, no further enquiry is necessary. However, while a decisive factor, Article 4 does not require an express 'organ' denomination under domestic law, for the meaning of 'organ' under domestic law might be narrower than the ARSIWA's. Article 4(2) ARSIWA indeed provides that 'an organ *includes* any person or entity which has that status in accordance with the internal law of the State'.[399] Organs 'include' entities recognised as such under internal law but are not limited to this category only. In other words, domestic law is the starting point of the enquiry, not the ending point.[400]

---

the State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units'. See also, *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, para 32; *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2020, para 182.

[397] Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd, Oxford University Press 2012) 216.

[398] Christian J. Tams, 'All's Well that Ends Well? Comments on the ILC's Articles on State Responsibilty' (2002) 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 759. See, Applicability of the obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 26 April 1988, ICJ para 57.

[399] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368), Article 4 (emphasis added).

[400] *F-W Oil Interests Inc v. Republic of Trinidad & Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 203. See also Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti, 'International State Responsibility and Internal Law in Investment Arbitration: A Hierarchy of Sorts' (2022) 37(1-2) ICSID Review 210, 223.

In this connection, according to Crawford, the degree of actual integration into the legal structure of the State is crucial for the determination of a State organ.[401] In other words, the question is whether the entity forms part of the State organisation and acts on its behalf. One could say that Article 4(2) aims at 'clarify[ing] that, apart from internal law, the status of an organ may also be inferred from other – factual – elements'.[402] Indeed, under specific circumstances, as we will see, an entity may well be categorised as a State organ under international law even though not officially recognised as such under domestic statutory law. This is so in international law as a State should not be allowed to 'avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'.[403] It is indeed a well-established principle under international law that domestic law has no binding effect on international law and cannot justify the violation of international obligations. Hence, the ARSIWA allow for a broad interpretation of the term 'organ' and, by so doing, public international law can play a supplementary role to domestic law. [404]

Regarding the second requirement, if an entity enjoys the status of an organ but is not acting as one when carrying out the conduct, that conduct would not be attributable to the State.

---

[401] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) 40 in II (2) Yearbook of the International Law Commission 40, 1 (2001). James Crawford and Paul Mertenskötter, 'The Use of the ILC's Attribution Rules in Investment Arbitration' in Meg N Kinnear and others (eds), *Building International Investment Law: The first 50 years of ICSID* (Wolters Kluwer 2016), 27.

[402] Paolo Palchetti, 'De Facto Organs of a State' [2017] Max Planck Encyclopaedias of International Law [MPIL] 1, 5. According to the ILC, 'this result is achieved by the use of the word "include"' (at 91).

[403] ARSIWA Commentary on Article 4, para 11. As for investment caselaw, see *William Ralph Clayton and others v. Government of Canada*, PCA Case No 2009–04, Award on Jurisdiction and Liability (17 March 2015) para 315; *Ortiz Construcciones y Proyectos SA v. People's Democratic Republic of Algeria*, ICSID Case No ARB/17/1, Award, 29 April 2020, para 161.

[404] This is relevant as States have occasionally tried to resist attribution claims by arguing that the entity charged with the alleged investment treaty breach was not at all an organ under its domestic law or that such an organ was not acting in its official capacity. Pierre M Dupuy, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford commentaries on international law. Oxford University Press 2010), 180.

Nevertheless, the ILC Commentary states that where 'such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State'.[405]

Moreover, the ILC Commentary recalls the distinction between 'unauthorised conduct' (*ultra vires* conduct)[406] and 'purely private conduct', initially drawn by international arbitral decisions such as the French-Mexican Claims Commission.[407] The ILC Commentary reminds us that the case of purely private conduct should not be confused with an organ functioning as such yet acting *ultra vires* or in breach of the rules governing its operation.[408] In fact, the State is responsible only in the second case as 'the organ is nevertheless acting in the name of the State', as per ARSIWA Article 7.[409]

*ii. Article 4 in ISDS Case law*

Investment arbitrators have generally upheld the ILC reading of ARSIWA Article 4.[410] However, the nuances of the law of State responsibility embedded in this provision might have

[405] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 379) 42 Commentary to ARSIWA Article 4.

[406] Thomas Weatherall (ed), *Duality of Responsibility in International Law* (Brill | Nijhoff 2022) 185.

[407] *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, UNRIAA, vol. v. (Sales No. 1952.V.3), p. 516, at p. 531 (1929). In the *Caire* case, the Mixed Commission excluded State responsibility only in cases where the act had no connection with the official function and therefore could be equated to an act of a private individual. See Clive Parry and others, *Parry & Grant encyclopaedic dictionary of international law* (3rd ed. Oxford University Press 2009).

[408] See *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No ARB/09/1, Award, 21 July 2017, para 702.

[409] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) 42. Article 7 ARSIWA recites that '[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'. *Ultra vires* conducts of State organs are therefore attributed through the channel of Article 7 ARSIWA. See *Stabil LLC and Others v. Russian Federation*, UNCITRAL, PCA Case no. 2015-35, Final Award, 12 April 2019, para 166.

[410] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017.

been sometimes overlooked.[411] For instance, in the 2003 *Generation Ukraine, Inc. v. Ukraine*, the Tribunal dismissed Ukraine's objection on jurisdiction by holding that the conduct of an entity recognised as an official organ under the State's domestic law was *per se* attributable to that State.[412] Here, the Tribunal considered that, for attribution purposes, characterising an entity as a State organ entailed that once the link between the State and the entity had been formally established, every breach of international law would be automatically attributed to that State. This was so as attribution under ARSIWA 4 occurs regardless of whether the relevant conduct is of a sovereign or commercial nature.

When domestic law provisions are not decisive in classifying an entity as an organ of the State, tribunals engage in an 'overall assessment' of the legal framework of the entity. Under international law, the essential question becomes whether domestic law, even though it does not officially recognise the entity the status of an organ, factually confers it the rights, duties, and functions usually associated with an entity acting on behalf of the State.[413]

In 2012, the *Deutsche Bank v. Sri Lanka* Tribunal had to establish whether Ceylon Petroleum Company (CPC) was a Sri Lankan State organ. While not deeming it necessary to rule on this issue[414], the arbitrators nonetheless highlighted specific elements which pointed either to an organic relationship between a CPC and the State or to CPC being under the instruction of the State.

To begin with, the Tribunal recalled a 1979 Sri Lanka Supreme Court's judgment which labelled CPC as 'a Government creation clothed with a juristic personality to give it an aura of

[411] See *Chevron v. Ecuador*, PCA Case No 2009–23, Second Partial Award on Track II, 30 August 2018, para 8.8, 8.46-8.47. See also *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, paras 795-804.

[412] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paras. 10.2 -10.7. See also *Eureko B.V. v. Republic of Poland*, ad hoc arbitration, Partial Award, 19 August 2005.

[413] Robert Kolb (ed), *The International Law of State Responsibility* (Edward Elgar Publishing 2017) 73–78; Dupuy (n 404); Ramsundar (n 375) 75. Also see Luca Schicho (n 382) 88.

[414] The Tribunal did not need to arrive at a firm conclusion on the attributability of CPC's activities to the State, given it had already established IIA's breaches by *de jure* organs of Sri Lanka, the Central Bank Ministry and the Supreme Court. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, paras 402 and 406.

independence' and which was under deep and pervasive State control.[415] In this regard, the arbitrators noted that '[w]hile it may be unusual for a State enterprise to be considered an organ of the State, that is only the case where the State enterprise is genuinely independent – the fact that it takes form of a separate legal entity is not decisive'.[416] Then the tribunal moved on to analysing the specific elements construing the control exerted by Sri Lanka over CPC, which was held as evident. For the Tribunal, several factual circumstances proved it so.

To begin with, the State wholly owned the company and benefitted from the protection of immunity from suit.[417] Also, the Ministry of Petroleum held the power to appoint and remove directors. Moreover, from a reading of the statute establishing CPC the Tribunal found it clear that this entity had been established with the political intention of furthering Sri Lanka's national interest by conducting the country's oil policy. If this was not enough, it could be established that the Government of Sri Lanka exercised significant control over CPC's personnel, finances and decision-making. The Tribunal emphasised how CPC had to follow any written directions of the Minister of Petroleum, 'regardless of whether those directions [were] in the best interests of CPC'.[418]

There was also considerable evidence demonstrating that CPC acted under the 'direct instruction' of Sri Lanka both in negotiating and executing the investment agreements and in refusing to pay the amounts owed following the termination of the said agreements. These actions and omissions directly resulted from orders CPC received from the Supreme Court and

[415] id. See *Dahanayake v. De Silva and others*, [1978] 1 SLR 41, 10 September 1979, paras 53-54.

[416] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, paras 402-406.

[417] See in this very regard *Mohammad Reza Dayyani, et al. v. The Republic of Korea*, PCA Case No. 2015-38. Here, the PCA Tribunal found that KAMCO, a Korean asset management corporation was a State organ also in light of the fact it benefitted of immunity from suit. The Award is not public but a summary of the Tribunal reasoning is provided by IAReporter. See, Jarrod Hepburn, 'Full Details of Iranians' Arbitral Victory over Korea Finally Come into View, With Arbitrators Seiing Bit Breach After Investment Deposit Not Returned, But Disagreeing Whether Any Compensation Was Warranted' [2019] <https://www.iareporter.com/articles/details-of-iranians-arbitral-victory-over-korea-come-into-view-with-arbitrators-seeing-bit-breach-after-investment-deposit-not-returned-but-disagreeing-whether-any-compensation-was-warranted/> accessed 13 May 2022.

[418] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, para 405.

the Central Bank.[419] Indeed, CPC was complying with a Ministerial directive when terminating the investment agreements. According to the Tribunal, CPC could simply not refuse to abide by such directive.

The Tribunal categorised such direct instructions as a component of the overall (or general) control that Sri Lanka exerted over CPC as an organ, rather than identifying it as an autonomous relationship between these actors, as the ARSIWA allow to through ARSIWA Article 8.

Lastly, the Tribunal delved into a comparative analysis with the UK *Gécamines* case, since the Respondent referenced it.[420] According to Sri Lanka, this case was relevant to the case as it corroborated its position that CPC was not a State organ.[421]

In such case, the UK Privy Council laid down some fundamental principles for identifying SOEs, their relationship to their sponsoring State and their liability for State debts. Specifically, the Privy Council enquired about the correct approach for distinguishing between

[419] id.

[420] *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 27. In 2010, the Royal Court of Jersey upheld FG Hemisphere's claim, including a claim for injunctive relief. It did so on the basis that Gécamines was 'at all material times an organ of and so to be equated with the DRC, its interests plainly subordinated to those of the Congolese State' (at paragraph 64). It highlighted the State's high degree of management and control, and the fact that Gécamines was operating in a vital sector of the DRC economy. The Jersey Court of Appeal upheld this judgment. Gécamines appealed to the Privy Council (the highest court of appeal for UK overseas territories, Crown dependencies and a number of other independent Commonwealth jurisdictions). The Privy Council (Board) allowed the appeal. See, Joanne Greenaway and Andrew Cannon, 'Liability of State-Owned Companies for Debts of State: Gécamines v FG Hemisphere Associates LLC' [2012] Thomson Reuters Practical Law <https://uk.practicallaw.thomsonreuters.com/5-520-6833?transitionType=Default&contextData=%28sc.Default%29> accessed 25 October 2021.

[421] The English case's background involved FG Hemisphere, a vulture fund active in the State-debts market, which had purchased two International Chamber of Commerce (ICC) arbitration awards against the Democratic Republic of Congo (DRC). Precisely, FG Hemisphere sought to enforce the awards as debts against Gécamines, a DRC State-owned company holding assets in the United Kingdom. The Privy Council held that Gécamines was to be regarded as distinct from the DRC State and that FG Hemisphere could not enforce against Gécamines' assets, particularly given that the DRC's liability had 'nothing to do with Gécamines' activities'. See, id. Lord Mance at para 2.

a State organ and a separate legal entity for immunity from substantive liability and enforcement. Even though this case regarded the application of sovereign immunity to a State entity rather than the attribution of internationally wrongful acts, *Gécamines* has been held crucially important in the discussion about the identification of the link between States and State entities. This is so because, as we will see, such inquiries on the link between States-State entities in the State immunity and in the State responsibility fields echo each other.

The answer to the questions above given by the Privy Council was that separate juridical status was not conclusive, though the entity's constitution, control and functions remained relevant.[422] In the judges' eyes, constitutional and factual control and the exercise of sovereign functions 'did not without more convert a separate entity into an organ of the [S]tate'.[423] The Privy Council added that

*[e]specially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities*.[424]

According to the Privy Council, such a strong presumption could only be displaced in extreme circumstances. Such would be, for instance, the lack of the entity's effective separate existence despite its juridical personality. Such assimilation between entity and State can be proven after examining the relevant constitutional arrangements, as applied in practice, and the control exercised by the State over the entity and the entity's activities and functions. The result 'would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the [S]tate and vice versa'.[425]

The *Deutsche Bank* Tribunal confirmed, reverting to our case, that the separate legal personality of an entity is a strong indicator of a non-organic relationship between the entity

[422] id. para 25.

[423] id. para 29.

[424] id.

[425] id.

and the State. It bears noticing that international law officially recognises the doctrine of corporate separation.[426] However, as it was also expressed in *Gécamines* and by the *Deutsche Bank* arbitrators, exceptions to such general rule exist. In particular, according to the *Deutsche Bank* Tribunal, these exceptions would occur when an entity has 'no effective independent existence or where the conduct of the State justifies lifting the corporate veil'.[427]

Yet, whether these exceptions would apply is entirely fact-specific, and the Tribunal found that the facts in *Gécamine*s were different from those in *Deutsche Bank*.[428] Indeed, even though some factual similarities were noticeable[429], according to the Tribunal the indicators of a lack of true independence in *Deutsche Bank* were 'much stronger than those set out in the *Gécamines* decision'.[430] It followed that notwithstanding – or one could say in light of – the *Gécamines*' findings, the *Deutsche Bank* Tribunal did not alter its observation vis-à-vis CPC's lack of independence from the Respondent. Therefore, as a general remark, the Tribunal admitted the possibility of reverting the assumption that the separateness of legal personality creates a strong presumption of absence of State control.

Coming to more recent cases, the Russian annexation of Crimea in 2014 has given impulse to several investment disputes initiated under the Ukraine-Russia BIT and brought primarily, yet not exclusively, by Ukrainian investors against the Russian Federation. Several of such cases often involved the categorisation of SOEs, specifically State-owned banks, as entities affiliated with the Crimean-Russian State.

The roots of the Russian annexation of Crimea originate back to 1991, when Ukraine became independent from the URSS, and the region of Crimea formed part of its territory.

---

[426] *Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v. Spain*, Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3, (1970) 9 ILM 227, ICGJ 152 (ICJ 1970), 5th February 1970, United Nations [UN]; International Court of Justice [ICJ] (*Barcelona Traction* case). Peter T Muchlinski, 'Corporations in International Law' [2014] Max Planck Encyclopaedias of International Law [MPIL] 1 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1513>.

[427] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, para 405.

[428] id.

[429] Such as the ability of the Government to veto certain decisions of the company.

[430] id.

Ukraine's territorial integrity, including the territory of Crimea, was recognised by Russia after its independence from the Soviet bloc.[431] However, in 2014 uprisings to oust the at-the-time Ukrainian President Viktor Yanukovych sparked a political crisis in Crimea region.[432] More specifically, in February and March 2014, Ukraine Crimean and Russian authorities used the internal conflict in Ukraine to undermine and ultimately remove the Ukrainian Government's control over Crimea, hold a referendum, and declare the independence of Crimea.[433] Soon after, Russia formally recognised Crimea as an independent State. The Crimean Parliament requested Crimea to be admitted to Russia, and a treaty was signed to annex Crimea to Russia.[434]

As a result of these events, several arbitration claims have been filed by Ukrainian investors against Russia, alleging violations committed in Crimea after its annexation by Russia in 2014.

One of the publicly available awards is the PCA-administered *Oschadbank v. Russia* case, whereby some critical questions on attribution have been raised.[435] Here, the Tribunal considered the Bank of Russia and other Crimean authorities as State organs under ARSIWA Article 4. Specifically, the arbitrators also held the conduct of the Crimean State officials, the Crimean courts, the Crimean Parliament and the Sevastopol Assembly, as attributable to Russia under ARSIWA Article 4. This conclusion was drawn from the finding that 'with the signature

[431] Patrick Dumberry, ''Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction Over the Claims of Ukrainian Investors Against Russian Under the Ukraine-Russia Bit' (2018) 9(3) Journal of International Dispute Settlement 506.

[432] ibid.

[433] Christian Marxsen, 'The Crimea Crisis from an International Law Perspective' [2016] Kyiv-Mohyla Law and Politics Journal 13.

[434] Marxsen (n 433).

[435] *Oschadbank v. Russia Oschadbank and Russian Federation*, PCA Case No. 2016-14, Award, 26 November 2018. See, Johanna Braun, 'Uncovered: Tribunal in Previously-Unseen Award Against Russia Upheld Jurisdiction over Crimea-Related Claims, and Award over 1.3. Billion USD in Compensation' [2022] Investment Arbitration Reporter <https://www.iareporter.com/articles/uncovered-tribunal-in-previously-unseen-award-against-russia-upheld-jurisdiction-over-crimea-related-claims-and-awarded-over-1-3-billion-usd-in-compensation/>.

of the Accession Treaty and the Accession Law in March of 2014, all Crimean authorities effectively became Russian organs'.[436]

For the purposes of our enquiries on SWFs and SOEs, it is worth dwelling on the conclusion held by the Tribunal that the conduct by the Bank of Russia was attributable to Russia under Article 4 based on the 'characteristics and function' of such a bank. As will be discussed in Chapter IV, given their functions in carrying out national monetary policies, central banks enjoy institutional, functional, financial and operational independence from the state.[437] Yet, exactly because of their functions and primary role in managing domestic monetary policy, central banks are usually easily seen as State organs in the law of State responsibility.[438]

In the *Oschadbank* case, the Claimant argued that the Bank of Russia was an organ of the Russian Federation or, in the alternative, an entity entrusted with governmental authority under ARSIWA Article 5. Specifically, it stated that the Bank ranked amongst the highest authorities in Russian monetary regulation, carrying out Russian monetary policy, supervising the commercial banking system, maintaining the payment system and channelling 75% of its profit into the Russian budget.[439] The Tribunal, as mentioned, agreed with this finding and referred to the 2009 *Invesmart v. the Czech Republic*, where the Czech National Bank was categorised as a State entity whose conduct was attributable to the Czech Republic.[440] The

[436] ibid.

[437] Rodolfo Dall'Orto Mas, Benjamin Vonessen, Christian Fehlker, Katrin Arnold, 'The case for central bank independence. A review of key issues in the international debate' (October 2020). Occasional Paper Series 248 <https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op248~28bebb193a.en.pdf> accessed 21 April 2023.

[438] Ingrid Wuerth (n 48) 279. However, especially in the law of state immunity, the classification of central banks as 'States themselves, or agencies and instrumentalities of States, or neither, has sometimes been difficult, especially as central banks have become more independent from States over the past three or four decades'. Yet, one must remember that the law of international State responsibility does not regulate the definition of state in the law of State immunity.

[439] Para 136.

[440] Johanna Braun (n 435). See, *Invesmart v. the Czech Republic*, UNCITRAL, Award, 26 June 2006, para 258.

*Oschadbank* Tribunal said that given the features and functions of the Bank of Russia, it could not identify any reason to stray from the *Invesmart* approach in the *Oschadbank* case.

Another publicly available award of such Ukrainian-Russian arbitrations is the *Stabil LLC and Others v. Russian Federation*. Here, similarly to the *Oschadbank* case, the Tribunal found that the conduct of the Crimean State Council and the Sevastopol Government could be attributed to Russia under ARSIWA Article 4. [441] On the other hand, the conduct of the paramilitary forces that took control of the investor's assets could be attributed to Russia under both ARSIWA Articles 5 and 11.[442]

Unfortunately, the vast majority of the awards related to the Russian annexation of Crimea remain confidential. Therefore, the information on the Tribunals' legal reasoning is found in third parties' assessments, on which we have to rely. Thus, we cannot venture into further inferences *vis-à-vis* such cases.[443]

Coming to other recent cases, the 2018 *Unión Fenosa v. Egypt* ICSID Award addressed the nuanced difference between a government-entrusted SOE with public sector duties and a structurally and functionally State organ.[444] Precisely, the arbitrators excluded that EGAS and EGPC, two Egyptian SOEs, were organs of the State within the meaning of ARSIWA Article 4 in light of their separate legal personality and degree of autonomy from the State.

---

[441] *Stabil LLC and Others v. Russian Federation*, UNCITRAL, PCA Case no. 2015-35, Final Award, 12 April 2019, para 163 *et seq.* See also, Damien Charlotin, 'Analysis: Stabil v. Russia Tribunal Attributes Paramilitary Actions to Russia, and Awards 35 Million USD on Account of Expropriation of Ukrainian Petrol Investments' [2022] Investment Arbitration Reporter <https://www.iareporter.com/articles/analysis-stabil-v-russia-tribunal-attributes-paramilitary-actions-to-russia-and-awards-35-million-usd-for-expropriation-of-ukrainian-petrol-investments/>.

[442] See also *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Jurisdiction and Liability, paras 456 *et seq.*, where similarly to the *Stabil* case the ICSID Tribunal found that a private expropriation later endorsed by the State of Venezuela could be attributed to the latter under ARSIWA Article 11.

[443] Although the awards remain confidential, 'the limited information available about them indicates that tribunals have concluded they had jurisdiction over these claims'. Patrick Dumberry (n 431), 507.

[444] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4*, Award (31 August 2018).

Citing the ICJ in the 2007 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnian Genocide*) case,[445] the Tribunal reasoned that, while the separate legal personality was not a decisive factor, 'circumstances sufficient to connote the status of an organ of the State to a separate legal person must be extraordinary, involving functions and powers considered to be as quintessentially powers of Statehood'.[446] Moreover, the Tribunal specified that if, on the one hand, 'state ownership of entities and their involvement in the development of State-owned natural resource necessarily implicate public sector concerns', on the other hand, their 'participation in the public sector is not the same thing as being integral to the State apparatus'.[447] However, we must clarify that the *Bosnian Genocide* case did not involve SOEs or other corporate entities. As will be explained, the threshold used by the ICJ in the context of the attribution of conduct in this case was extremely high and, according to some, potentially too high if transposed into economic scenarios.[448]

2. De facto Organs

Entities or physical persons – which are not *de jure* organs – might still be equated to State organs in light of a genuine dependency relationship with the State. Such a case occurs when States use these entities as '*de facto* organs'. Precisely, the notion of *de facto* organ presupposes that, 'within the organization of the State, a distinction can be made between individuals who have the status of organ under municipal law and individuals who have that status on the basis

[445] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Judgment (11 July 1996) I.C.J. Reports (2007), hereafter, '*Bosnian Genocide*' case.

[446] ibid. para 9.96. 'As the International Court of Justice stated in the Bosnian Genocide Case, 'to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as 'complete dependence''.

[447] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, para 9.98. See also, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Award, 12 June 2012.

[448] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009. Also see Kristen E. Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15(2) Melbourne Journal of International Law 1 <https://ssrn.com/abstract=2495526>.

of a factual link with that organization'.[449] In other words, their status as organs does not arise from domestic law but is inferred from factual circumstances.

As mentioned, the idea underlying Article 4(2) is that individuals may be considered as organs for purposes of attribution based on the role that they in fact perform within the structure of the State, even if they are not officially recognised as organs under municipal law. However, the ILC commentary does not clarify the identifying criteria of the *de facto* link between the individual and the State. The ICJ enucleated such criteria first in *Nicaragua* and later in the *Bosnian Genocide* case. Overall, the ICJ established that under ARSIWA Article 4(2), even when a formal organic identity is missing under domestic law, a State could be found to use entities, individuals or groups of individuals in a way that amounts to employing them as *de facto* organs.

In *Military and Paramilitary Activities against Nicaragua*, the issue of attribution of specific conduct carried out by the armed band Contras to the United States arose.[450] Specifically, the question was raised as to whether the conduct by private individuals, namely the Contras, could be attributed to the United State. The ICJ famously addressed this question, examining whether the Contras qualified as *de facto* organs of the United States. The ICJ held that in order to do so, the relationship between the armed group and the State had to be 'so much one of dependence on the one side and control on the other that it would be right to equate the Contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of the Government'.[451] Yet, the Court rejected this hypothesis because Nicaragua had not proven that the Contras were wholly dependent upon the United States. For the Court, the

[449] Paolo Palchetti (n 402); Paolo Palchetti (n 402). In exceptional circumstances, 'functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization'. UN ILC 'Text of the Draft Articles with Commentaries Thereto: Responsibility of International Organizations' [2011] GAOR 66 Session Supp 10, 69th.

[450] ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua*, Judgment (27 June 1986).

[451] id. para 109. The Court noted that it had to go beyond the silence of US domestic law on the status of the arm group.

fact that the United States 'participated in financing, training and equipping the contras was not sufficient to hold that the contras were *de facto* organs of the US'.[452]

With its words, the ICJ first laid down the international law test for attributing specific conduct of a private individual (or entity), which is not an organ of that State and is not entrusted with governmental authority, to a State.[453] With this test the Court enabled, in principle, attribution to the State of conduct of private entities so to avoid States shielding themselves behind the lack of an official organic link to entities which, in reality, are completely controlled to the same level as an official organ. Moreover, by setting such a high threshold of control and dependence it made clear that this was meant as an exceptional attribution method.[454]

This test was clarified further in the *Bosnian Genocide* case, where the Court had to establish whether Serbia was responsible for the acts of the Bosnian Serbs in the 1995 massacre of Srebrenica. It did so by using a two-step approach. It first posed the question of whether the organs of Serbia perpetrated the Srebrenica genocide under ARSIWA 4(1) and answered in the negative. Then it established whether the Republika Srpska and its armed forces were Serbian *de facto* organs. The court applied the *Nicaragua* approach trying to determine whether the relationship between Serbia and the Bosnian-Serb entity, the Republika Srpska, was so much of dependence on one side and control on the other as to render the Bosnian Serbs *de facto* organs of Serbia.[455] Because the Republika Srpska retained a significant amount of autonomy

[452] Paolo Palchetti (n 402), 3.

[453] In this regard, we will discuss how this passage by the ICJ is frequently cited in the context of effective control analysis. See *infra*, Section E. on the 'effective control test' under ARSIWA 8. See Heleen M. Hiemstra, 'The Importance and Difficulties of Establishing and Clarifying the International Legal Personality and Responsibility of Non-State Armed Groups' in Samantha Besson and Matthieu Loup (eds), *International Responsibility: Essays in Law, History and Philosophy* (Éditions romandes Volume 10. Schulthess 2017).

[454] Stephan Wittich, 'Investment Arbitration as an Engine of Development of the Rules of Attribution - with Particular Focus on Lex Specialis and De Facto State Organs' in Christian Tams, Stephan Schill and Rainer Hofmann (eds), *International Investment Law and General International Law* (Edward Elgar Publishing 2023) 197.

[455] Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58(3) The International and Comparative Law Quarterly 493 <http://www.jstor.org/stable/25622224> accessed 23 April 2023.

from Serbia, the ICJ ruled that the former could not be categorised as a *de facto* organ under the *Nicaragua* test.[456]

As said, in this case the ICJ refined its reasoning and specified the concept of *de facto* organs in different respects. First, it expressly distinguished the complete dependence test from the effective control test enshrined in ARSIWA Article 8.[457]

Indeed, the notion of *de facto* organs can easily overlap with situations covered by ARSIWA Article 8 – which we tackle more in-depth in the following sections of this Chapter.[458] As Wittich recalls, a main source of confusion stems from the fact that the concept as it stands now in Article 4 was previously part of current Article 8.[459] The rules of attribution under ARSIWA Articles 4 and 8 echo each other and are crucial as 'they directly address the assessment of the level of State support necessary to establish State responsibility'.[460] Moreover, there might be cases whereby *de facto* organs actually exercise elements of governmental authority, blurring the lines also between Article 4 and 5 ARSIWA.[461] However, one can say that the criterion envisaged in ARSIWA Article 4(2) differs from the one provided

[456] *Bosnian Genocide* case, para 394.

[457] This differentiation and the overall ICJ line of reasoning on the complete dependence test was not uncontested. See Jörn Griebel, Plücken, Milan A. 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia' (2008) 21(3) Leiden Journal of International Law 601.

[458] It must be noted that the classification of a situation under Arts 4 or 8 Articles on State Responsibility is not without consequences for purposes of determining to what extent the conduct of an individual is to be attributed to the State. In particular, the problem of attribution of ultra vires acts only arises in relation to the situation covered by Art. 4.

[459] Wittich, 'Investment Arbitration as an Engine of Development of the Rules of Attribution - with Particular Focus on Lex Specialis and De Facto State Organs' (n 454) 196. See also James Crawford, *State Responsibility: The General Part* (Cambridge studies in international and comparative law, Cambridge University Press 2013) 126.

[460] Ramsundar (n 375) 77.

[461] Wittich, 'Investment Arbitration as an Engine of Development of the Rules of Attribution - with Particular Focus on Lex Specialis and De Facto State Organs' (n 454) 196. See also A. J J de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72(1) British Yearbook of International Law 255.

for in Article 8 'in that attribution is not based on the control exercised by the State over the specific conduct of individuals'.[462]

Therefore, individuals or entities may be considered *de facto* organs only if they act in 'complete dependence' of the State.[463] The State must exercise complete control over the entity and its actions to create a link of absolute dependence.[464] Also, the State must make use of such power over the completely dependent and controlled entity. In other words, this relationship has to be actual and not only potential.[465]

Some doctrine has criticised the complete dependence criterion because, among other things, it is close to impossible to be met.[466] Indeed, the test's practical usefulness has been put into question given that the evidentiary threshold of the complete dependence test is an extraordinarily high one.[467] In addition, the test might be unnecessary given the effective control test *ex* Article 8 might cover the instances captured by *de facto* organs and the complete dependence test anyway. However, others have argued that the attribution routes under ARSIWA Article 4 and Article 8 are substantially different in that the first would attribute all the conduct of an organ, regardless of their commercial/sovereign nature and even *ultra vires* conduct. The second route does not have the same attribution reach. Attribution under ARSIWA Article 8 would only link specific actions to the State. Therefore, it follows that also

[462] Jörn Griebel, Plücken, Milan A. (n 457); Paolo Palchetti (n 402), 4.

[463] See, ICJ, *Bosnian Genocide* case, cit., para 392.

[464] id. para 406. In some cases brought before the European Court of Human Rights (ECtHR) attribution was not strictly based on control over the specific conduct; rather, the individuals or entities under consideration were equated with organs because of their substantial integration within the structure of the State. In this regard, see the ECtHR judgments in the *Loizidou* Case, and in *Catan and others v. Moldova and Russia* and *Chiragov and others v. Armenia* (ECtHR) App 13216/05, paras 168–187. See also *Iran-United States Claims Tribunal in Yeager v. Islamic Republic of Iran* ('Yeager Case' [1988] 17 Iran-US CTR 92).

[465] See, ICJ, *Bosnian Genocide* case, cit., paras 392-394.

[466] Jörn Griebel, Plücken, Milan A. (n 457). See also Brigitte Stern, 'The Elements of An Internationally Wrongful Act' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford commentaries on international law. Oxford University Press 2010) 206.

[467] Jörn Griebel, Plücken, Milan A. (n 457), 613. The authors cast doubts as to whether the 'complete dependence' test is actually the only attribution test available for de facto organs, arguing that effective control under ARSIWA Article 8 could effectively be used. However, see *contra* Also see Luca Schicho (n 382) 93–94.

the levels of control required by these two provisions are different. Therefore, *de facto* organ attribution substantially differentiates from the one under Article 8.[468]

Others have criticised how both Articles 4 and 8 have been strictly and literally interpreted by the ICJ, notwithstanding what Ago originally explained in the first Articles draft, that is, 'the situations of attribution where armed bands maintain links with the State are by no means clear'.[469] This critical remark emphasises that attention should be paid to the interpretation provided by the ICJ, on whether such a reading might be too rigid or literal to the point of being able to mask 'the real link between the supporting State and the armed group'.[470]

Coming back to our subject of enquiry, the application of the ICJ's *de facto* organ doctrine to SWFs or SOEs in ISDS would ensure that even when enjoying a separate legal personality of private law, these entities could qualify as *de facto* State organs. Yet, in as much as complete dependence on the State and State control over the conduct could be established. This could be done, for instance, on the ground of severe lack of independence, such as institutional and financial dependency, and State mandates so overwhelming that the SWF or SOE appears like an arm of governmental functions rather than a business actor.[471] Hence, in principle, a SWF without a separate personality and utterly dependent upon the Ministry of Finances could be more easily regarded as a *de facto* organ than one structured as a corporation with an external asset management mandate.

[468] Frauke Renz, *State Responsibility and New Trends in the Privatization of Warfare* (Edward Elgar Publishing Limited 2020). See also Marko Milanović, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken' (2009) 22(2) Leiden Journal of International Law 307.

[469] Ramsundar (n 375) 77.

[470] ibid. See also *Bosnian Genocide*, Separate Dissenting Opinion of Judge Al Khasawneh, para 39 *et seq.*

[471] Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration under international investment agreements: A guide to the key issues/ edited by Katia Yannaca-Small* (Oxford University Press 2010) 287.

Investment tribunals have been rather 'compliant' in applying the *de facto* organs doctrine in investment arbitration.[472] They only occasionally tried to apply the *de facto* organ doctrine under Article 4(2) to qualify SOEs with separate legal personalities as organs of State.[473] This is widely explainable in light of the fact that many cases of attribution in investment arbitration involve State entities which do not have a clear organic link to the host States and do not form part of the organic apparatus as required by the *de jure* organ requirement. In this context, when they do not rely on the existence of a *de jure* organic relationship, tribunals prefer applying ARSIWA Articles 5 and 8 rather than venturing into the complete dependence test analysis.

As of today, only one investment case can be counted whereby an investment tribunal answered the question of attribution of the conduct of an entity to a State from the perspective of the *de jure* organ doctrine. This case is the 2016 *Flemingo v. Poland* Award.[474] Here, the Tribunal concluded that the Polish Airports State Enterprise (PPL), wholly owned by the Polish State Treasury, was indeed a *de facto* organ in light of the close, structural, and substantial control and supervision of the Ministry of Transport. The Tribunal reasoned that through its full ownership, the State interacted with the airport in a way that invariably made it a *de facto* State organ.[475] Moreover, it was noticed by the arbitrators that ARSIWA Article 4(2) only provides that entities, which per the internal law are considered as State organs, are also State organs for the purpose of State responsibility. However, they also stated that this does not prevent an entity with no internal status of a State organ from being considered as such under international law for State responsibility purposes.[476]

---

[472] Wittich, 'Investment Arbitration as an Engine of Development of the Rules of Attribution - with Particular Focus on Lex Specialis and De Facto State Organs' (n 454) 198.

[473] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 137, 152. See also Nick Gallus (n 473).

[474] *Flemingo Duty Free Shop Private Limited v. the Republic of Poland*, UNCITRAL, Award, 12 August 2016, para 434. See also *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No ARB/16/28, Award, 28 February 2020, para 511.

[475] Alejandro Solano Meardi, 'State Attribution: Whether State Ownership of a Private Entity Is Important in Determining if the Actions of that Entity Are Attributable to the State' (2021) 7(1) Arbitration Brief 1 <https://digitalcommons.wcl.american.edu/ab/vol7/iss1/1/> accessed 24 April 2023, 5.

[476] id. para 433.

In particular, in assessing whether PPL was a *de facto* organ, the Tribunal gave relevance to the public declaration from the Secretary of State in the Ministry of Transport rendered in 2011 before the Polish Parliament that PPL was an enterprise functioning within the structure of the Ministry of Transport. The Tribunal also added that

> *[the Secretary of State in the Polish Ministry of Transport] confirmed in 2013 that the Ministry of Transport was participating in the modernisation of the Chopin Airport by saying: '[w]hen it comes to questions on investments [...] the supervision over PPL's action is exercised by the minister responsible for transport and in a way we are also responsible for all issues connected with the functioning of the enterprise [PPL] – at the Chopin Airport in Warsaw'.*[477]

The Tribunal reasoned that the highest Polish authorities confirmed before the Polish Parliament that PPL functioned within the structure of the Ministry of Transport.[478] All the above considered, it was concluded that PPL was indeed a *de facto* State organ whose acts and omissions were attributable to Poland under international law.

In other cases, while not expressly mentioning the doctrine of *de facto* organs, investment tribunals established that separate economic entities could qualify as organs of the State. By way of example, in the 2003 *Almås v. Poland* Award it was established that an entity's status under domestic law 'does not necessarily imply that an entity is not a State organ if other factors such as the performance of core governmental functions, direct day-to-day subordination to central government or lack of all operational autonomy, point to the other way'.[479]

In the 2003 *Nykomb v. Latvia* case, for instance, the Tribunal had to establish whether a wholly owned SOE (Latvenergo) was established in 1991 and subsequently transformed into a joint-stock company 100 per cent owned by the Latvian Republic, was an organ of the Latvian State. The arbitrators noted that the company supervision had been transferred to the Ministry of Economics by order of the Cabinet of Ministers. Secondly, before and after the

[477] See also *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para 101 *et seq*.

[478] *Flemingo Duty Free Shop Private Limited v. the Republic of Poland,* para 434.

[479] *Kristian Almås and Geir Almås v. The Republic of Poland* (PCA Case No. 2015-13), Award 27 June 2003, para 207.

organisational changes, Latvenergo held a dominant position as a major domestic producer of electric power and the sole distributor of electricity over the national grid. Third, Latvenergo had no freedom to negotiate electricity prices but was bound, and considered itself to be bound, by the legislation and the regulatory bodies' determination of the purchase prices to be paid for electric power produced by cogeneration plants. In light of this, the Tribunal decided the company 'was clearly an instrument of the State in a highly regulated electricity market. In the market segment where Windau operated, Latvenergo had no commercial freedom'.[480]

Given such factors, the Tribunal held that Latvenergo could not be considered to be, or to have been, an independent commercial enterprise. Rather, it could be assimilated into a constituent part of the Latvian State's organisation of the electricity market and a vehicle to implement the State's decisions concerning the price setting for electric power.[481]

In the unpublished 2020 ICC *Güriş İnşaat v. Libya* Award, the Tribunal seemed to have expressly admitted the possibility to categorise an SOE as a *de facto* organ. Yet, according to the arbitrators, this finding can occur only in exceptional circumstances, as such a finding would require the Claimant to prove a complete dependence on the State.[482] In the case at hand, the arbitrators held that, even though a governmental entity (Rekabe) supervised the SOE at issue, namely ODAC, this supervision was deemed only to ensure ODAC's compliance with financial regulations. This entailed that neither Rekabe nor the Libyan Government had the power to hinder ODAC's 'full autonomy to conclude and implement specific contracts for the projects with which it was entrusted'.[483] Interestingly, yet not surprisingly, the ICC Tribunal

[480] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award 16 December 2003, para 4.2.

[481] id.

[482] *Güriş İnşaat ve Mühendislik A.Ş. v. Libya*, ICC Case No. 22137/ZF/AYZ Partial Award on Jurisdiction and Liability, 4 February 2020; Final Award, 23 November 2021 (unpublished). See the summary provided by IAReporter: Damien Charlotin, 'Analysis: Tribunal in Guris v. Libya Award Draws Contrast with Cengiz Award on FPS Interpretation and Sides with Majority of Prior Libya Awards with Respect to War Losses Clause' [2020] Investment Arbitration Reporter <https://www.iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/> accessed 16 May 2022.

[483] ibid.

acknowledged all case law cited by the parties, like the 2020 *Gustav Hamester v. Ghana* Award, which supported such a conclusion. On the contrary, the 2020 *Güriş İnşaat* Award seems to have not made any reference to *Flemingo Duty-Free v. Poland* where, as seen, the ICSID Tribunal arrived at an opposite conclusion.

The acknowledgement of the applicability of the *de facto* doctrine in the ISDS context also emerged in the recent ICSID award in the 2020 case of *Ortiz v. Algeria*.[484] Here, the Tribunal held that the question of whether an SOE qualified as a State organ under ARSIWA Article 4 was the most delicate one, and specifically, it held that

> *[p]lusieurs décisions ont refusé de qualifier de telles entreprises comme des organes* de facto *de l'État dès lors qu'elles possédaient une personnalité juridique distincte. Ceci étant, la jurisprudence confirme aussi que des entreprises publiques économiques doivent être considérées comme des organes* de facto *de l'État si elles ne sont pas véritablement indépendantes ou si elles sont un simple instrument de l'État.*[485]

The arbitrators noted that several Tribunals had refused to qualify SOEs as State organs, especially when having a separate personality from the State.[486] In this case, the Tribunal stated it had to establish whether the SOEs under scrutiny were in a relationship of complete dependency on the Egyptian State to be deemed *de facto* organs. By following the reasoning of the mentioned *Almas v. Poland* Award, it took into consideration three factors to determine whether the entities were *de facto* organs, namely: 1) whether the entity performed core governmental functions; 2) whether there was a day-to-day subordination to the central Government, and 3) whether the entity lacked all operational autonomy.[487] The conclusion was

---

[484] *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 April 2020 (only available in French).

[485] id. para 163.

[486] id. footnote 253. See, *Jan de Nul v. Egypt*, para 158-162; *Bayindir v. Pakistan*, paras 119; *EDF (Services) c. Romania*, para 190; *Gustav FW Hamester v. Ghana*, para 184; *Unión Fenosa v. Egypt*, para 9.11; *Almås v. Poland Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para 213 (*Almås v. Poland*).

[487] *Almås v. Poland*, paras 93-97. See Lisa Bohmer, 'Analysis: In Ortiz v. Algeria, Arbitrators Offer in-Depth Analysis of the Criteria for Attributing Acts of the State-Owned Companies to the State; Claims Are

that the entities enjoyed an appreciable autonomy from the State, and consequently, the Tribunal rejected the argument that they were *de facto* organs under ARSIWA Article 4(2).

### 3. Interim Remarks: Would SWFs Be Considered as State Organs in ISDS?

Considering the above, we must stress how a general conclusion can hardly be drawn *vis-à-vis* SWFs and, more broadly, SOEs' characterisation in ISDS. Whether SWFs or SOEs could be identified as State organs by investment tribunals strictly depends on their legal structure and the surrounding circumstances of the specific case.[488]

If a SWF had no separate legal personality, it would most probably be treated as a pool of governmental assets, which may even be managed by a State organ, such as a central bank or a ministry, precisely like in the case of the Norwegian GPFG. In such a case, the actor violating a rule of international law would be the organ managing the fund rather than the fund itself, which is devoid of legal personality and could hardly be the entity entering into/or breaching agreements.

Conversely, had a SWF a separate legal personality, like in the case of the Singaporean GIC, the Kuwaiti KIA or the Qatari QIA, it could be argued that the fund was in the position to enter into and breach foreign investors' rights. However, in such instances, SWFs would hardly be considered fully-fledged, *de jure* organs of States. Indeed, even when SWFs are structured as SOEs, the common understanding is that they are not usually State organs under domestic law. Applying the reasoning in *Deutsche Bank v. Sri Lanka* or *Almas v. Poland*, the degree of proximity between a State and a fund would still have to be appreciated against the backdrop of the concrete facts of the case and a very demanding threshold for establishing an organic affiliation. Could a SWF be considered a *de facto* organ? Even if applying the *Flamingo* approach, complete dependence should be proven, which, as we have seen, is very challenging, even in contexts far from economic scenarios such as extraterritorial armed aggressions.

---

Dismissed on the Merits' [2020] Investment Arbitration Reporter <https://www.iareporter.com/articles/analysis-in-ortiz-v-algeria-arbitrators-offer-in-depth-analysis-of-the-criteria-for-attributing-acts-of-state-owned-companies-to-the-state-claims-are-dismissed-on-the-merits/> accessed 16 May 2022.

[488] Nick Gallus (n 480).

In other terms, an SOE legal structure could give the fund a degree of independence and autonomy capable of falling outside the umbrella of an organic relationship. As shown, investment tribunals have usually found that State enterprises enjoying separate legal personality from the State were categorised as State-empowered entities rather than State organs, falling outside the scope of ARSIWA Article 4. In this context, SWFs participation as shareholders of companies can be held as indicative of State's overall control over those companies and, therefore, an important, yet non-conclusive, factor for attributing the conduct of such entities to the State. In this context, SWFs could, in principle, be assimilated to entities entrusted with governmental authorities or private entities controlled or directed by the State. In turn, SWFs could hold shares in private or public companies entering into agreements with foreign investors, with their conduct potentially being controlled by the State. However, this should be verified in practice and, more importantly, under attributive methods other than ARSIWA Article 4.

Therefore, the probability of a tribunal would apply ARSIWA Article 4 for attributing a SWF's conduct to a State would seems relatively slim. This is so as, again, a finding that a SWF is a *de facto* or a *de jure* organ would require an organic relationship or a relationship of complete dependence and control of the State over the fund amounting to a *de facto* organic relationship. In most cases, the relationship between a SWF and the sponsoring State is not as manifestly defined as through an organic tie. As mentioned, arbitrators may instead be drawn to treat these actors as entities whose conduct could be attributed to their sponsoring State through ARSIWA Articles 5 or 8.

## D. SOVEREIGN WEALTH FUNDS AS ENTITIES EXERCISING GOVERNMENTAL AUTHORITY IN ISDS

### 1. ARSIWA Article 5

#### *i. Introduction*

The most significant reason for the enucleation of ARSIWA Article 5 is probably the decentralization and commercialization of governmental functions ('commercialization of

sovereignty'), which started in aftermath of the First World War.[489] Indeed, to counter to the need of decentralization, 'not *ratione loci* as in the case of the creation of public territorial communities, but *ratione materiae*, States more and more frequently authorize private institutions to exercise sovereign authority'.[490] As explained in several passages of this work, today is rather usual to see private institutions entrusted with governmental authority to carry out public functions. Some classic examples are airline companies, central banks and stock exchanges often organised as separate entities from governments and their economic policies, 'but which may exercise regulatory authority'.[491] Also, in the cyber domain, private actors play a significant role in upholding cybersecurity and engaging in hostile operations on States' behalf.[492] Overall, the source of this phenomenon lies in neoliberal policies initially implemented in the United Kingdom and the United States and globally through the so-called 'Washington consensus'.[493]

This has resulted in a blurring of the boundaries between public and private sector activity, causing concern in some contexts regarding accountability for the wrongful behaviour of the private entities concerned.[494] Indeed, what happens when one of such entities commits

[489] On the topic of the privatization of sovereign functions see Frédéric Mégret, 'Are There "Inherently Sovereign Functions" in International Law?' (2021) 115(3) American Journal of International Law 452. Also see, Jean L Cohen, 'The Democratic Construction of Inherently Sovereign Functions' (2021) 115 American Journal of International Law Unbound 312. Doreen Lustig and Eyal Benvenisti, 'The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings' (2014) 15(1) Theoretical Inquiries in Law.

[490] Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford commentaries on international law. Oxford University Press 2010), 244.

[491] James Crawford, *State Responsibility* (n 459) 128. The abuses committed by contractors working for private military and security companies (PMSC) at Abu Ghraib in Iraq are a case in point.

[492] Jennifer Maddocks, 'Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution' (2019) 59(1) Virginia Journal of International Law, 1.

[493] Mégret (n 489). See also Saul Estrin and Adeline Pelletier, 'Privatization in Developing Countries: What Are the Lessons of Recent Experience?' (2018) 33(1) The World Bank Research Observer 65.

[494] Jennifer Maddocks (n 492).

what under the law of State responsibility is a breach of an international obligation? Can we attribute responsibility to its sponsoring State? In principle, we can, thanks to the attribution rules provided in ARSIWA Article 5.

Originally, the attribution rule under Article 5 was enshrined in the draft Article 7 of the 1974 ARSIWA, which stated that it had 'to take into account a typical phenomenon of [those] times: the proliferation of entities that are empowered within a given community to exercise some governmental authority'.[495] In this respect, the ILC Commission noticed that 'the real common feature which these entities have [is] that the State empowers them if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State'.[496]

However, at the beginning, Article 5 was dedicated to territorial units organised as separate entities. It was only after the second reading that Article 5 was dedicated to entities empowered to exercise elements of governmental authority. That is, the ILC came to the decision that this provision should have addressed entities *not integrated* into the structure of the State. Thus, in according to the final version of Article 5 adopted on the second reading, the conduct of a person or entity that is not an organ of the State but is empowered by domestic law to exercise governmental authority elements may be considered an act of State in international law.[497] Therefore, from its very inception, Article 5 was thought of as a functional test of attribution, as opposed to the structural test of ARSIWA Article 4.[498]

With the increase of outsourcing of 'government' functions, which also resulted in the creation of parastatal entities by States, Article 5 has consequently increased in relevance.[499] These entities engage the responsibility of the State even if they are autonomous, and they have

[495] International Law Commission, 'Report of the ILC on the work of its twenty-fifth session, draft Articles on State Responsibility with commentaries' (7 May 1973). 2 YBILC 188 (1973) Commentary to Art. 7, para 14.

[496] ibid para 18. The Preparatory Committee of The Hague Conference (Basis for Discussion No 16) heavily influenced the ILC when it adopted draft article 7 on first reading.

[497] Djamchid Momtaz (n 490) 244.

[498] James Crawford, *State Responsibility* (n 459) 127.

[499] In most recent times, concern has been focused on the activities of what are presently termed 'private military corporations'. The commentary list in this category, *inter alia*, 'public corporations, semi-public entities, public agencies of various kinds, and even, in special cases, private companies'.

the discretion to exercise the authority as long as the conduct in question is an exercise of the elements of authority which the internal law empowers them to carry out. In contrast with Article 8, as we will see, it is not necessary to prove the existence of control over the entity. Indeed, the relationship with the State for attribution purposes is the empowerment conferred by the internal law to the entity to exercise governmental authority.

Not all corporate entities with ties to the governments are to be considered agents of the States for the purpose of ARSIWA Article 5. This distinction is evidenced in the case law of the *Iran–US Claims Tribunal*, which, due to the character and course of the Iranian Revolution of 1979, was required to determine on numerous occasions whether the acts of *prima facie* private individuals could be attributed to Iran.[500]

Later on, also the ICJ stressed this fundamental distinction in *Armed Activities on the Territory of the Congo* where it held that a State could (only) be held responsible for any case of governmental authority exercised 'on its behalf'.[501]

As we will see, the notion of governmental authority is a complex and narrow one. It surely seems to cover governmental tasks reserved for organs of a State and exercised by private persons under specific circumstances only.[502] As it has been noticed, the strictness of

[500] See *Hyatt International Corporation, Hyatt Management, Inc., International Project Systems, Inc. v. The Government of the Islamic Republic of Iran, Bank Mellat (formerly Known As Bank Omran), Alavi Foundation, Foundation for the Oppressed, Iran Touring and Tourism Organization*, IUSCT Case No. 134 (*Hyatt International Corporation v. Iran*), where the Tribunal held Iran liable for acts of expropriation carried out by a non-state charity, the Foundation of the Oppressed. Richard B Lillich, Daniel B Magraw and David J Bederman (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1997).

[501] *Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v. Uganda*] [2005] ICJ Rep 168, 29 October 2010, para 160. However, the Court did not find enough pieces of evidence that Uganda contracted governmental authority to the Congo Liberation Movement. See however the Dissenting Opinion of Judge Kooijmans, para 46.

[502] Alexander Kees, 'Responsibility of States for Private Actors' [2011] Max Planck Encyclopaedias of International Law [MPIL] 1.

such a notion is justifiable by the fact that the mere exercise of public functions or tasks in the public interest 'does not lead to attribution'.[503]

It bears noting that governments criticised this restriction in the course of the work on the Draft Articles on State Responsibility.[504] Indeed, questions could be raised as to whether this limitation adequately serves the purpose of Article 5 ARSIWA, which is to attribute the exercise of governmental authority comprehensively and independently of the internal organization of the State. This was meant to prevent an abusive and factitious division of certain tasks by a State trying to avoid international responsibility. However, according to the case law of international courts and tribunals, the factual exercise of governmental authority is decisive, not the mode of its empowerment.[505]

*ii. ISDS Case law*

Investment tribunals have often addressed the treatment of foreign investors by State entities operating in strategic sectors ranging from infrastructure, energy and commodities, mining, water and irrigation management, banking and insurance services, telecommunications, and tourism.[506] This is why ISDS seems to represent one of the most prolific fields of international decisions involving the attribution of conduct of State-backed economic operators.[507]

When a State entity, which is not a State organ under ARSIWA Article 4, is alleged to have breached commitments it entered into with foreign investors, attribution to the State serves to elevate the claim from the level of a commercial relationship between two non-State actors to the supranational level of ISDS. In these instances, the first ground for attribution

[503] ibid 4.

[504] UNGA *'State Responsibility: Comments and Observations Received from* Governments' [23 April–1 June and 2 July –10 August 2001] UN Doc A/CN.4/515, 22).

[505] Alexander Kees (n 502), 4.

[506] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 150–151.

[507] ibid 150. Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement: Nouveaux développements* (Bibliothèque de l'Institut des hautes études internationales de Paris. Anthemis; L.G.D.J 2006).

becomes ARSIWA Article 5, which deals with the attribution of conduct of persons or entities exercising elements of governmental authority.

As already seen in the context of ARSIWA Article 4, when assessing the nature of an entity, attention is given to whether it is structured with a separate legal personality from the State. In this connection, as stated, international law officially recognises the separation between a corporate vehicle and its owner. Specifically, the ICJ recognised the concept of separate legal personality for corporations under international law in the 1970 *Barcelona Traction* case and in the 2007 *Ahmadou Sadio Diallo* case.[508] In general, the activities of SOEs do not subject the State of ownership to international legal responsibility.[509] This is because the doctrine of corporate separation is recognised by international law as a rule, which can only be lifted in exceptional cases.[510]

Therefore, from this one can infer that the State ownership criterion is not decisive for classifying an entity as a parcel of the State or as a parastatal entity.[511] Several other criteria, such as the profit motive and the circumstance of the enterprise pursuing an economical management method, are to be accounted for.[512] In this last regard, the *Maffezzini v. Spain* Award is the landmark decision which historically confirmed that the test that has emerged in

[508] *Barcelona Traction* case, paras 38–47, see section C. *Case Concerning Ahmadou Sadio Diallo, Guinea v Congo, the Democratic Republic of the Congo*, Judgment on compensation, ICJ GL No 103, [2012] ICJ Rep 324, ICGJ 435 (ICJ 2012), 19th June 2012, International Court of Justice [ICJ] (*Ahmadou Sadio Diallo* case), para 61.

[509] Peter T Muchlinski (n 509). The corporate legal form consists of five main elements: legal personality, transferable shares, limited liability, centralized management, and investor ownership (Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100(7) The Yale Law Journal 1879, 5–15.

[510] Specifically in cases of fraud or evasion. See Peter T Muchlinski (n 509) and *Barcelona Traction*, paras 56–58.

[511] *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No ARB/10/17, Award, 26 February 2014, paras 157-158.

[512] OECD, 'State Owned Enterprises and the Principle of Competitive Neutrality' [2010] 1 <https://www.oecd.org/daf/competition/46734249.pdf> accessed 2 November 2021.

IIL considers various factors, such as (i) ownership; (ii) control; (iii) nature; (iv) purposes and objectives of the entity whose actions are under scrutiny; (v) character of the actions taken.[513]

The Tribunal also added that the practical relevance of these criteria is rendered more evident 'when there is a direct State operation and control, such as by a section or division of a Ministry, but less so when the State chooses to act through a private sector mechanism, such as a corporation (*sociedad anonima*) or some other corporate structure'.[514] Moreover, it was observed that State entities such as SOEs, creatures of corporate structure, might give rise to peculiar issues requiring the combination of principles of public international law and municipal, corporate law.[515]

In *Maffezini*, it was ultimately held that the SOE at issue (SODIGA) was sufficiently associated with the State and that its actions were *prime facie* those of the State.[516] Consequently, the Tribunal dismissed the challenge to its jurisdiction, according to which Spain was not the *prima facie* Respondent to the dispute.[517] Moreover, the arbitrators famously stated that a finding that a State owns an entity, directly or indirectly, 'gives rise to a rebuttable presumption that it is a State entity'.[518] At first reading, this seems to suggest a burden of proof, according to which full State ownership would create a presumption of attribution of conduct. Following this line of reasoning, this presumption remains rebuttable by the Respondent, which

[513] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 (*Maffezzini* or *Maffezzini v. Spain*). Maffezzini is seen as the case which effectively developed, in the ISDS context, the functional test related to ARSIWA Article 5. See Csaba Kovács, *Attribution in International Investment Law* (International arbitration law library volume 45, Kluwer Law International B. V 2018) 145.

[514] id. para 76. See also *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award, 12 November 2008, paras 147 *et seq.*

[515] id. para 77.

[516] Abby Cohen Smutny, 'State Responsibility and Attribution: when is a State Responsible for the Acts of State Enterprises? Emilio Agustín Maffezini v. the Kingdom of Spain' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

[517] However, at the merits, the Tribunal found that only one of SODIGA's conducts was attributable to the State; the others were the actions of a private entity and, therefore, not attributable.

[518] *Maffezzini v. Spain*, para 77.

would have to show that the State entity was acting independently in that particular instance. Nevertheless, this line of reasoning was used at the jurisdictional phase and to specifically assess whether SODIGA could qualify as a State entity to establish the Tribunal jurisdiction over the dispute and not to attribute the actual entity's conduct to Spain.[519] Furthermore, in its reasoning, the *Maffezzini* Tribunal never considered that SODIGA was sufficiently connected with the State to the point that all its actions could be attributable to it.[520]

The criteria used in *Maffezini* have sometimes been divided into two tests: a structural analysis of the nature of the entity and a functional assessment of its conduct. Indeed, investment tribunals often mark the distinction between such two analytical steps. However, many public international law scholars have referred to a single[521] or triple[522] attribution process rather than distinguishing between two analytical steps.

At any rate, the *Maffezini* dual assessment seems confirmed by the ILC Commentary of ARSIWA Article 5, in that one should first establish whether the State has empowered the entity to exercise an element of governmental authority and, once this is established, analyse its conduct.[523] Specifically, one should look at whether the actual conduct under scrutiny was carried out in the context of that governmental capacity. This implies that it does not suffice that the State has empowered an entity if the specific conduct at issue has not been taken under a governmental 'vest'.

Hence, rather than two tests, this is a double-pronged assessment, the first part of which evaluates if the entity is a parastatal; the second, the attributability of the specific act or

[519] See, Luca Schicho (n 382) 210.

[520] Specifically, 'at no point did the Tribunal consider that the State enterprise could have been an Article 4 organ'. Carlo de Stefano, *Attribution in International Law and Arbitration* (n 40) 153.

[521] See, Pierre-Marie Dupuy (n 41). See also Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW 1.

[522] According to other scholarship, attribution under ARSIWA Article 5 calls for an assessment of even three specific elements, namely the entity empowerment by domestic law; the delegation to the entity of governmental authority; and the entity conduct carried out under the delegated governmental capacity. See Luca Schicho (n 382) 123.

[523] Indeed, the formulation of ARSIWA Article 5 is limited to 'entities which are empowered by internal law to exercise governmental authority'. See Commentary ARSIWA Article 5, 43, para 7.

omission to the State, based on the nature of the authority entrusted to the entity and its conduct.[524] Such two analytical steps answer two different questions:

1) What is the nature of the entity that committed the wrongful act, i.e. its relationship with the State?

2) Is its conduct then capable of being attributed to the State, and, therefore, is it of a governmental character?

In other words, one has to enquiry about the position of an entity *vis-à-vis* the State and its sovereign powers from a structural and functional perspective. If both assessments reveal a 'sufficiently intense' link to the State, the entity should generally be treated as an instrumentality of the State. Nevertheless, what 'sufficiently intense' means is not clearly established.

To answer this, one has to begin enquiring about the entity's structure and assess whether an entity is formally separate from the State. It is, in practice, 'an inductive process, which proceeds from an empirical and casuistic approach'.[525] This means that the structural test is fact-based. In this regard, international courts and tribunals have pinpointed some indicia for such identification throughout the years.[526] More precisely, investment arbitrators have built their selection of standards by also picking on the previous international judicial experience of the Iran-US Claims Tribunal.[527]

Overall, to establish the status of a State entity under the test set forth by ARSIWA Article 5, investment arbitrators have usually referred *inter alia* to[528]: the establishment by

[524] Pierre-Marie Dupuy (n 41).

[525] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 154.

[526] In his extensive analysis of investment tribunal case law, Carlo de Stefano listed the 'symptomatic' elements that have been usually used by investment tribunals, to which the present work references to.

[527] See, for instance, *Hyatt International Corporation v. Iran*.

[528] This list is not exhaustive and has been drawn on the list provided by Carlo de Stefano. See, Carlo de Stefano, *Attribution in International Law and Arbitration*, at 154 *et seq.*

statutory act or decree (including privatisation laws);[529] the mission to provide a public service or to pursue a public purpose;[530] the entitlement to acquire, hold, and dispose of property;[531]

[529] *Waste Management, Inc v. United Mexican States* (Waste Management II), ICSID Case No ARB(AF)/00/3, Award 30 April 2004, para 75; *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 200; *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 6; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 10; *Noble Ventures, Inc v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 71; *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 204; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, paras 45, 160; *United Parcel Service of America Inc (UPS) v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 9; *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 51, 54; *William Nagel v. The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 144, 162; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 81; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 22; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 8. *Eureko BV v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 38; *Nykom Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 1.1.

[530] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No ARB/08/11, Award, 25 October 2012, para 173; *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 32; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, *supra*, para 81; *Waste Management, Inc v. United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 45; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, *supra*, para 184, 189; Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92; *Emilio Agustín Maffezini v. The Kingdom of Spain*, *supra*, para 86; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, *supra*, para 10.

[531] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, *supra*, para 173; *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, *supra*, para 32; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, *supra*, para 81; *Waste Management, Inc v. United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, *supra*, para 45; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, *supra*, para 184, 189; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92; *Emilio Agustín Maffezini v. The Kingdom of*

the management of State-owned property;[532] the capacity to sue and to be sued;[533] the autonomous budget;[534] the funds deposited in a particular account or accounts at the central bank of the establishing State;[535] the subsidisation by the Government;[536] the exercise of a delegated monopoly (including the power to set prices);[537] the appointment of board of directors appointed (and revoked) by the Government or political power;[538] the ministers sitting as president or members of the board of directors;[539] the applicability to employees of the labour regime governing public servants;[540] the registration on the Treasury's accounts of the charges collected and revenues received by the parastatal;[541] the auditing of accounts and

*Spain*, *supra*, para 86; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, supra, para 10.

[532] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, *supra*, para 173.

[533] *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, *supra*, para 200; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, *supra*, para 184; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, *supra*, 2005, para 10.

[534] *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, *supra*, para 161; *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, paras 51, 55.

[535] *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, *supra*, para 82.

[536] *United Parcel Service of America Inc (UPS) v. Government of Canada*, *supra*, para 45.

[537] ibid. para 9.

[538] *Noble Ventures, Inc v. Romania*, *supra*, para 76; *Impregilo SpA v. Islamic Republic of Pakistan*, *supra*, para 201; *William Nagel v. The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 164; *Wintershall AG, et al v. Government of Qatar*, Partial Award on Liability, 5 February 1988, paras 811–12.

[539] *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 19, 36; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 83; *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, *supra*, para 32.

[540] *Impregilo SpA v. Islamic Republic of Pakistan*, *supra*, para 203; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, *supra*, para 82.

[541] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92.

balance sheets by the General Auditor of the State; [542] the jurisdiction of administrative courts over the activities of the parastatal entity;[543] the applicability of the administrative regulation for public contracts (including concessions and procurements);[544] the general and broad power to issue regulations to implement a parastatal's mandate;[545] the empowerment to impose coercive measures, such as charges, fines, and penalties;[546] the protection of immunity from suit[547], and, last but not least, the palpable governmental oversight, mandatory approval of resolutions and operations, and mandates.[548]

---

[542] *Impregilo SpA v. Islamic Republic of Pakistan*, *supra*, para 207.

[543] *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, *supra*, para 146 (vi).

[544] *United Parcel Service of America Inc (UPS) v. Government of Canada*, UNCITRAL, *supra*, para 51; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 38; *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, *supra*, para 34; *Emilio Agustín Maffezini v. The Kingdom of Spain*, *supra*, para 49.

[545] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No ARB/11/33, Award, 3 November 2015, para 327; *United Parcel Service of America Inc (UPS) v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 9; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 190: '[t]he Board of Directors may, by legislative instrument, make such regulations as it may see fit for the purpose of giving effect to the provisions of this Law.'; *Impregilo SpA v. Islamic Republic of Pakistan*, *supra*, para 208.

[546] *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 166; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 190; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121.

[547] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, *supra*, para 405(b).

[548] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 4.2; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 154; *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, *supra*, para 51; *Impregilo SpA v. Islamic Republic of Pakistan*, *supra*, para 204, 209; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, *supra*, para 118; *Noble Ventures, Inc v. Romania*, *supra*, para 77; *EDF (Services) Limited v. Romania*, *supra*, para 205; *William Nagel v. The Czech Republic*, *supra*, para 164; *Waste Management, Inc v. United Mexican States (Waste Management II)*, *supra*, para 75; *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, *supra*, para 32; *EnCana Corporation v. Republic of Ecuador*, *supra*, para 154.

The establishment of even each and every one of the above elements (or even of a plurality of them) is not *per se* mandatorily decisive for investment tribunals. Indeed, as mentioned, these are indicia. That is to say, there is no mandatory and exhaustive list of criteria for arbitrators to consider. Besides, it is noteworthy to remember that establishing the fulfilment of the structural test does not automatically entail an attribution of conduct to the State under ARSIWA Article 5.

Interestingly enough, among such elements, the requirement of a State entity's public mission or aim is perhaps one of the most indicative ones. By way of example, in the 2004 *Salini v. Morocco*, the Tribunal mentioned that the main objective of the disputed entity was to 'accomplish tasks that [were] under State control'.[549] Later in the 2006 *Helnan v. Egypt* case, the Tribunal referenced the domestic law of the Respondent State. It highlighted how the disputed enterprise's main objective was to contribute to the development of the national economy in its field of activity '[…] within the framework of the public policy of the State'.[550] The arbitrators focused on the context of the conduct, namely the performance of functions within a 'governmental framework' rather than the nature of the entity's function.[551]

In other cases, such as the 2006 *FW Oil Interest v. Trinidad & Tobago*, tribunals have referenced the 'public aegis' concept.[552] In this case, the Tribunal highlighted the relevance of the sector of entity activity to the national economy of the Respondent State. In light of such prominence, the Tribunal stated, 'they have been acting sufficiently within the overall aegis of public authority as to engage the responsibility of the State'.[553] It then added that the general nature of the activity gives such 'possibility a particular meaning in question in this arbitration, namely the winning of a sovereign natural resource of undeniably major significance to the entire economy of the country'.[554]

---

[549] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, *supra*, para 33.

[550] *Helnan Hotels v. Egypt*, Decision on Jurisdiction, 17 October 2006, para 92.

[551] id.

[552] See also *Duke Energy v. Ecuador*, Award, 18 August, paras 300, 394.

[553] *F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 26 March 2006, para 204.

[554] ibid.

According to some, investment tribunals have sometimes conflated the public aim criterion – which forms part of the structural test – with an examination of the governmental authority (*prérogatives de puissance publique*), the second limb of the test set forth by ARSIWA Article 5.[555] In so doing, the public aim of an enterprise has sometimes been evaluated as sufficient ground for attribution.[556] However, time and again, for attribution purposes, a finding that the entity pursues a public aim does not solve the analytical reasoning that ARSIWA Article 5 requires to apply. Indeed, using the words of the *Hamster v. Ghana* Tribunal *vis-à-vis* the SOE at hand in the case (Cocobod)

> *[i]n considering the application of Article 5 of the ILC Articles, the Tribunal has carefully assessed whether, […] Cocobod acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers. It must be observed that this analysis has necessarily concentrated on the utilisation of governmental power. It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.*[557]

In this same regard, however, it could still be argued that the public aim element might complement the governmental authority analysis. In other words, an essential element of governmental authority is the State's perception of the governmental or official character of such an activity. As some commentators keenly noted it, the perception of the governmental character of an activity 'lies in the eye of the beholder, who inevitably perceives the object, i.e. the conduct, in its surroundings. Certain surroundings and circumstances may turn conduct of usually commercial, non-official nature into an exercise of governmental authority'.[558] This, in turn, begs the question of what to extent one should look into such surrounding circumstances. Be that as it may, the concrete meaning of governmental authority still escapes us, remaining

[555] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 40) 157.

[556] As in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], *supra*, para 33. See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para 169-170.

[557] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, *supra*, para 202.

[558] Luca Schicho (n 382) 142.

a highly undetermined concept. In light of this, we can only attempt to outline the main indicative features recognised by the investment arbitral jurisprudence.

## 2. The Content of 'Governmental Authority'

After performing the structural test, a tribunal should analyse the actual exercise of elements of the governmental authority under the 'functional limb' of ARSIWA Article 5 test. Nevertheless, what 'governmental' means, as cited in Article 5 and applied by investment tribunals, is far from settled. Indeed, as seen, neither Article 5 nor the ILC commentary expressly defines the scope and content of this wording. Indeed, as Caron stated, governmental authority is 'not only undefined but elusive when pursued'.[559] As expressed by the ILC Commentary, '[b]eyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions'.[560]

The interpretation of the notion of governmental authority becomes even more challenging as neither IIAs usually provide its definitions. Only a few IIAs provide some clarifications or exemplifications on this concept.[561] This is the case of treaties that provide for *lex specialis* rules on attribution in the sense of ARSIWA Article 55.[562] This point is most evident from a small number of trade and investment cases that directly considered the existence of *lex specialis* on attribution and effectively applied negative special rules of

[559] David D. Caron (n 378), 861.

[560] Commentary to the ILC Articles, commentaries to Article 5, para 6.

[561] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 160.

[562] Article 55 ARSIWA recites that the ARSIWA 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'.

attribution.[563] The first case is the arbitral award in the 2007 *UPS v. Canada*[564] case, brought under the North American Free Trade Agreement (NAFTA).[565]

UPS argued that the Respondent had violated its obligation to provide the Claimant's investment with the required standard of treatment.[566] In this context, the main question was whether the Canadian SOE Canada Post 'was bound to comply with the treatment rules in Articles 1102–05 NAFTA, that is, whether it acted on behalf of Canada as a State party to the treaty'.[567]

UPS claimed that the conduct of Canada Post would be attributable to Canada under the ARSIWA (Articles 4 or 5). The Respondent, conversely, contended that NAFTA enshrined a *lex specialis* of attribution which overrode the ARSIWA. Specifically, according to Canada Articles 1502–03 NAFTA, which impose a regime of positive obligations on States parties concerning private and governmental monopolies and State enterprises, were applicable in the case at hand *en lieu* of the ARSIWA.[568]

The Tribunal concluded that such NAFTA provisions excluded the applicability of the attribution rules in ARSIWA Articles 4 and 5 to entities such as Canada Post. Finally, the Tribunal held that such treaty provisions were indeed *lex specialis* within the meaning of ARSIWA Article 55 and that it effectively created a 'negative' special rule of attribution. Indeed, applying the general rules of attribution as per the ARSIWA, in that case, would have

[563] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 International Law Studies 296 <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2926&context=ils> accessed 27 April 2023.

[564] *United Parcel Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007.

[565] NAFTA, the North American Free Trade Agreement: a Guide to Customs Procedures. Washington, DC: Department of the Treasury, U.S. Customs Service, 1994.

[566] As per Articles 1102–05 NAFTA.

[567] Marko Milanovic (n 563) 306. Canada Post was established by statute and with a legal personality distinct from the government under Canadian law.

[568] 1502–03 NAFTA apply to 'any regulatory, administrative or other governmental authority […] such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges'.

meant dismissing the specific rules of attribution under NAFTA. The approach in *UPS* was followed in subsequent NAFTA cases against Canadian SOEs.[569]

Another case in point is represented by Article 10.1.2 of the US-Oman FTA, which recites as follows: 'A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party'.[570] This clause has been interpreted in 2015 by the *Al Tamimi v. Oman* Tribunal as *lex specialis*, displacing the application of the ARSIWA as a basis for attribution of conduct to the State.[571] Indeed, the Tribunal was satisfied that the conduct of the Oman Mining Company LLC (OMCO), which consisted in the termination of a lease agreement[572], did not embody the exercise of any regulatory or administrative authority and, consequently, denied attribution.

Beyond such sparse cases, absent IIAs provisions, investment tribunals usually follow the indications provided by the ILC commentary. Precisely, that the essential questions of the application of a general attribution standard to the diverse circumstances are 'not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their

[569] *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para 362. Moreover, see the ongoing NAFTA-based arbitration *Alicia Grace and others v. the United Mexican States*, the Parties disagreed on whether NAFTA Article 1503(2) alone or customary international law as codified by the ARSIWA should have governed the question of attribution. See, *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Statement of Claim, 7 October 2019, paras 367 *et seq.* See, Lisa Bohmer, 'In Mexican Offshore Oil Dispute, Canada and the United States Set Out Their Views on Claims by Dual Nationals, Reflective Losses, and State Enterprises under Nafta' [2021] Investment Arbitration Reporter <https://www.iareporter.com/articles/in-mexican-offshore-oil-dispute-canada-and-the-united-states-set-out-their-views-on-claims-by-dual-nationals-reflective-losses-and-state-enterprises-under-nafta/> accessed 13 May 2022.

[570] Free Trade Agreement between the United States and Oman ('US-Oman FTA'), entered into force 1st January 2009, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2718/download> accessed 24 May 2022.

[571] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015), para 318 *et seq.*

[572] In the context of the development and operation of a limestone quarry.

exercise'.[573] The criteria identified in this passage from the ILC were analysed in 2020 by the *Ortiz v. Algeria* Tribunal[574], which held that emphasis should have been given to: (i) the content of the powers, namely whether the delegation authorises the exercise of *acta jure imperii*, rather than mere *acta jure gestionis*, (ii) the mode of conferral concerns the nature of the act, legislation, regulation, a decree, a contract, whereby the authority is conferred, (iii) the purpose refers to the nature of the goals, public or private, in pursuit of which the powers are conferred, and (iv) the accountability criterion concerns the degree of public oversight to which the person or entity is subject.[575]

Overall, tribunals usually draw from the *acta jure imperii*/*acta jure gestionis* distinction to delimitate the conceptual borders of governmental authority. [576] Therefore, the main field of inquiry to assess whether a general definition of governmental authority has emerged in the investment law context is the arbitral interpretation of the sovereign–commercial dichotomy typical of the law of sovereign immunity.[577] However, as pointed out by scholars, one must bear in mind that the context of the law of sovereign immunity is relevant but distinct from that of attribution rules. Indeed, on the one hand, the attribution rules 'cannot serve to determine which State official benefits from immunity' and, on the other, '[t]he rules granting immunity, and the reasons underlying them, are simply distinct from attribution rules'.[578]

[573] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) 42, section (6).

[574] *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, Award, 29 April 2020, paras 201-204. The Tribunal cited James Crawford, *Les articles de la CDI sur la responsabilité de l'État pour fait internationalement illicte [i.e. illicite]: Introduction, texte et commentaires* (A. Pedone 2003).

[575] Jorge E Viñuales, 'Attribution of Conduct to States in Investment Arbitration' (2022) 20 ICSID Reports 13, 52.

[576] In the reading of the ARSIWA, one has to take into account the commentary provided by the ILC given the fact that the Commission drafted them. This is a practice in accordance with the VCLT interpretative rules.

[577] As we will also see in Chapter IV, the determinations of national courts with regard to State immunity from adjudication can serve as a complementary assessment in arbitrators' review, on the account of the application of the same distinction between sovereign and commercial acts.

[578] Viñuales (n 583), 70.

At any rate, the prevalent criterion used (also in the law of sovereign immunity) focuses on the content of the power and, therefore, on the nature of the function. This means that, whenever the *characterisation* of the conduct is contentious, tribunals usually start their analysis by 'asking whether the activity in question ordinarily falls in the purview of the State'.[579] They do so by looking at whether the function can be seen as 'typically commercial' or 'typically governmental', using what has been referred to as the 'test of the private contractor'.[580] Under such a test, the activities in which a private party cannot engage, exactly because of its 'non-sovereign identity', are regarded as 'sovereign', whilst all such activities that *also* a private party may typically perform are regarded as 'commercial'.[581]

In this context, arbitrators give much weight to the extent to which private or public entities dominate the field of activity in which the specific activity falls. This assumes that if conduct forms part of the 'typically commercial' activity category, it should not constitute an exercise of governmental functions under ARSIWA Article 5 and vice versa.[582] This approach seems to be built on the assumption that the market can be effectively divided in private-public dichotomy whereby the public sector can be identified with the part of the economy under State control and the private sector as dominated by private enterprises. [583] Yet, as the subject of our enquiry demonstrates, this assumption may leave out actors such as SWFs typically working in private sector areas yet remaining potentially entrenched with sovereign aspirations.

As said, in this sectorial analysis, it seems that the nature (typicality of the commercial or sovereign character of an action) retains a primary importance. In a complementary manner, also the purpose (profit or not-for-profit orientation of an act) of an activity may help determining the private-sovereign nature of a conduct. In this way, the main focus is maintained on the 'typicality' of a conduct.

---

[579] Kovács (n 513) 135.

[580] Similarly to what we have seen in the structural assessment. See, at 22, footnote 87.

[581] See, for instance, *Gustav Hamester v. Ghana*, Award, para 202. See James Crawford, *State Responsibility* (n 459) 130.

[582] Luca Schicho (n 382) 136.

[583] Gregory Messenger, 'The Public–Private Distinction at the World Trade Organization: Fundamental Challenges to Determining the Meaning of "Public Body"' (2017) 15(1) International Journal of Constitutional Law 60.

The 2008 *Jan van de Nul* Award illustrates how arbitrators may tackle the division between sovereign and commercial spheres. This Award indeed held that the subject matter of the contract at issue in the dispute, namely the maintenance and improvement of the Suez Canal, was irrelevant to the purposes of its categorisation as governmental.[584] The Tribunal specified that it had to consider the actual acts complained of by the Claimant. Specifically, it held that SCA, the SOE which entered into contractual agreements with the Claimant, acted like any contractor would have had since it tried to achieve the best price for the services it was seeking and that, therefore, it did not act as a State entity.[585]

Other investment tribunals like the *EDF v. Romania* Award followed this line of reasoning. The arbitrators established that State entities' contractual relations with the French energy company *EDF* were not exercises of delegated governmental authority. Instead, these relations were entered into and performed in pursuit of the corporate objects of a commercial company with the view to making profits 'as any other commercial company operating in Romania'.[586]

Arbitrators have categorised as *jure gestionis* or commercial acts, for instance, the default on settlement of contractual debts owed to a service,[587] the refusal to pay the amounts owed following termination of a hedging agreement[588] and the undertaking of business with an

[584] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008.

[585] *Jan de Nul v. Egypt*, Award, para 169. See also *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, para 74.

[586] *EDF (Services) Limited v. Romania*, Award, para 198. Moreover, 'the power or prerogative exercised by the State instrumentality in relation to a given foreign investment should not go beyond, and as such actually override, the ordinary schemes of private law. As observed with regard to the *Maffezini v. Spain* award, '*une telle irrégularité ne pouvait se réaliser sans les pouvoirs exorbitants du droit commun dont était investie l'entité paraétatique*''. Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 162.

[587] See, *Limited Liability Company Amto v. Ukraine*, Award, para 107. Here, the Tribunal specifically stated that: 'The payment or non-payment by a state entity of contractual debts owed to a service provider involves no exercise of sovereign authority or *puissance publique*, and cannot be attributed to the Ukraine'.

[588] See, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, Final Award, para 405 and (f): 'The above points suggest that CPC's actions would be attributable to the State, either because CPC is an organ of the State under ILC Article 4 or because CPC lacked separate legal existence, and/or acted under the instruction

assumption of reasonable commercial risk.[589] Furthermore, acts like the exercise of shareholders' rights, advising and providing information to businesses, accounting services, and technical assistance, the organisation of auctions of commercial spaces, and the refusal to grant an extension of time in the context of a tender process were also found to be commercial activities.[590]

However, it must be said that, by applying this same approach, investment arbitrators have also found a vast array of conduct qualifying as governmental. Investment tribunals have identified as sovereign activities such as marketing and export regulations, land inspections, site expropriations, an official certification of products, handling and moving financial accounts without the account holder's consent, and even university education.[591]

By way of example, starting from the more 'classic' governmental functions, the *Jan van de Nul* Tribunal found that issuing decrees, imposing and collecting charges 'are the most characteristic manifestations of '*puissance publique*'.[592] In *Bayindir v. Egypt*, the Tribunal found that other governmental functions are the infliction of sanctions or penalties, levy, collect or cause to be collected tolls on public roads or the power to enter upon lands and premises to make inspections.[593]

In the 2020 *Gustav Hamester v. Ghana* Award, the Tribunal specifically found that the Ghanian State entrusted the private corporation Cocobod with governmental authority. This is because Cocobod had the mission 'to regulate the marketing and export of cocoa, coffee and shea nuts; to encourage the development of all aspects of cocoa production and transformation

---

of the State. It is unlikely, however, that CPC's actions would be attributable to Sri Lanka under ILC Article 5 as the specific wrongdoing in the present case (failure to pay the amounts owing under the Hedging Agreement) could not be considered an act of government or sovereign authority'.

[589] See, *William Nagel v. The Czech Republic*, Final Award, para 163. Also see, Luca Schicho (n 382) 143.

[590] See, Luca Schicho (n 382) 143.

[591] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 160–161.

[592] *Jan van de Nul v. Egypt*, Award, para 149. See also *Impregilo v. Pakistan*, Decision on Jurisdiction, para 208. *UPS v. Canada*, Award on Merits, para 9.

[593] See *Bayindir Insaat v. Egypt*, Award, para 121.

to fight diseases of cocoa beans'.[594] Indeed, to fulfil these functions, Cocobod was granted governmental powers. The Tribunal highlighted that the Cocobod Board of Directors could, by legislative instrument, enact regulations for giving effect to its mission, which encompassed issuing licences or permits, regulating the control of the issuance of such licences or permits and determining the conditions under which they could be used, produced, revoked or returned.[595] Moreover, if the regulations enacted by Cocobod had been violated, the corporation would have been able to impose penalties. Hence, the Tribunal concluded that all these entitlements made it clear that 'besides its economic and commercial objects, Cocobod was endowed with elements of '*puissance publique*''.[596]

Another interesting case is *Crystallex v. Venezuela*, whereby in 2016 the arbitrators framed the unilateral rescission of a mining concession based on an SOE's power of 'autotutela'.[597] Here, the Tribunal expressly noticed that the termination of the contract had to be seen as a sovereign act because the entity 'expressly invoked its power of self-adjudication and self-enforcement (*autotutela*), a power that only entities acting as an authority (and not as a contractual party) may exercise'.[598] Moreover, the arbitrators found that the entity 'specifically invoked reasons of 'opportunity and convenience' to terminate the [contract], which constitute[d] an example of an exorbitant public law prerogative deriving from sovereign authority or *ius imperium* under Venezuelan law'.[599]

Another notable case is *Bosh v. Ukraine*.[600] Here, the Tribunal analysed the question of attribution to the Ukrainian State of a wholly State-funded University's conduct under Article 5 ARSIWA. Specifically, the Tribunal ruled over an alleged breach of a contract between the public-funded Ukrainian National University and the company B&P owned by the Claimant.

---

[594] *Gustav Hamster v. Ghana*, Award, para 190.

[595] See *Bayindir Insaat v. Egypt*, Award, para 121.

[596] id.

[597] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para 700.

[598] id. para 706.

[599] id.

[600] *Bosh International, Inc. and B&P Ltd Foreign Investment Enterprise v. Ukraine*, Award, 25 October 2012.

The arbitrators had to evaluate whether the imputed breach would fall under the scope of purely commercial acts. On the contrary, it could be categorised as an action taken in exercising governmental authority.

The contract concerned the joint management of the facilities and activities of the wholly State-funded Ukrainian University, which were supposed to be (at least) partly of a public educational character. However, it was found that the educational activities performed in such facilities were almost non-existing, having been used primarily for entertainment activities. Under Ukrainian law, such entertainment activities were not eligible for public funding, which was not granted to the University. Consequently, the University requested the termination of the contract with B&P. The investor reacted by invoking the US-Ukraine BIT challenging the termination of the contract as a breach of Ukraine's obligations, the University is an entity funded by the latter State. The arbitrators found that the University had been empowered with governmental authority in Ukrainian law.[601] This entailed that the Ukrainian University's management was falling under the scope of 'governmental activities' and, thus, that 'high education' could be regarded as a public service.[602] However, as we will see below, this was not enough to attribute the breach of contract to the Respondent State.

### 3. The Exercise of 'Governmental Authority'

As said, attribution under ARSIWA Article 5 may only occur if the empowered entity has exercised elements of governmental authority when acting in its 'public capacity'.[603] Hence, a fundamental passage in applying ARSIWA Article 5 is to question whether the specific conduct attributed to the entity was taken in the enforcement of such governmental authority or the context of a different activity. This is a rather crucial assessment, given that the State entities'

[601] See *Bosh v. Ukraine*, Award, para 173.

[602] id.

[603] Georgios Petrochilos, 'Attribution' (n 471) 304. See *Staur Eiendom v. Republic of Latvia*, Award, para 338. See also, *A.M.F. Aircraftleasing v Czech Republic*, PCA Case No 2017–15, Final Award, 11 May 2020, para 548.

activities taken in the public capacity can constitute a small share of the overall governmental function bestowed upon them.[604]

This, in a way, is what was found in the *Bosh v. Ukraine* case. Indeed, even though, as we saw, the State-funded University was entrusted with governmental powers, the Tribunal held that this was not enough ground for attributing conduct under ARSIWA Article 5. Indeed, if, on the one hand, the nature of the delegated activities was governmental, on the other, the termination of the contract and the very entering into it were actions not connected to such governmental powers delegated by the State of Ukraine. According to the Tribunal, the University acted autonomously in concluding that contract, as it did not need any authorisation by the State. In addition, the Tribunal focused on the purposes underlying the conclusion of the contract, as the University had been managing State-owned properties for its determinations and not for public purposes.[605] Therefore, attribution to Ukraine under ARSIWA Article 5 was excluded because the conduct under scrutiny was not related to the framework of governmental empowerment in which the specific activity was undertaken. Interestingly enough, it is noteworthy how to arrive at such a conclusion and apply the double pronged *Maffezini* test, the Tribunal focused both on the nature of the conduct at issue and its purposes, i.e. the ultimate goal of the contract.

By contrast, some tribunals have gone as far as attributing even commercial acts under ARSIWA Article 5. This is the case of the 2005 *Noble Ventures v. Romania* Tribunal, holding that the Romanian State was accountable for the conduct of some Romanian institutions only because domestic laws had officially empowered them.[606] However, when assessing the nature of the acts to be attributed to the State, the Tribunal diverged from the canonical approach taken by most investment tribunals. It expressly stated that there was no reason why the commercial acts carried out by the concerned institutions could not be in principle, attributed to Romania.

[604] This in turn can also mean that attribution to the State of the entity conduct is difficult. As Crawford noticed, 'this strict conception of governmental authority seems to reflect customary international law, it is doubtful whether Article 5 ARSIWA qualifies as customary law insofar as the person in question must have been 'empowered by the law''. See e.g., the arbitrations by the I-USCT in the *Yeager Case* and in *Hyatt v. The Islamic Republic of Iran* [1985] 9 Iran-US CTR 72.

[605] *Bosh v. Ukraine*, para 176-177.

[606] *Noble Ventures Inc. v. Romania*, Award, para 100 *et seq.*

The Tribunal stated that concerning the argument that a distinction had to be drawn between attribution of governmental and commercial conduct, the latter not being attributable, such a distinction 'play[ed] an important role in the field of sovereign immunity'.[607] However, the Tribunal also added that, in the context of responsibility, it was difficult to see 'why commercial acts, so-called *acta iure gestionis,* should by definition not be attributable while governmental acts, so-called *acta iure imperii*, should be attributable'.[608] Precisely it stated that

> *[t]he ILC-Draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its Draft Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor*'.[609]

Some scholars have severely criticised this – fascinatingly circular – reasoning adopted by the Noble Venture's Tribunal. This is so as it disregarded the exercise of governmental authority requirement, which, according to the ILC Commentary's interpretation of ARSIWA Article 5, should be the framework in which the attributable conduct is carried out.[610] Specifically, on the one hand, the Tribunal did not delve into a proper analysis of the nature of the activities. On the other hand, it applied ARSIWA Article 5 as it were, in fact, ARSIWA Article 4 and attributed to the defendant State both sovereign and commercial activities. However, the application of Article 5 ARSIWA should necessarily be limited in scope as it would otherwise overlap with Article 4. Indeed, if the conduct of entities empowered to

[607] id. para 82.

[608] id.

[609] id.

[610] Andrej V. Kuznetsov, 'The Perils of the Noble Ventures and the Value of Preserving the Distinction between a State Entity's Act of Commercial and Governmental Character for the Purpose of Attribution in Investment Treaty' (2011) 51(19) Currents: International Trade Law Journal 51.

exercise governmental authority were to be automatically attributed to States, the attribution of conduct of State organs would be virtually extended to every State entity.

### 4. Interim Remarks: Would SWFs Be Considered as Entities Entrusted with Governmental Authority in ISDS?

A tribunal may conclude that a SWF is not a State organ under ARSIWA Article 4 due to the lack of an organic tie with its sponsoring State, being the former structured in such a way to be sufficiently detached from the State (i.e., with separate legal personality and an SOE structure). In such an event, attributability may still occur under ARSIWA Article 5. Specifically, ARSIWA Article 5 has particular importance where a State-owned enterprise has been privatised but retains public or regulatory functions.

However, for this provision to apply, a claimant must prove that the SWF was State empowered to perform a governmental function and that the specific conduct to be attributed is governmental by design and adopted in that capacity.

The ILC Commentary observes how, although being owned by, and in that sense subject to the control of the State, corporate entities are considered to be *prima facie* separate from the State. The general rule is that corporate entities are considered separate from the State in their activities, and consequently, their conduct is regarded as not attributable to the State. This is unless such entities' conduct was taken in exercising elements of governmental authority within the meaning of ARSIWA Article 5. Applying such reasoning to a SWF would mean checking its structural link to the sponsoring State and verifying whether the specific conduct was taken in the context of an (i) empowered (ii) governmental authority.

In the context of SWFs, the *de jure* empowerment of the authority can quickly be verified through a swift reading of their institutional statutes and mandates – that usually contain the public objectives the funds are set to pursue.[611] *De facto* empowerment, however, might be extremely difficult to prove. Indeed, in the context of attribution under the ARSIWA, one mainly focuses on official empowerment. This can leave out all the unofficial channels that can be used between governments and sovereign entities which, especially in the context of State capitalist economies, might not be such an exceptional venue.

[611] *De facto* empowerment, however, might be extremely difficult to prove.

The governmental nature of the authority can be relatively difficult to prove – if one seeks to establish SWFs activities' sovereign character. Indeed, for assessing if the conduct is indeed governmental, tribunals usually conduct the characterisation analysis in the light of all relevant circumstances and, in this context, revert to some recurrent parameters.[612] The most recurrent criteria which guide the determination of the category of governmental authority are the content of the prerogative, mode of conferral, (to a certain extent) purpose of its exercise, and degree of public oversight.[613] Moreover, some 'narrower categories' than 'sovereign vs commercial acts' are usually used as a starting point by arbitrators.[614] For instance, the exercise of contractual rights and the private contractor test, which focuses on the character of the entity's activity under scrutiny, assess it against the 'private' or 'public' predominance of the economic sector of reference. This assessment does not take much into consideration the context against which the concept of public and private have to be interpreted against. It gives for granted is the Western one, applying to all entities regardless of their economy of reference. Moreover, as already pointed out, these criteria lie on the assumption that a stark division between public and private sectors can be drawn, as they were day and night. One has to notice that only two terms are available in this analysis, namely, no third category other than sovereign or commercial acts can be traced. In, other words, no 'dusk' is envisaged in such an analysis.

Moreover, the purpose of the conduct is not usually held, at its best, as decisive as the nature of the activity, and it only has a secondary role compared to the importance given to the nature of the activity. As we will see in Chapter IV, this seems consistent with the *iure gestionis*/*iure imperii* division set in the law of sovereign immunity. Yet, some scholars noticed how this predominance of the nature over the purpose of the activity not only is still contentious, but it was developed in the international case law since it is not spelt out in public international law instruments.[615]

[612] Tribunals focus is usually on one or more specific acts. Viñuales (n 575), 73.

[613] ibid.

[614] ibid.

[615] 'It was only developed in the case law that the purpose test is not decisive, and that it has only a secondary role in comparison to the nature test'. Ming Du, 'The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado about Nothing?' (2022) 20(4) Chinese Journal of International Law 785, 811.

Against this backdrop, SWFs are public entities or entities with public objectives to pursue; nevertheless, they remain financial actors that avail themselves of corporate law instruments exactly as private funds and entities do. Hence, to demonstrate that the conduct of a SWF is attributable to the sponsoring State under ARSIWA Article 5 is to prove that the challenged conduct is not typical of the corporate world. This, in turn, might be a daunting task if the consideration of the character of the activity is not accompanied by an equal consideration of other aspects, such as the overarching aim of the activities or the overall socio-political context in which the conduct was made.

Indeed, ARSIWA Article 5 ILC Commentary does not really exclude that various elements and circumstances surrounding an entity and a given conduct, including its purposes, may be considered when identifying the scope of governmental authority. As mentioned, Article 5 does not even really attempt to identify precisely the scope of 'governmental authority'. However, what it is indeed stated in the ILC Commentary, is that the content of the powers, the way they are conferred on an entity, as also the purposes for which they are to be exercised and the extent to which the entity is accountable to the government for their exercise are of relevance in the determination of attribution under Article 5 ARSIWA. Specifically, it is stated that '[t]hese are essentially questions of the application of a general standard to varied circumstances'.[616]

In this connection, it has been suggested that reliance by arbitrators on the principle of competitive neutrality could strengthen the scope of the rules of attribution codified by the ARSIWA to foster the accountability of States and State entities such as SWFs and SOEs.[617] The underlying rationale for the principle of competitive neutrality of SOEs posits that an economic enterprise's public or private ownership should not affect its competitiveness in the market arena.

[616] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) 42, section (6).

[617] Carlo de Stefano, 'Competitive Neutrality of Soes in International Investment Law' [2018] SSRN Electronic Journal 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209867>.

The OECD has elaborated such a principle by adopting soft law instruments, such as its 'Guidelines on Corporate Governance of State-Owned Enterprises'.[618] Specifically, Section III of these Guidelines is dedicated to the issue of SOEs in the marketplace. Here it is provided that: '[c]onsistent with the rationale for state ownership, the legal and regulatory framework for SOEs should ensure a level playing field and fair competition in the marketplace when SOEs undertake economic activities'.[619]

Applied in the context of ISDS[620], 'an activity may be attributed to the State in light of the casuistic finding that an SOE could not have performed it on a rational basis (like any other private competitor) without availing itself of its status'.[621] Therefore, with regard to State responsibility for sovereign investors' conduct, the principle of competitive neutrality would extend the scope of the 'private contractor' test to acts that a normal private economic actor would not capable to perform in a private market arena so that they 'be considered as falling under the exercise of elements of the governmental authority'.[622] In such a way, according to

[618] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition* (n 252). See also Uwe Böwer, 'State-Owned Enterprises in Emerging Europe: The Good, the Bad, and the Ugly' (2017) 17(221) IMF Working Papers 1. In addition, the practice of the World Trade Organization (WTO) dispute settlement system (DSS) may also be instructive with regard to the definition of 'public body' under Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

[619] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition* (n 257) 20.

[620] Considering the facts that a SWF or some SOEs would hardly meet the rationale underlying the 'like circumstances' criterion in the application of the MFN clauses, it would not be too far-fetched to think that the principle of competitive neutrality could apply to SWFs and the same SOEs.

[621] Carlo de Stefano, 'Enhancing the Accountability of SOEs/SCEs in International Economic Adjudication through Competitive Neutrality' (2020) 17(6) Transnational Dispute Management, 13 <https://www.transnational-dispute-management.com/article.asp?key=2769>. Georgios Petrochilos, 'Attribution: State Organs and Entities Exercising Elements of Governmental Authority' in Katia Yannaca-Small (ed), *Arbitration under international investment agreements: A guide to the key issues/ edited by Katia Yannaca-Small* (Second edition. Oxford University Press 2018).

[622] Carlo de Stefano, 'Enhancing the Accountability of SOEs/SCEs in International Economic Adjudication through Competitive Neutrality' (n 621).

the same authors, ARSIWA Article 5 could set a level playing field in markets where SOEs and private undertakings compete.[623]

In the context of this discussion it may be of interest to mention that, as we will see in Section F of this Chapter, the WTO AB has already found that 'Chinese SOEs in which the [Government of China] has a full or controlling ownership interest 'possess, exercise, or are vested with governmental authority''.[624] If this ruling were applied to IIL, 'then the remaining issue would be whether the Chinese SOE has exercised governmental authority in the particular investment in dispute'.[625]

In this connection, if we extend our gaze to EU law or WTO law we will see that both fields provide principles and provisions that may be applied vis-à-vis the treatment of SOEs and underlie competitive neutrality principles.[626] For instance, EU law provides norms and principles that may make such a concept available in the regulation of State aids under Article 107, services of general economic interest under Article 106(2) of the TFEU, and public procurement under the Directive 2014/2488 as to the notion of the contracting authority.[627]

---

[623] Sébastien Miroudot and Alexandros Ragoussis, 'Actors in the International Investment Scenario: Objectives, performance and advantages of affiliates of state-owned enterprises and sovereign wealth funds' in Roberto Echandi and Pierre Sauve (ed), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013).

[624] WTO Appellate Body Report, *United States–Countervailing Duty Measures on Certain Products from China, Recourse to Article 21.5 of the DSU by China*, WT/ DS437/AB/RW (16 July 2019), para 5.56.

[625] Ming Du (n 615), 811. However, as we will see, some domestic instruments on State immunity do express a preference in terms of criteria to use for the interpretation of *iure gestionis*/*iure imperii* character of the activities.

[626] In general, the WTO Agreements contain several provisions that may deal with the treatment of SOEs. Article III:8(a) (as to 'governmental agencies') and Article XVII:1 (as to 'state trading enterprises') of the GATT 1994, Article I:3(b)-(c) (as to 'governmental authority'), Article VIII (as to 'monopolies and exclusive service suppliers') and Article XIII:1 (as to 'governmental agencies') of the GATS, to Article 1.1(a)(1) of the SCM Agreement as to the definition of 'public body', and to Article 9.1(a) of the Agreement on Agriculture as to the notion of 'governments or their agencies'.

[627] European Parliament and Council Directive 2014/24/EU of the 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance [2014] OJ L 94. Moreover, a critical issue in the Court of Justice of the European Union (ECJ) case law has been whether a body, be it of public or private law, can be deemed an emanation of the State. The rationale of the ECJ stance on this point was that an entity,

Furthermore, State Parties to modern FTAs have inserted express references to the principle of competitive neutrality of SOEs. This is found in Article 15.8 of the CETA, Article 9.7 of the US-Singapore FTA, Article 14.4 of the US-Australia FTA (AUSFTA), and Article 5 of Chapter 10 of the negotiated text of the EU-Vietnam FTA.[628] This drafting technique may indicate the recognition of such a principle by Parties, which may also have an impact under the WTO Dispute Settlement Mechanism (DSS).

In any event, coming back to the core subject of this section, *prima facie*, one could conclude that SWFs and SOEs should be treated as private entities unless striking governmental features are traced. Yet again, the reasoning goes round in a loop: can we really discern what is a purely governmental conduct of a SWF, especially when sponsored by a State capitalist country?

## E. SOVEREIGN WEALTH FUNDS AS STATE AGENTS IN THE ISDS JURISPRUDENCE

### 1. ARSIWA Article 8 in ISDS Jurisprudence

#### *i. Introduction*

The general rule under the international State responsibility regime provides that conduct by a private person (or a non-State) entity is generally not attributable to States, with a few exceptions.[629] ARSIWA Article 8 covers one of the exceptions to this rule, which is recognised in cases involving a specific factual relationship between private subjects engaging in the conduct and the State. Such a provision serves to attribute conduct taken by persons or entities acting under States' instructions, direction or control.

---

irrespective of its legal form, may be held as being the 'State' in so far as it avails itself of measures and prerogatives that are exorbitant and thus surmounts the ordinary legal schemes normally applicable between private parties. See Case C-188/89, *Foster and others v. British Gas plc* [1990] ECR I-03313.

[628] Minwoo Kim, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements' (2017) 58(1) Harvard International Law Journal 225.

[629] Among which the one identified by ARSIWA Articles 5 and 11. See, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995). See, *Thunderbird v. Mexico* ICSID, Award, para 201. See, also, *Waste Management v. Mexico (II)* ICSID, Award, para 75.

In this regard, attribution under Article 8 is pursuable only when the requirements by ARSIWA Article 5 are not met, either because the State has not empowered the entity or because the exercise of elements of governmental authority is lacking in the specific case at hand.[630] If no such authority was involved, it becomes necessary to revert to Article 8 ARSIWA to assess whether the State had used its powers to control or direct the entity's conduct.[631]

However, as anticipated when discussing ARSIWA Article 4, if the relationship between the State and the non-State entity outgrows these requirements and becomes one of 'complete dependence', the latter will be considered a *de facto* organ, removing the situation from the scope of application of Article 8 altogether and attributing responsibility to the State under ARSIWA Article 4.[632]

As mentioned, the issue of attributing specific conduct carried out by the armed band Contras to the United States arose in the famous *Nicaragua* and the *Bosnian Genocide* cases. The ICJ developed the international legal test for attributing specific conduct of an entity, which is not an organ of that State and is not entrusted with governmental authority to a State.[633] Specifically, the ICJ held that it had to be shown that the entity was partially dependent on and controlled by the 'sending' State. The ICJ also famously addressed whether attributing the conduct of the Contras to the US (in *Nicaragua*) and Republika Srpska to Serbia (in *Bosnian Genocide*) could be achieved under the route of the *de facto* organ doctrine. That is by qualifying both such entities as *de facto* organs of the two States.[634] It bears repeating that the ICJ held the *de facto* organic relationship had to be so much one of dependence on the one side

[630] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 171.

[631] Luca Schicho (n 41) 200. See *Noble Ventures v. Romania*, para 74-83.

[632] Kubo Mačák, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) 21(3) Journal of Conflict and Security Law 405, 410.

[633] See Chapter IV.

[634] Hoogh (n 461).

and control on the other that the entities could have been equated to organs of the state acting on its behalf.[635]

In this regard, however, another passage by the ICJ in *Nicaragua* is frequently cited in attributing private entities' conduct to the State. Indeed, when analysing the relationship between the United States and the Contras, the Court found that 'to give rise to State responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed'.[636] This test has been referred to as the 'effective control' analysis.[637]

The ICJ set (another) rather stringent threshold to prove that an entity's conduct was, in fact, under the control or direction of a State. Indeed, while the Court reasoned that the US exerted extensive influence over the Contras, an element that Nicaragua had extensively proved, this did not exclude that certain acts committed by the Contras could have been taken, lacking the United States' control and knowledge, or even will. In other terms, attribution should occur only when 'there is evidence that individuals have been specifically charged by State authorities to commit a particular act, or carry out a particular task of some kind on behalf of the State'.[638]

Conversely, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a more lenient approach, which to the ICJ effective control test, preferred the so-called 'overall control test'.[639] Precisely, in *Prosecutor v. Tadic´*, the ICTY applied the effective control test for jurisdictional purposes, and, by so doing, it denied having

[635] See *Military and Paramilitary Activities against Nicaragua*, para 109. Yet, as said, the Court also rejected this hypothesis because Nicaragua had not proven that the Contras were not wholly dependent upon the US. Therefore, they could not be equated to State organs.

[636] *Military and Paramilitary Activities against Nicaragua*, para 115.

[637] As mentioned, ARSIWA Article 8 may be easily conflated with ARSIWA Article 4(2) and the *de facto* organs doctrine.

[638] Luca Schicho (n 382) 162.

[639] See *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, paras 118 – 119, 141.

jurisdiction over the case. The Prosecutor then appealed the decision before the Court of Appeal, which, in turn, expressly stated that the Nicaragua test was, in its view, 'unpersuasive'. The Appeals Chamber, therefore, had to establish whether the conflict was international to determine whether the Trial Chamber could exercise its jurisdiction over the alleged grave breaches of the Geneva Conventions.[640]

The Chamber determined that the degree of control was not required to be precisely the same for any relationship as it could vary depending on the specific circumstances. Thus, the Chamber identified two degrees of control based on judicial and State practice investigation. The first degree of control pertained to acts performed by private individuals engaged by a State to perform specific illegal acts in the territory of another State; for such actions, the 'effective control test' as enucleated by the ICJ in *Nicaragua* would apply. The second degree of control was related to actions taken by organized and hierarchically structured groups, such as military or paramilitary units. In such a case, overall control by the State over the group was sufficient; hence, specific instructions were not required for each operation. The Appeal Chamber argued that this test was based on State practice, which, however, supported its applicability solely in instances of single individuals acting on behalf of a State. Therefore, the Appeals Chamber thus argued in favour of a flexible approach to the issue of imputability.[641]

Nevertheless, the ICJ expressly rejected the overall control test in the *Bosnian Genocide* case.[642] Indeed, in deciding on whether the Genocide of Srebrenica could be attributed to Serbia

[640] Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) European Journal of International Law 649, 657-658. As Cassese reminded, the Chamber 'favoured both the 'effective control' test (as enunciated by the ICJ) and another test, better suited to instances where the persons whose conduct may or may not be attributed to a State, make up an organized and structured group, normally of a military or paramilitary nature'. See idem.

[641] To read more on the topic of 'control' in international criminal and human rights case law, see, *inter alia*, Antal Berkes (ed), *International Human Rights Law Beyond State Territorial Control* (Cambridge University Press 2021).

[642] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, merits, Judgment of February 26, 2007, <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm> accessed 03 September 2021. See, Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) European Journal of International Law 649.

under the laws of State responsibility, it concluded that the acts of genocide were not committed by persons acting on the instructions, direction or control of Serbia as no (complete or) effective control was established over the alleged actions.[643] This is therefore the test which is commonly accepted under international law for attribution under ARSIWA Article 8.

The first essential requirement under ARSIWA Article 8 is a specific factual relationship between the entity engaging in the conduct and the State. As mentioned, the ILC identified three separate subcategories of factual links between non-State actors and States: instructions, direction, and control to be given or exercised by States or State organs on the entity. These three terms identify a set of three separate and non-cumulative criteria which the ICJ initially used for attributing *ad hoc* conducts of extraterritorial-armed bands to States remotely directing the activities by the controlled bands.

Such factual relationships 'must be related to and have a bearing on the conduct', that is, there must be a relationship 'between the instructions given or the direction or control exercised and the specific conduct complained of'.[644] Indeed, the sole factual relationship between the State and the entity is not enough to attribute the entire conduct under ARSIWA Article 8.[645] Consequently, the focus has to be given to the State's control over the entity *vis-à-vis* the specific conduct. Moreover, the State controlling influence must be a *conditio sine qua non* for the occurrence of that act. Should a State merely approve of some acts in generic terms, neither control, direction, or instruction under ARSIWA Article 8 would be usually established.[646]

---

[643] J. Morgan-Foster and Pierre-Olivier Savoie, 'World Court finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide' (2007) 11(9) American Society of International Law-Insights <https://www.asil.org/insights/volume/11/issue/9/world-court-finds-serbia-responsible-breaches-genocide-convention-not#_ednref27> accessed 3 September 2021.

[644] Luca Schicho (n 382) 157. See Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm Evans and Panos Koutrakos (ed), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013).

[645] As this is the ground for applying ARSIWA Article 4.

[646] In cases where States subsequently acknowledge or express support for certain acts, ARSIWA Article 11 and its attribution rules might be applied. As stated in the ILC Commentary to Article 11, this provision 'is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognises 'nevertheless' that conduct is to be considered as an act of a State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'.

While instructions, direction and control are three disjunctive elements, it must not follow from this distinction that courts and tribunals apply three different tests under ARSIWA Article 8.[647] In other words, effective control is seen as an 'umbrella test', some elements of which include 'control' but also 'instructions', 'direction' and other elements.[648] Indeed, according to some scholarship, it would be 'incorrect to conclude that the assessment of acts performed under the 'instruction' or the 'direction' of the State is different from the 'effective control' test'.[649]

Article 8 and the ILC Commentary do not specify the communication channel of such directions and control, be it the form or the way the instructions or direction should be given. This entails that they may be formulated in writing or given orally, and they may appear in a variety of acts.[650] However, it is understood that they have to be given in an authoritative way, such that an exhortation falls short of a governmental instruction or direction.[651] This seems confirmed by the ICJ, whereby in the *Tehran Hostages* case, regarded the public declarations made by Ayatollah Khomeini exhorting militants to attack the United States and Israel could not be considered as directives or instructions.[652] Specifically, for the Court these exhortations were not amounting to authorization from the State to undertake the specific operation of invading and seizing the United States Embassy.[653]

---

[647] Viñuales (n 575), 57.

[648] See International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 379) commentaries to Article 8, para. 8.

[649] Viñuales (n 583), 56.

[650] However, the terms 'instruction' or 'direction' exclude pure recommendations, encouragements, suggestions and general policies by definition. See *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para 448.

[651] Viñuales (n 575), 57.

[652] *United States Diplomatic and Consular Staff in Tehran, United States v. Iran* (*Tehran Hostages* case*)*, Judgment, ICJ GL No 64, [1980] ICJ Rep 3, ICGJ 124 (ICJ 1980), 24th May 1980, United Nations [UN]; International Court of Justice [ICJ] *(United States of America v. Iran)*, para 59. The Court went on to conclude that Iran had engaged its international responsibility due to its inaction in the face of this first phase of events, and its subsequent acceptance of the acts that ensued, but the relevant acts and attribution routes are different from the one now formulated in Article 8 of the ILC Articles.

[653] Viñuales (n 583), 59.

As will be discussed, investment tribunals have, by and large, adopted the ICJ approach in terms of the criteria and threshold required to apply ARSIWA Article 8. In turn, arbitrators require a high degree of control to attribute conduct under ARSIWA Article 8 according to the 'effective control' test.

*ii. ISDS Case Law*

The subsidiarity of ARSIWA Article 8 is well received in several investment tribunals' reasoning.[654] Should a State empower an entity to exercise elements of governmental authority, such as managing a privatization process, while retaining significant powers to control that entity, a tribunal would, in principle, be bound first to review whether the conduct complained involved the exercise of governmental authority and only in a second phase whether it involved state directions, instructions and control.

Moreover, the above-described general architecture of analysis of ARSIWA Article 8 seems upheld by arbitrators in reference to the array of different factual relationships of control and instructions in investment cases.[655] Investment tribunals have carefully treated ARSIWA Article 8 as a unique attribution mechanism. It may even be said that in light of the very structure and purposes of the Article and its interpretation by the ICJ, arbitrators have been somewhat reluctant to apply ARSIWA Article 8. Indeed, contrary to Article 5, Article 8 has often been invoked by claimants yet rarely applied by investment tribunals. By way of example, the *EDF v. Romania* Tribunal stated that the ILC Commentary 'makes clear that such attribution is exceptional'.[656] This is much like attribution under the *de facto* organ doctrine.

[654] See, *F-W Oil Interests v. Trinidad and Tobago*, para 203.

[655] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of* Ecuador, ICSID Case No. ARB/03/6, Award, 31 July 2007, para 219. For instance, the Tribunal in *Tulip Real Estate v. Turkey* concluded from the disjunctive character of instructions, direction and control under ARSIWA Article 8 that it only needed one of those elements is present 'in order for there to be attribution under Art. 8. See *Tulip Real Estate v. Turkey*, para 303.

[656] *EDF v. Romania*, Award, 3 October 2009, para 200.

However, it also must be noted that according to a recent ICSID case survey, an overall increase in the frequency of references to ARSIWA Article 8 has been detectable in the last ten years.[657]

As said, the three different sets of connections between States and entities under ARSIWA Article 8, namely instructions, direction or control, identify three separate and non-cumulative criteria. As seen in the *Nicaragua* and *Genocide* cases, such criteria have been applied by the ICJ to attribute *ad hoc* conducts of extraterritorial-armed bands to States remotely directing the activities of the controlled bands in the territories of other States. On this very point, as Crawford explained in 2010, ARSIWA Article 8 is of enormous importance in public international law because it covers 'the whole field of support by the State to acts of irregular armed forces, which has given rise to many difficulties in cases involving international and internal armed conflict'.[658] The same author also added that '[f]ortunately, most investment cases are a long way from that terrain, and so the issues that have been contentious in the context of Article 8 have tended not to rise'.[659]

One cannot disagree with such statements. On the one hand, it is clear how ARSIWA Article 8 enshrines a pivotal attribution rule under general international law covering attribution of unofficial armed forces in the context of armed context. It is equally true that, in principle, investment disputes are usually far off from such scenarios and that, therefore, Article 8 application has not been so common in ISDS. Following these observations, two remarks can be made.

First, the vast majority of investment disputes have been indeed far off from armed conflict scenarios, and yet, whenever attribution of private or State-owned entities occurred, tribunals were compelled to require the same demanding threshold applied in the context of

[657] Esmé Shirlow and Kabir Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) 37(1-2) ICSID Review 378. There has also been an increase of references to ARSIWA Article 11.

[658] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (n 393) 134.

[659] ibid.

armed conflicts. This, in our opinion, might be indicative of the application of a test which may be too demanding when applied to the corporate world.[660]

Second, ARSIWA Article 8 scarce successful application in the field of investment arbitration might be related to upholding the principle of the separateness of the corporate structure. In international law, there are only very few exceptional caveats to the separateness of the corporate form principle.

This principle, as mentioned, was already recognised by the ICJ in 1970 with the *Barcelona Traction*.[661] This case regarded a question about diplomatic protection brought by Belgium against Spain on behalf of several Belgian shareholders in a Canadian company, which Spain had allegedly injured. The Court found that it could not. In reaching this decision, the Court drew this conclusion from domestic law where the process of lifting the veil was regarded as an extraordinary one, admitted only in exceptional circumstances, justifying it in the interest of shareholders.[662]

The ICJ famously held that 'the law has recognised that the independent existence of [a] legal entity cannot be treated as an absolute'.[663] The Court found that the municipal practice already accumulated indicated that the so-called corporate veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal

[660] However, in the wake of the Crimea annexation or the war in Ukraine, is it even possible today to say that investment disputes have something to do with armed conflicts? See, Christoph Schreuer, 'Investment Protection in Times of Armed Conflict' (2022) 23(5-6) The Journal of World Investment & Trade 701. See also Tobias Ackermann, *The Effects of Armed Conflict on Investment Treaties* (Cambridge University Press 2022). But also see *AMT v. Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997.

[661] See, ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. As mentioned, this principle was subsequently reiterated in *Diallo*. However see Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28(2) ICSID Review 223, 233.

[662] Saïda El Boudouhi, 'Barcelona Traction Re-Imagined' in Ingo Venzke and Kevin J Heller (eds), *Contingency in International Law* (Oxford University Press 2021), 395. See, ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, paras 56-58.

[663] It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes.

requirements or obligations.[664] The Court found that such exceptions as equally admissible in international law.[665]

This tenet is also expressed in the Commentary to ARSIWA Article 8. Specifically, the ILC Commentary first recalls that international law acknowledges the general separateness of corporate entities at the national level. Indeed, the Commentary states that

> *[q]uestions arise with respect to the conduct of companies or enterprises which are State-owned and controlled […]. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the 'corporate veil' is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate,* prima facie *their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the* de facto *seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property*.[666]

Therefore, on the one hand 'the fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity'.[667] On the other hand, this statement is not an absolute which can thus be proven otherwise in exceptional circumstances, such where the 'corporate

[664] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, paras 56-58.

[665] id. paras 56-58.

[666] International Law Commission, 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries' (1991). Yearbook of the International Law Commission, 1991, vol. II, Part Two. Commentary to Article 8, para 6 <https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf>.

[667] ibid.

veil' is a mere device for abuse, exactly as established by the ICJ in *Barcelona Traction*. This, in turn, should also apply in ISDS and to sovereign investors.

2. State Instructions

As said, attribution due to State instructions applies to cases whereby a State has issued instructions to an entity to engage in specific conduct.[668]

Transposed in the context of investment arbitration and SWFs, attribution by instructions would happen had a State ordered (usually in writing) a decision-making body of a SWF (or of an SOE or another State entity, *e.g*. the Board of Directors) to exercise its voting rights in a specific manner to pursue a precise goal (*e.g.* in favour of a termination of a contractual relationship of the entity controlled by the SWF with a foreign investor).[669]

This was precisely established in the 2009 *EDF v. Romania* case.[670] The Tribunal found that the Ministry of Transportation mandated its representatives in the Board of Directors and the General Meeting of shareholders of the two State entities involved (AIBO and TAROM) to extend the contract duration and EDF operation by three months.[671]

The Respondent maintained that the Ministry of Transportation did not dictate orders to the representatives of the Board through the two State entities' mandates, given that, according to Romania, the mandates were not legally binding on AIBO or TAROM. Romania argued that none of the mandates could be understood, either '*de jure* or *de facto*', as an order from the Ministry of Transportation to the Company.[672]

In the Tribunal's view, such an interpretation of the role of the mandates was not satisfactory. These mandates were indeed issued by the Ministry of Transportation to companies falling under its authority, whether *de jure* or *de facto*. The arbitrators found that it was *de jure* since, as indicated in the preamble of Order No. 597 of April 17, 2001, the mandate

[668] See, Antonio Cassese (n 642).

[669] Luca Schicho (n 382) 152.

[670] *EDF (Services) Limited v. Romania*, Award, 8 October 2009.

[671] *EDF v. Romania,* Award, para 207.

[672] *EDF v. Romania,* Award, para 201-213.

was granted to the corporate bodies of said companies to support 'the standpoint of the Ministry'.[673]

According to the Tribunal this kind of language made it clear that the corporate bodies of companies under the authority of the Ministry of Transportation did not have 'the initiative to originate, in full independence, proposals to the Ministry concerning the kind of decisions to be taken, much less that such bodies were free to decide other than as provided by the mandates'.[674] The Tribunal indeed established that 'the fact that directions are given by the mandates to the members of the Board of Directors, a body that should decide in full autonomy in the company's interest', was indicative of the compelling nature of the Ministry's mandate system as a whole.[675]

Moreover, the Tribunal did not share the Respondent's interpretation vis-à-vis *de facto* instructions regarding the decision taken by AIBO and TAROM on the extension of the said contract duration. Indeed, the arbitrators found that the positions taken by the companies in the AIBO's Board of Directors had to await the Ministry of Transportation order to be approved in the General Assembly and that no such approval was issued. Instead, the Ministry of Transportation gave a mandate with the decision that the duration and operation of EDF be extended by three months to the representatives in the Board of Directors and General Assembly of Shareholders of AIBO and TAROM.[676]

In this case, the underlying domestic law provisions already strongly indicated that the mandate system was binding in EDF. However, the Tribunal also addressed the actual practice and 'the apparent perception of those mandates as binding by the company representatives' to complement its analysis.[677] In this way, the Tribunal touched upon the difference between *de jure* and *de facto* instructions given by States to State entities. Such differentiation becomes vital in the context of our inquiry. Indeed, the factual relationship between a State and a State

[673] id. para 205.

[674] id.

[675] id. para 206.

[676] Para 207. The Tribunal concluded that the two companies were indeed under the direction and control of Romania, so mixing the three criteria under ARSIWA Article 8.

[677] Luca Schicho (n 382) 214.

entity may in principle enable State organs to give instructions through unofficial channels, rendering them officially non-binding but given the influence that States exert over such entities, also impossible to escape.

Coming to other cases, in the 2006 *Encana v. Ecuador* case, the Tribunal noted that the SOE Petroecuador was subject to instructions from the President of Ecuador.[678] As will be discussed in the next section on the control threshold required by arbitrators, according to the *Encana* Tribunal (chaired by Crawford), the State power extended to supervision and control of Petroecuador's performance of the participation contracts and to their potential renegotiation.[679]

The 2010 *Lemire v. Ukraine* is another case where State directive influence was found to have been exercised over an entity.[680] The Tribunal's Decision on Jurisdiction provides a detailed account of State intervention in the entity's decision-making process. Specifically, the *Lemire* Tribunal had to decide whether the interference of the President of Ukraine with a decision of the National Council for Television and Radio Broadcasting over the allocation of radio frequencies constituted a violation of the FET standard.[681] The Claimant, who operated a radio station, lamented a discriminatory treatment by the National Council to in favour of some politically connected radio stations.[682] In this context, the President had sent a written instruction to the Chairman of the National Council, expressly asking for the support of a specific radio station that had applied for additional frequencies.[683]

The Respondent submitted that the instruction should have been construed exclusively based on its plain language and that it amounted 'to no more than an admonition to the National

[678] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (formerly *EnCana Corporation v. Government of the Republic of Ecuador*), Award, 3 February 2006.

[679] id. para 154.

[680] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 321-322.

[681] Luca Schicho (n 382) 214.

[682] Namely, Radio Era and Radio Kokhannya.

[683] Luca Schicho (n 382) 215.

Council to do its job'.[684] The Tribunal assessed the substantial impact of the instruction on the entity and dismissed the Respondent's argument diminishing such instructions to mere admonitions. Indeed, it was even questioned why such admonitions were needed in the first place, considering the lack thereof in other tender proceedings. The Tribunal concluded that the President's instructions interfered with the independent and impartial decision of the National Council in favour of two of the Claimant's competitors. It showed a politically motivated preference for one competitor, thus violating the FET standard contained in the IIA, amounting to an 'arbitrary or discriminatory measure' within the meaning of the BIT.[685]

In turn, even though the *Lemire* decision does not *per se* deal with attribution, it provides a clear example of how, especially in a context of legal ambiguities, political decision-makers can influence State entities to the detriment of foreign investors. In such cases, domestic law provisions establishing that a State entity is separate and independent from the State might not be a sufficient guarantee against governmental attempts to influence that entity. Secondly, as mentioned, such attempts might take a different form than an explicit binding order. Indeed, they can be set as expectations upon the decision-making body's members, 'which combined with the ability of that organ to appoint and remove those members, should usually suffice that the desired decision is taken'.[686]

In the 2017 *Karkey v. Pakistan* case, the arbitrators decided that the conduct of two companies, namely Lahkra and PEPCO, relating to the performance of a contract was the result of the direct instructions of Pakistan and that they were, therefore, attributable to Pakistan.[687] The Tribunal noted that Lakhra did not pay termination charges under the Contract to Karkey due to the direct and explicit instructions from the Pakistani Government ordering Lakhra to initiate and prosecute judicial proceedings in the Sindh High Court to collect funds from

[684] *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, at para 344.

[685] It thus constituted a violation of applicable Ukrainian legislation, and the apparently politically motivated preference for one competitor represents a discrimination against Claimant, who was applying in the same tender processes for the same frequencies.

[686] Luca Schicho (n 382) 216.

[687] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para 573, 590, 595.

Karkey. For this and other reasons, the Tribunal held that even if it were to find that Lakhra was an entity independent of the State,

> *Lakhra's actions and decisions with respect to the Contract (notably the decision to enter into the contract and amendments thereto, decision not to pay Karkey under the Contract, and the filing of proceedings against Karkey requesting the arrest of Karkey's Vessels) were made under the instructions, direction and control of Pakistan, and are therefore attributable to Pakistan.*[688]

Though requiring a rather demanding evidential burden, attribution of conduct under the instruction criterion might not raise as many interpretative problems as the direction and control criteria.[689] Indeed, instructions require a relatively narrow context. The instructions would need to refer to specific acts that constituted wrongful conduct rather than to general instructions requesting to pursue specific objectives. Moreover, even though the ILC Commentary does not expressly requires it, instructions should have a written form to prove such instructions ever existed. As Simma put it, if the controlling State is clever (or incompetent) enough not to keep a scrupulous record, it becomes pretty challenging for a claimant to meet the necessary burden of proof of State instruction.[690] We wonder how this strict requirement can be applied in the context of some State capitalist settings whereby governments have a close hold on State entities and may instruct them through different channel, through written and non-written mediums.

### 3. State Directions or Control

It is noteworthy to recall that the ILC choice of the syntagm 'direction or control' would point to a conceptual difference between these two terms.[691] However, the ILC Commentary being silent on the matter, such a difference is not always practical or easy to grasp. Overall, it seems

[688] id. para 593.

[689] Luca Schicho (n 382) 152.

[690] ibid. See, ILC Drafting Committee, Statement of Judge Simma, 13 August 1998, at 7.

[691] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368) Commentary to Article 8, para 7. See, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/19, Award, 30 October 2017, para 7.46.

courts and tribunals have a tendency to interpret the words 'direction or control' as imposing a single attribution standard.[692]

In drafting the concept of direction and control in ARSIWA Article 8, the ILC relied on several pivotal judgments rendered between the first and the second reading of the ARSIWA. Namely, the *Nicaragua* and *Tadić*, but also decisions of the Iran–US Claims Tribunal, such as the 1987 *Yeager v. Iran* [693], or judgments of the ECtHR, such as in the 1996 *Loizidou v. Turkey* case.[694]

In this very regard, Crawford noticed that some have criticised the ILC's reliance on such cases as forming 'a feedback loop' wherein these decisions were used as a basis of the drafting of Article 8 and its associated commentary. In turn, the Articles were relied upon by the ICJ in arguing that its earlier position reflects customary international law.[695] These criticisms, of which Cassese was a prominent voice, reflect a wider debate concerning the level of control required in customary international law for attribution to occur under ARSIWA Article 8. Yet, as seen, this provision does not spell out this, and the ICJ first enucleated the 'effective control' test in *Nicaragua* and affirmed it in *Armed Activities* and *Bosnian Genocide*. However, as seen, other courts have devised other tests for such route of attribution. We refer to the 'overall control' test formulated by the ICTY Appeals Chamber in *Tadić* and reaffirmed in the subsequent case law of the ICTY.

Be as it may, based on such international case law and scholarship, it would seem that the criteria of direction or control have a broader scope than State instructions.[696] Indeed, they have been applied to more generic instances, envisaging cases where State directing influence on an entity was exercised through repeated or regular acts. In this very regard, some scholars tentatively suggest differentiating between instructions on one side and direction and control

[692] James Crawford, *State Responsibility* (n 459) 146.

[693] *Yeager v. Iran*, (1987) 17 Iran–US CTR 9.

[694] See ECtHR *Loizidou v. Turkey*, (1996) 108 ILR 443.

[695] James Crawford, *State Responsibility* (n 459) 146.

[696] See for instance, ICJ, *Nicaragua*, para 64, where the Court speaks of actions such as 'financing, organising, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation'.

on the other, based on the singularity or continuity of influence exercised by the State over the State entity's conduct.[697]

In the investment law context, direction or control would be exercised in cases where a State entity undertakes a series of measures overall failing an investment. In this scenario, the State would continuously control such measures by issuing regular directions or exercising supervisory rights, even using informal measures like implied requests in informal meetings.[698]

Many investment cases involve factual scenarios whereby domestic public law equips the State with the means to exert such control through special rights or powers. Textbook examples are the statutory requirement of ministerial approval over an entity's internal regulation or the reporting obligation of an entity to the Ministry, which can retain the decisional oversight on the entity's operations. Other examples are the power of selection to appoint and remove the members of an entity's decision-making body. All these elements can be considered as relevant indicia of State influence over an entity that can, given some specific circumstances, lead to establishing State (direction and) control over the entity.[699]

Usually, the combination of approval and selection powers may put a company under the controlling influence of the State in different ways. For instance, by threatening the removal of the members of the decision-making body should it perform or not perform the conduct required by the State.[700] A similar thing applies to the appointment of 'loyal personnel', which may be drawn to follow the State's or the State organs' direction with the aim of being re-elected. Besides, the State can influence the entity by withholding approval of essential decisions.[701]

---

[697] Antonio Cassese (n 642), 663 Cassese suggested that 'instruction' and 'direction' are conceptually closer than 'direction' and 'control'. According to this author, 'direction' implies a continuing period of instruction, or a relationship between the State and a non-State entity such that suggestion or innuendo may give rise to responsibility.

[698] See, Carlo de Stefano, 'Enhancing the Accountability of SOEs/SCEs in International Economic Adjudication through Competitive Neutrality' (n 621) 8–9.

[699] Luca Schicho (n 382) 197.

[700] Or of a State organ.

[701] Luca Schicho (n 382) 197.

However, while these links may be perceived as evidence establishing the power of the State to direct and control an entity, the burden of proof might be hard to reach for the claimant. As we will see, the applicant would have to prove the factual circumstances, *i.e*. the concrete link between the State and the entity over specific conduct. As seen, according to the test devised by the ICJ, it is not enough to have general control[702], but the direction or control over specific conduct must be proven.

In many instances accruing in the economic field, it might even be virtually impossible to prove direction or control over specific conduct, for instance, even when the State appointed representatives in the Board of Directors. However, when the conduct is seemingly the result of decisions taken with the preliminary approval of State organs – as in *Bayindir v. Pakistan*, where the State entity's decision to terminate the contract came with the express *ex-ante* clearance of the Pakistani Government – then the investors might be able to succeed in attributing the conduct to the State.[703] This can equally be said for instances where, by implementing State directives, the entity's conduct results in a failure to take action toward an investor, *e.g.* with the failure to perform a payment.

In this connection, the ECT-based case *Anatolie Stati v. Kazakhstan* offers an example of how the proximity of a SWF organizational structure with the sponsoring State's government has been considered crucial by an arbitral tribunal in terms of control of the State, for evaluating the attributability of the entity conduct.[704] In this case, the Claimants alleged that Kemikal, one of their largest customers, had failed to post some bank guarantees and pay their dues. The Claimants argued that such conduct could be attributed to the Respondent State since the Kazakhsta SWF, Samruk-Kazyna, controlled Kemikal. Contrariwise, the Respondent argued that such conduct could not be attributed to it, as Kemikal was a commercial entity.[705] The Tribunal observed that Kemikal was indeed managed by Samruk-Kazyna, a SWF 100% owned and controlled by Kazakhstan. The former Deputy Manager of Samruk-Kazyna, Mr

[702] While as seen, it is conversely for the ICTY.

[703] *Bayindir v. Pakistan*, Award, para 125. Luca Schicho (n 382) 199.

[704] *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan* (I), SCC Case No. 116/2010, Award, 19 December 2013, para 1094.

[705] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 66.

Kulibayev, had close family ties with Kazakhstan's President.[706] In light of these facts, the Tribunal concluded it was 'more probable than not that Kazakhstan caused Kemikal's failure to provide the requisite bank guarantees'.[707]

This assessment by the *Stati v. Kazakhstan* Tribunal deserves a reflection. Indeed, the reader might have noticed how the Tribunal here spoke of 'probability of causation' of the breach originated in the Kazakh State control over Samruk, which in turn controlled Kemikal. These considerations by the Tribunal clearly do not match the high threshold set by the ICJ vis-à-vis direction or control. It also true that the wording used by the Tribunal remains vague on the point, speaking of probability of causation rather than direct control of the State. Indeed, the Tribunal did not further elaborate on this point. On the one hand, it would seem like a lower standard of attribution compared to the effective control test, yet on the other hand, it could also be a reflection by the arbitrators over a factual reality typical of many State capitalist investors. Namley, a rather blurred division between a State-owned/State-managed corporate entity and the State.[708]

Coming to other cases, in the cited *Oschadbank v. Russia*, the Depositor Protection Fund (DPF) and the Crimean Self-Defense Force were found to be directed and controlled by the Russian Federation and, therefore, their wrongful conduct were attributable to Russia under ARSIWA Article 8. According to the reports on this case, the arbitrators followed the Claimant's reasoning concerning DPF's 'true nature', which was founded by Russia to implement Russian legislation on depositor protection in the Crimean financial system, and, therefore, to be directed and controlled by the State within the meaning of ARSIWA Article 8.[709] The same applied to the Crimean Self-Defense Force, 'which the Supreme Council of the Autonomous Republic of Crimea put under the supervision and control of the Internal Affairs Ministry of the Autonomous Republic of Crimea, which is in turn directly controlled by

[706] ibid.

[707] *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan* (I), para 1094.

[708] Be as it may, one could say that the result would be the same, namely that the Tribunal indeed attributed the origin of the breach to the State.

[709] Johanna Braun (n 441).

Russia'.[710] Here attention seems to have been given to the chain of control between the entities and the sponsoring government and the function of such entities within the State apparatus.

In reading such tribunals' reasonings, one has to bear in mind that State ownership is held as one of the most relevant (yet alone not decisive) elements when analysing the influence of a State over an economic entity.[711] In this connection, as explained, international law recognises the general separateness of the corporate forms, except for cases whereby the corporate structure is used purposely for abuses. Hence, while full ownership might amount to a strong indicator of control or the power to direct, it might also be just a single factor showing the State's *potential ability* to influence the entity, yet not the *actual* control/direction exerted over it. Consequently, time and again, State ownership must be disentangled from the idea of 'control'.[712]

For instance, in *Salini v. Morocco*, the Tribunal analysed the corporate structure of the National Highway Society of Morocco (ADM) to assess whether it could be seen as a public entity to establish *ratione personae* jurisdiction.[713] The State of Morocco held around 89% of shares in ADM and consequently determined the majority of the members of the Board of Directors. Specifically, the Tribunal found that

> *the fact that a State may act through the medium of a company having its own legal personality is no longer unusual if one considers the extraordinary expansion of public authority activity. In order to perform its obligations, and at the same time take into account the sometimes diverging interests that the private economy protects, the State uses a varied spectrum of modes of organisation, among which are in particular semi-public companies, similar to ADM, a company mostly held by the State which, considering the size of its participation (over 80%), directs and*

[710] ibid.

[711] Luca Schicho (n 382) 205. Schicho suggests that the primary legal framework for the relationship between the State and the State entity would be corporate law rather than public law'.

[712] Indeed, it is well established that a majority stake in a company might not necessarily imply control and, to the opposite, a minority stake might provide control through special voting rights like golden shares.

[713] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para 32.

*manages it. All these factors resolutely imprint a public nature on the said company.*[714]

In the same vein in the 2014 *Yukos v. Russia* Award, the Tribunal held that notwithstanding the extensive signs of control of Russia over the entity (Rosneft), attribution could not be established under ARSIWA Article 8. Specifically it held that Russia owned 'all, or, subsequently, over 70 percent of the shares of Rosneft', and that 'Rosneft's officers were […] appointed by the State and many of the members of Rosneft's Board of Directors concurrently occupied […] senior executive positions in Government, some close to President Putin'.[715] However, the arbitrators found that this was not decisive to attribute the acts of Rosneft to Russia 'because it would be difficult, if not impossible, to prove that Rosneft in so acting, did so at the instructions or direction, or under the control of the Russian State […]'.[716]

In other terms, State ownership, as also the close corporate ties between a State and an entity, does not in and of itself constitute a ground for attribution of conduct of a State entity to the sponsoring State, as each State has the right to choose and develop its economic system in all freedom.[717] It is the political use of such ownership (and of the said ties) to pursue a specific result that can, on the contrary, constitute a ground for attribution. The conduct of an SOE is only attributable when it is proven that a State has used its ownership interest in a corporation specifically to direct that conduct.[718]

Hence, we can see how the threshold to prove such control is key to such analysis. As will also be shown concerning the tribunals' analysis of the *locus standi* of SWFs and other State entities as claimants, investment tribunals have generally upheld the international law test

[714] ibid. para 35.

[715] *Yukos Universal Limited (Isle of Man); Veteran Petroleum v The Russian Federation,* PCA Case No. 2005– 04/AA227, 2005–05/AA228, Final Award, 18 July 2014, para 1468.

[716] ibid. para 1469.

[717] UN General Assembly, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) A/RES/2625(XXV) <https://www.un.org/ruleoflaw/files/3dda1f104.pdf> accessed 31 August 2021.

[718] Nonetheless, just because States may do so, it does not automatically entail they certainly and always will.

under ARSIWA Article 8 instead of developing a specific test applicable to investment cases.[719] This means that tribunals have usually required 'effective control' within the meaning of the ICJ finding in *Nicaragua* and, as we will see in the following parts of this work, also for purposes other than attributing wrongful acts to States.

### 4. ARSIWA Article 8 Threshold: The 'Effective Control Test' in ISDS

Generally, tribunals require the Claimant to be able to show both general control exerted by the State over the entity and a form of direct control of the State over the conduct to be attributed. Starting from the discussed *Jan de Nul v. Egypt* case, the Claimant referred to the legal framework of the State entity involved and its relationship to the Egyptian State. It pointed out that a presidential decree determined the appointment, removal and decisions of salaries of all relevant decision-makers of the entity. The entity was under reporting obligations to the Prime Minister, who had the power to approve the board of directors' decisions. The Tribunal did not engage in an analysis of the mentioned relationship between the entity and the State. It referred to the effective control test stating that it requires 'both a general control of the State over the person or entity and specific control of the State over the act, the attribution of which is at stake'.[720] On this ground, the Tribunal concluded that there was no evidence of such strict control over the lamented conduct and attribution under ARSIWA Article 8 could not be established.[721]

Many investment tribunals have followed this approach.[722] For instance, in *Georg Gavrilovic v. Croatia*, the Tribunal noted that absent evidence of both general and specific control, the conduct could not be attributable to the State under ARSIWA Article 8.[723] The

[719] See for instance, *Wintershall A.G., et al. v. Government of Qatar*, Partial Award on Liability, 5 February 1988, 28 ILM 795 (1989), *Nykomb v. Latvia*, Award, 16 December 2003, para 4.2.; *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, 26 November 2009, para 119, 121, 144.

[720] Jan de *Nul v. Egypt*, Award, para 173.

[721] See also *Impregilo v. Pakistan*, Decision on Jurisdiction, para 198.

[722] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (n 393) 159–161.

[723] *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018. See, also *Tatneft v. Ukraine*.

Tribunal noted that ARSIWA Article 8 stipulates an effective control test under which, for the conduct to be attributable to the State, it is required that the State exercises both general control over a private party and specific control over the conduct in question.[724]

In the 2020 *Hamester v. Ghana*, the Tribunal first recalled how the jurisprudence of the ICJ sets a very demanding threshold. Then it expressly stated that the test elaborated in the international criminal caselaw by the ICTY that deems, at least for military or para-military groups, general control as sufficient, as no need for specific control over the acts committed by members of such groups, is not exportable in an investment law context.[725] Therefore, it would seem that not only the overall control test has not been used so far by investment arbitrators but that tribunals, such as *Hamster v. Ghana*, have expressly rejected it.[726]

This was also maintained in the more recent 2020 *Ortiz v. Algeria* case, where in its Award, the Tribunal distinguished the two levels of control, general and specific, admitting, in this case, the existence of the first but rejecting the presence of the second.[727] Specifically, it found that

> *[w]hile the Tribunal is ready to accept that the Algerian State exercised an overall control over [the State-owned construction company][…] however [it] detects no convincing element in the record that would allow to conclude that the State gave specific instructions or directions to [the SOE] or that it allegedly exercised a specific control over [it] in relation to [three acts allegedly in breach]. As explained above, Article 8 requires a party to demonstrate the existence of an instruction or a direction or an effective control, that is both general and specific,*

[724] Oleg Alyoshin, Olha Nosenko and Ivan Yavnych, 'The Investment Treaty Arbitration Review: Attribution of Acts or Omissions to the State' [2021] The Law Reviews <https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/attribution-of-acts-or-omissions-to-the-state#footnote-016-backlink>.

[725] *Hamester v. Ghana*, Award, para 179. Not surprisingly, investment arbitrators have not relied on the overall control test given that the ICJ rejected it in the Genocide Convention case.

[726] In the 2017 *Teinver S.A. v. Argentine Republic* Award the Tribunal after having endorsed the effective control test, however noted that even the 'lower test' of the overall control test was not satisfied. See para 724.

[727] *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1 Viñuales (n 575), 62.

*and it does not suffice to contend that the activity of [the SOE] in general was under State control, as the Claimant suggests.*[728]

However, it must be added that some slightly diverging approaches *vis-à-vis* ARSIWA Article 8 application can be found in investment arbitration. Indeed, while the general trend is described above, some investment tribunals applied more lenient tests than the ICJ effective control test. This is, for instance, the case of the 2009 *Bayindir v. Pakistan* Award.

In this case, the mere 'clearance' from the then military ruler of Pakistan, General Musharraf, was held sufficient by the Tribunal to consider the decision of a State entity as attributable to the State.

It has been noticed that the *Bayindir* test 'is not representative of the exceptional character of attribution under Article 8 of the ILC Articles'.[729] The *Bayndir* Tribunal took into account an act which, in principle, falls short of giving a specific 'instruction', 'direction' or 'control' and operates as permission weighing it against the backdrop of a highly political context of the case.[730] However, it has been noticed how 'permission' is, in principle, different from 'instruction' and 'direction'. First because 'permission' presupposes that 'the impulsion for the act does not come from the State organ but from the person or group of persons whose acts the claimant seeks to attribute', which also implies a level of autonomy.[731] Secondly, 'permission' does not imply that the State organ is aware of all the details, 'which again would emphasise a certain margin of manoeuvre in the future conduct of the person or group of persons'. [732]

Yet, in this regard, the *Bayndir* Tribunal expressly stated that the levels of control required for a finding of attribution under ARSIWA Article 8 and the effective control test

[728] *Ortiz v. Algeria*, para 254.

[729] Viñuales (n 575), 58. 'Such a relaxation of the requirements could not serve as standard, and it does not reflect general international law'.

[730] Yet, such permission is not an "acknowledgement and adoption" of the conduct, in the meaning of the rule formulated in Article 11 of the ILC Articles, because it takes place before the act is performed.

[731] Viñuales (n 575), 58.

[732] ibid.

might not be suitable for an international economic law application.[733] Specifically, the arbitrators held that

> *the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. [The Tribunal] believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.*[734]

Some scholars have warranted that this relaxation of the ILC control threshold adopted by the *Bayindir* Tribunal should not be taken as a signal of the relaxation of the requirements under general international law.[735] Indeed, such scholars believe the only reason why such a conclusion may be justified lies in the factual circumstances of the *Bayndir* case, namely the highly concentrated nature of political rule in Pakistan under General Musharraf rather than the permission itself.

> *[I]t is not the permission as such which would make the act attributable but the confluence of three other elements, namely the highly concentrated political rule in one person, the fact that the permission comes directly from this person (rather than other State organs), and the manifest ability of the claimant to prove such clearance.*[736]

In the absence of such circumstances, the risk would be that any act in a politically concentrated regime would be deemed to be attributable on the assumption that it can only proceed with the approval of the State. One can however wonder whether this reasoning could equally be a justification for ignoring similar context with less blatant regime concentration.

Moving onto other cases, as seen in *Encana v. Ecuador*, the Tribunal noted that the SOE Petroecuador was subject to instructions from the President of Ecuador. It also noticed that the

---

[733] *Byindir Insaat Turizm Ticaret ve Sanayi v. Pakistan*, Award, *supra*, para 130.

[734] id.

[735] Viñuales (n 583), 59.

[736] ibid.

Attorney-General exercised authority to supervise the performance of contracts and propose or adopt the judicial actions necessary for the defence of the national assets and public interest. Thus, the Tribunal held that

> *[a]ccording to the evidence, this power extended to supervision and control of Petroecuador's performance of the participation contracts and to their potential renegotiation […] conduct of Petroecuador in entering into, performing and renegotiating the participation contracts (or declining to do so) is attributable to Ecuador.*[737]

What is noticeable is that the Tribunal did not thoroughly analyse the supervisory power exercised by the State organs over Petroecuador, which might be interpreted as the application of a lower threshold compared to effective control.[738]

In the 2017 *Ampal v. Egypt* Decision on Liability, the Tribunal found overwhelming evidence that the two-State entities involved in the case decided to conclude and then terminate the agreement with the investor with the blessing of the highest levels of the Egyptian Government. The Tribunal established that the conduct was attributable to Egypt under Article 4 and, in any event, also under ARSIWA Article 8 and ARSIWA Article 11.[739] In particular,

> *[s]uch acts [were] attributable to the Respondent pursuant to Article 8 of the ILC Draft Articles on State Responsibility as [the entities] were 'in fact acting on the instructions of, or under the direction or control of the Respondent in relation to the particular conduct.*[740]

---

[737] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (formerly *EnCana Corporation v. Government of the Republic of Ecuador*), para 154. However, the Tribunal went as far as saying that for attributing such conduct it did not matter whether this result flows from the principle stated in ARSIWA Article 5 or that stated in Article 8. According to that Tribunal the result would be the same.

[738] Luca Schicho (n 382) 202. See also, *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Award, 12 November 2008, para 107-108.

[739] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability, para 146. Since the Respondent subsequently ratified the termination of the agreement, it thus 'acknowledge[d] and adopt[ed] the conduct in question as its own within the terms of such agreement'.

[740] id.

Other tribunals followed this approach by looking at the general scenario in which an entity would operate, like in the discussed *Karkey v. Pakistan*.[741] Similarly, in the 2017 *UAB v. Latvia* dispute, the Tribunal had to determine whether the initiation of civil actions resulting in a freezing order against the investor by two companies wholly owned by a Latvian municipality could be attributed to the State under ARSIWA Article 8.[742] The Tribunal held that the 'body of circumstantial evidence' suggested that the municipality 'orchestrated the legal claims using the two companies as an instrument to implement its public policies in the sector of the local supply of heating'.[743] In this case, the Tribunal specifically recalled that 'although the Municipality's sole ownership of the companies is not by itself sufficient to found an inference of direction, it is a significant background factor'.[744]

### 5. The 'Particular Result' Requirement in ISDS

Beyond instructions, direction and control, the ILC Commentary to ARSIWA Article 8 states that the conduct of a State entity can be attributed to the State when evidence is found that the corporation was exercising public powers or that the State was using its ownership interest in or control of a corporation specifically to achieve 'a particular result'.[745] Overall, while shared goals that indicate political alignment between a State and an entity may suffice 'for the purposes of political attribution, the same cannot be said for the establishment of legal liability'.[746]

In the discussed *EDF v. Romania*, for instance, the attribution of conduct to Romania according to ARSIWA Article 8 was established upon finding an articulated system of

[741] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para 573, 590, 595. See also *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, para 299.

[742] *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, para 827-829. See Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 176.

[743] ibid.

[744] ibid.

[745] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368).

[746] Kubo Mačák (n 632).

mandates through which the government had issued clear directives to the two Romanian SOEs (AIBO and TAROM). The adoption of a resolution conforming verbatim said instructions by the General Assembly of AIBO shareholders confirmed this finding.[747] Specifically, the Tribunal held that

> *the Romanian State was using its ownership interest in or control of corporations (AIBO and TAROM) specifically 'in order to achieve a particular result' within the meaning of the ILC Commentary above. The particular result in this case was bringing to an end, or not extending, the contractual arrangements with EDF and ASRO and instituting a system of auctions.*[748]

While the particular result enquiry is consistent with the ILC Commentary, investment tribunals have sometimes interpreted it as a result that should ultimately be at odds with the entity's interest. In other words, investment tribunals have applied ARSIWA Article 8, yet searching for an interest of the State in directing that particular conduct of the SOE that also was antithetic to the latter's subjective interests.[749] The *EDF* Tribunal stated that

> *[t]he test, as it has to be, is subjective, not objective, under the 'particular result' formulation of the Commentary to Article 8, if for no other reason than neither this Tribunal nor any tribunal is generally in a position to make a judgment as to what is objectively in the best interests of a company for purposes of State attribution.*[750]

Indeed, the Tribunal noticed that the Romanian SOE AIBO had 'long-awaited' the extension with EDF's contract. Nevertheless, it needed the approval of the Ministry, which never came because of a change in the national policy. AIBO had to follow such Ministerial direction and terminate the contract with EDF, even though this might not have been in its best business interests.

Specifically, in paragraphs 211 and 212 of the Award, the Tribunal stated that the core of the question of attribution related to the management of AIBO and TAROM, which was

---

[747] Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 174.

[748] See *EDF v. Romania*, Award, para 201.

[749] id. para 210.

[750] id. para 210.

'perceived to be in the Companies' interest just before the change in government policy regarding the extension of ASRO's […] contract […]'. In the Tribunal's view, there was much evidence of how AIBO and TAROM perceived their business interest. Nevertheless, the Tribunal noticed such interests seemed to have been swiftly changed right after the change of policy by the new government, elected in November 2000. In the Tribunal's view, such conduct, including the subsequent contract termination, 'was clearly designed to achieve a particular result within the meaning of the Commentary to Article 8 of the ILC Articles,' Hence, it was attributable to Romania.[751]

Other investment awards, such as the 2014 *Tulip v. Turkey*, upheld this reading of ARSIWA Article 8.[752] This case involved an investment trust (Emlak) owned and controlled by a Turkish State organ, namely the Housing Development Organization (TOKI). Emlak administered an SOE, which terminated a contract with the foreign investor. According to Emlak's articles of association, TOKI held 'dominancy in management' in Emlak, 'which meant that the State could exercise 'sovereign control' over the SOE to implement 'elements of a particular state purpose''.[753] However, the Tribunal concluded that attribution to the State could not be established. Emlak indeed terminated the agreement with its best business interests at heart. Specifically, the Tribunal held that

> *the Contract with Tulip JV was made by the Board of Emlak independently, in the pursuit of Emlak's commercial interests and not as a result of the exercise of sovereign power by TOKI. An analysis of the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers, does not lead to the conclusion that Emlak acted under the governmental control, direction or instructions of TOKI with a view to achieving a certain State purpose. Rather, the evidence confirms that Emlak acted in each*

[751] id. para 213.

[752] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28 Award, 10 March 2014, para 307. See also *Unión Fenosa v. Egypt*, Award, *supra*.

[753] See, Carlo de Stefano, *Attribution in International Law and Arbitration* (n 37) 174.

*relevant instance to pursue what it perceived to be its best commercial interest within the framework of the Contract.*[754]

On this point, it is crucial to recall arbitrator Jaffe's dissenting opinion. Contrary to the majority, he found that the acts at issue had been carried out under the control of the State. Arbitrator Jaffe considered that the evidence established that TOKI 'was not only capable of exerting effective control over Emlak through its control over the voting shares and through its representation on the Board of Emlak',[755] but that through the head of Emlak and the Chairman of TOKI, Emlak was all but read out of the decision-making equation as regards termination of the contract at issue.[756] He did not challenge the control test applied by the majority. However, the dissenting arbitrator noticed that the majority had reached its conclusion on the specific result based on the fact that the termination of the contract by Emlak was justifiable under commercial grounds. The reasoning was, therefore, that since the termination of the contract was in the best interest of the company, the act was not to be attributed to the State.

In his eyes, such an approach answered whether the acts of Emlak could be attributed to the State by answering a second question, namely whether the decision to terminate the contract was based on commercially viable grounds.[757] However, as he noticed, 'the answer to the second question does not necessarily foretell the answer to the first'.[758]

We find ourselves in absolute agreement with the Dissenting Arbitrator's statement. Indeed, States can share same goals with their controlled-/owned-entities, which can also be motivated by commercially viable justifications. Thus, excluding attribution on such premises could amount to effectively mixing the answers of two different sets of questions.

Moreover, one has to notice how arbitrators might have slightly 'adjusted' some elements of the attribution route under ARSIWA Article 8, like the particular result test, yet not others, such as the effective control test. Why this difference in treatment? One may be drawn to think

[754] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, Award, para 311.

[755] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, Separate Opinion of Michael Evan Jaffe, 7 April 2014.

[756] id.

[757] id.

[758] id.

that there is an embedded political view guiding this 'pick and choose' exercise, one that might be Western and liberal capitalist and which may emphasise the private nature of an entity and its commercial aspirations.

## 6. Interim Remarks: Are SWFs to Be Considered as State Agents in ISDS?

As a preliminary observation, it has to be borne in mind that ARSIWA Article 8 is a provision intended for attributing to States' conduct of non-State actors. Treating a SWF as a non-State entity would be, *per se*, a peculiar circumstance. Indeed, usually, SWFs are inserted in an overarching public mission entrusted to them by States. They manage public money, as also States are their principal shareholders. Thus, one might be drawn toward framing them under ARSIWA Article 5. This is even more likely as, when dealing with attribution of conduct of a State entity, investment tribunals have handled ARSIWA Article 8 carefully.

This being said, were a SWF to be involved in an investment case and be considered as being neither an organ nor an instrumentality of the State under ARSIWA Articles 4 and 5,then ARSIWA Article 8 would come into play.

Even so, if one were to treat a SWF as a non-State entity under ARSIWA Article 8, tribunals would uphold the public international law 'effective control' test required for establishing instruction, direction or control of a State over an entity. This means that, while general control or oversight might be easily proven in the context of a SWF structure and investment mandate, proving that specific conduct, be it an acquisition, a termination, or a signing of a contract, was directly instructed, directed and controlled by the State might be more difficult.

As it has to be noticed that, in the context of this assessment, the question is how much of the surrounding circumstances tribunals are prepared to look at.[759] However, as already stated, in applying the ARSIWA to SWFs, much would indeed depend on the type of investment structure the SWF would adopt on the political background against which these conducts are taken, this being an element that tribunals usually find not decisive.

[759] Whether one just finds that there is a contract or whether one also investigates its purpose and economic consequences as we have seen for ARSIWA Article 5.

Circling back to the effective control test has been identified as the appropriate standard for ARSIWA Article 8 in *Nicaragua* and *Genocide* cases. The inception of effective control as a test for attribution is closely linked to the issues brought before the Court in such two cases. As some scholarship noticed, the effective test 'was designed to address non-inherent acts contrary to international law such as violations of international humanitarian law'.[760] In Nicaragua, the ICJ was dealing with two different levels of activity: the first was the paramilitary operations of the Contras, whereas the second level of activity involved violations of humanitarian law perpetrated in the course of the para-military operations.[761] It has been submitted that, as such, the elements developed by the ICJ were most probably meant to apply to determining effective control during military operations subject to the laws of war. Thus, the same scholarship has found that the effective control test might have been problematic from the start because it 'tied to violation of international humanitarian law'.[762]

Then, since the *Nicaragua* case, the effective control test has 'permeated' into other subfields of international law, like IIL. However, it has been held that, despite the overall adherence to the employment of said test, the investment arbitrators' approach bears two main differences with the application in the ICJ cases.[763] First, especially in the context of SOEs or companies that States *de facto* control, the hierarchy or organisational element is 'de-emphasised' compared to the importance given in some of the ICJ cases, these being framed in a military setting.[764] Instead, as explained above in the case analysis, arbitral tribunals seem almost exclusively interested in assessing whether States exercised (overall or general) control over the entity and specific control over the conduct. By way of example, this is visible in the words of the 2011 *White Industries v. India* Tribunal, declaring that

[760] Kristen E. Boon (n 448).

[761] Kimberley N. Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (Oxford monographs in international law, Oxford University Press 2011) 43.

[762] Kristen E. Boon (n 448), 10.

[763] ibid.

[764] ibid.

'[*t*]*o the extent that White relies on the organisational structure of Coal India, the manner of appointment of its directors, and the frequency of consultation on issues such as pricing, these matters are largely irrelevant with regard to Article 8*'.[765]

Secondly, arbitral tribunals seem not to always pay much attention to 'what effective control would require under the applicable primary rules of law'.[766] This means there is an almost de-contextualised application of the control test, without a fair regard to the primary norms in the investment legal scenario. Tribunals often discuss the absence of State control over particular acts but rarely refer to primary rules of international law. Boon explains how, by contrast, the ICJ devised the test of 'effectiveness' in *Nicaragua* to address acts contrary to international law, such as violations of International Humanitarian law. [767]

However, IIAs do not usually provide for *lex specialis* vis-à-vis State responsibility nor clarify what type or level of control would suffice to prove that a State is accountable for a State entity's IIA breach. Nonetheless, we value the general observation submitted by the scholarship above. Notably, that control is inherently context-specific. This means that control is to be assessed against the backdrop of a specific factual background.[768] In addition, control should be appreciated in the specific legal context in which is applied. Assessing State control over armed groups in extraterritorial conflicts might require higher or even just different considerations than State control over economic entities in the corporate context. Authoritative voices in international law have pointed out how the effective control test is *per se,* potentially too demanding, even in the context of armed conflicts.[769] As such, it might not be far-fetched to say that care is required when applying abstract secondary rules that may cede to an economic, legal context and a specific factual reality, especially if we talk about attribution of

[765] *White Industries Australia Limited v. The Republic of India*, UNCITRAL Arbitral Tribunal, Final Award, 30 November 2011, para 8.1.6.

[766] Kristen E. Boon (n 448).

[767] ibid 20.

[768] Antonio Cassese (n 642), 665.

[769] ibid 652. See also *Bosnian Genocide* (Separate Dissenting Opinion of Judge Al-Khasawneh and Dissenting Opinion of Judge *ad hoc* Mahiou).

conduct by convoluted financial actors such as SWFs and SOEs.[770] This may even be more so in light of parallel inquiries in other fields of economic law as trade law.

## F. PARALLEL PERSPECTIVES: THE NOTION OF 'PUBLIC BODIES' AS CONSTRUED BY THE WTO DISPUTE SETTLEMENT MECHANISM

To complete our enquiry on the appraisal of sovereign investors' nature by ISDS tribunals, we think it would be appropriate to put it in context with similar discussions that emerged in the 'academic proximity' of international investment law. We refer to the debate concerning the meaning of 'public body' in international trade law.[771] Indeed, what constitutes a 'public body' has sparked one of the most controversial debates on the legitimacy and integrity of the WTO dispute settlement system.[772] Precisely, WTO Dispute Settlement Panels (Panels) and the Appellate Body (AB) varyingly disagreed on the interpretation and application of the 'public body' concept.[773]

The term 'public body' is found in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that establishes that a subsidy shall be deemed to exist if there is: '(a) a financial contribution by a government or any public body', and; (b) a benefit is thereby conferred'.[774] According to some, the notion of a 'public body' encompasses a broad set of entities, agencies and institutions, going beyond SOEs and enterprises conducting public functions.[775] Nonetheless, there is an undisputable interpretative issue of what 'public body' means in the context of the WTO system, since, very much like the 'governmental

[770] Kristen E. Boon (n 448), 23.

[771] It may be worth noticing that there are other provisions on State trading enterprises such as GATT XVII, (STEs) or governmental functions (GATS) but for the purposes of this work, we only selected one main issue.

[772] Dukgeun Ahn, 'Why Reform is Needed: WTO 'Public Body' Jurisprudence' (2021) 12(S3) Global Policy 61. For more information on the treatment of SOEs in Kim (n 628).

[773] Julien Chaisse, 'Untangling the Triangle: Issues for State-controlled Entities in Trade, Investment, and Competition Law' in Julien Chaisse and Tsai-yu Lin (ed), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford University Press 2016).

[774] *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, 1867 U.N.T.S 14 (entered into force 1 January 1995).

[775] For a more detailed account on this issue, see Dukgeun Ahn (n 775) 62.

authority' conundrum in the ILC Commentary, WTO Agreements provide no clear definition. Therefore, the content and scope of this concept have been mainly developed by the WTO case law.[776]

## 1. From a Control-Based Notion of 'Public Bodies' to the Focus on Governmental Authority

Initially, the existence of a 'public body' was established based on the government control standard, as in the case of *Korea – Commercial Vessels*.[777] Here, the European Communities argued that the Export-Import Bank of Korea (KEXIM) was a public body because it was created and is operated based on a public statute giving the Government of Korea control over its decision-making.[778] The Panel stated that an entity would constitute a 'public body' if it were controlled by the Government (or other public bodies). Hence, were an entity controlled by the Government (or other public bodies), any action by that entity could be attributable to the Government and should therefore have fallen within the scope of Article 1.1(a)(1) of the SCM Agreement. Interestingly enough, in this assessment, the Panel excluded the public policy objective as a relevant factor for determining a public body. However, government control was not treated as a decisive factor in other instances. This is because, in those other cases, the entities functioned in accordance with market considerations, while KEXIM was a policy-financing agency.[779]

However, one could say that it was not until the *US – Definitive Anti-dumping and Countervailing Duties on Certain Products from China* (*US – AD/CVDs (China))* case that the 'public body' interpretative issue became central in a Panel's and AB's reports.[780] In this

[776] See Dukgeun Ahn (n 772).

[777] *See* also Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, para 7.1359, WT/DS316/R (June 30, 2010).

[778] Alternatively, other public bodies.

[779] This reasoning echoes ARSIWA Article 4. See Dukgeun Ahn (n 772).

[780] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ('*US – AD/CVDs (China)*'), WT/DS379/R. See, Report of the Panel, 22 October 2010. Report of the Appellate Body 11 March 2011.

landmark case, the issue was the extent to which Chinese SOEs or State-owned commercial banks constituted 'public bodies' for Article 1.1(a)(1) of the SCM Agreement.[781]

The background to this case is that in 2007, the United States Department of Commerce (USDOC) determined that China's economy, albeit still not a market economy[782], had undergone sufficient economic reform to enable the USDOC to identify and countervail subsidies granted by the Chinese Government. The USDOC also determined that the Chinese State-owned commercial banks and SOEs were public bodies. Following these findings, the United States began applying countervailing duties to certain imports from China. As a result, on 9 December 2008, China requested the constitution of a WTO panel, claiming that the US countervailing duties[783] were inconsistent with the obligations of the United States under, *inter alia*[784], the SCM Agreement.[785]

[781] Gregory Messenger (n 583). Also see, Ru Ding, ''Public Body' or Not: Chinese State-Owned Enterprise' (2014) 48(1) Journal of World Trade 167.

[782] Petros C. Mavroidis and André Sapir, *China and the WTO: Why Multilateralism still Matters* (Princeton university press 2021), especially from 68.

[783] China requested consultations concerning the definitive anti-dumping and countervailing duties imposed by the United States, covering four products from China to the United States. See, Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R.

[784] China considered that the US measures were inconsistent with the obligations of the United States under Articles I and VI of the General Agreement on Tariffs and Trade 1994 ('GATT 1994'); Articles 1, 2, 9, 10, 12, 13, 14, 19 and 32 of the SCM Agreement; Articles 1, 2, 6, 9 and 18 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Anti-Dumping Agreement'), and Article 15 of the Protocol on the Accession of the People's Republic of China. See, *General Agreement on Tariffs and Trade* (1994), 15 April 1994, 1867 U.N.T.S 187, 33 I.L.M. 1153 (entered into force 15 January 1995) ('GATT 1994'), and *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* 1994, 15 April 1994, 1868 U.N.T.S. 201 (entered into force 1 January 1995) ('Anti-Dumping Agreement').

[785] On 22 October 2010, the Panel report was circulated and China appealed the Panel's findings regarding the USDOC's determinations on 'public body', 'specificity', 'benefit benchmarks', and 'double remedies'. On 11 March 2011, the Appellate Body report was circulated to Members.

China challenged the US interpretation of the term 'public bodies' and, paraphrasing the Appellate Body in *Canada – Dairy*[786], submitted that they should be defined by adopting a functional approach. Precisely, China argued that they are entities which exercise powers [or authority] vested in them by a ''government' to perform functions of a 'governmental' character'.[787] In other words, to China, these are entities vested with government authority and performing governmental functions, authorised by the State's law to exercise functions of a governmental or public character. Their acts in question must be performed in the exercise of such authority.

Following this reasoning, government-owned entities should then be *prima facie* treated as 'private bodies' unless a government created them to carry out governmental functions and vested them with authority to do so. In China's view, what would distinguish the conduct of public bodies from that of private bodies is not 'the degree of government ownership – the government may have ownership interests in both – but the source and nature of the authority the entities possess and exercise'.[788]

Most importantly, China invoked the customary rules of attribution as codified by the ARSIWA, specifically Articles 5 and 8, arguing in favour of their relevance vis-à-vis the interpretation of Article 1.1 (a) (1) of the SCM Agreement.[789]

The United States, on the other hand, defined public bodies as entities controlled by a government relying on the criterion of majority government ownership. It maintained that China had equated the terms 'government' and 'public body', making them 'functional equivalents' and 'the essence of a 'public body'' as fungible to the one of a 'government', namely to perform certain functions pursuant to government authority and power'.[790] The US disagreed with this view holding that, if that were the case, there would have been no need to

[786] *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/33, Report of the Appellate Body 13 October 1999.

[787] *US – AD/CVDs (China)*, WT/DS379/R, Report of the Panel, 22 October 2010, para 8.5.

[788] id.

[789] China argued that the ARSIWA being rules of international law applicable in the relations between the parties in the sense of Article 31 (3) (c) of the Vienna Convention (VCLT) were therefore applicable to the case.

[790] *US – AD/CVDs (China)*, WT/DS379/R, Report of the Panel, 22 October 2010, para 8.22.

use the two different terms of government and public body in Article 1.1(a)(1). The US then built the interpretation of 'public body' by contrasting it with the notion of 'private body' in Article 1.1(a)(1)(iv) SCM Agreement.[791] Indeed, given that the term 'private body' stands as 'the opposite of 'public body', and the ordinary meaning of the term 'private' includes the notion of being owned by individuals, not the State, the term 'private' in the context of Article 1.1(a)(1) indicates that a 'public body' can be an entity owned by the state'.[792] Therefore, ownership and control were the key factors in the US 'public body' analysis. This was so as

> *[c]ontrol, indicated by whole or majority ownership, can lead to a public body analysis, while the giving of responsibility to, or exercising authority over, an entity that is not necessarily government-owned or controlled will lead to an entrustment or direction analysis.*[793]

Moreover, the US strongly rejected China's argument that the ARSIWA were of use to the dispute at hand. In the US's view, being secondary norms of international law, the ARSIWA's objective 'is not to define the primary rules establishing obligations under international law [as the SCM Agreement] but rather to define when a [S]tate (as opposed to some other entity) is responsible for a breach of those primary rules'. Therefore, they were not applicable to solving the 'public body' interpretative issue.

Ultimately, the Panel agreed with the US by maintaining that 'public body' meant 'any entity controlled by a government'.[794] It acknowledged that there was no clear definition for

---

[791] 'For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1)there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), i.e., where: […] a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments'. See Article 1 SCM Agreement, <https://www.wto.org/english/docs_e/legal_e/24-scm.pdf>, accessed 19 May 2022.

[792] id.

[793] idem, para 8.33. Here, the US also stated that this approach was as 'was recognized by the Panel and the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, and rightly adopted by the panel in *Korea–Commercial Vessels*'.

[794] *US – AD/CVDs (China)*, WT/DS379/R, Report of the Panel, para 8.81.

the term 'public body', stressing how different jurisdictions define what constitutes it in different ways.[795] It then noticed that '[s]ome of these [definitions] go well beyond government agencies or similar organs of government, and include, *inter alia*, government-owned or -controlled corporations providing goods and/or services'.[796] Nevertheless, like the US, the Panel considered government ownership to be highly relevant and potentially conclusive evidence of government control. On that basis, it upheld the USDOC's determinations that the Chinese SOEs and State-owned commercial banks constitute public bodies. Moreover, siding again with the US, it also took the view that the ARSIWA, specifically Article 5, were irrelevant to the interpretation of Article 1.1 of the SCM Agreement.

Given the above, it is clear that the Panel favoured an interpretation centred on control as the principal distinctive factor in identifying the existence of a public body. Some trade law scholars criticised the Panel's stand, arguing that, instead of focusing on the distinction between 'public body' and 'government' and between governmental and non-governmental functions, as it should have, the Panel pivoted the whole discussion on the private-public sectors dichotomy. This, in turn, might have led the Panel to a control-based interpretation of the entire economic activity under scrutiny. In such a way, it followed that the public sector was identified as part of the economy 'under State control', and private enterprises as part of the economy as 'privately controlled'.[797]

In this connection, China appealed the Panel's decision. Its submissions to the AB specified how the USDOC should have begun its investigations with the presumption that the Chinese SOEs and State-owned commercial banks were private bodies. Then, only in the second stage should the USDOC have moved onto examining whether they were exercising governmental authority to perform governmental functions.[798] According to China, this assessment should have been performed by considering factors such as

[795] Gregory Messenger (n 583).

[796] *US – AD/CVDs (China)*, Panel Report, para 8.60.

[797] Gregory Messenger (n 583).

[798] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, para 44. Moreover, at para 27, the AB recalled how China stated that 'whether an entity is vested with and exercises authority to carry out governmental functions would not require any analysis of whether the terms of a given transaction are commercial or not'.

*(i) whether the entities were created by special decrees or under company and commercial banking laws; (ii) the purposes for which they were formed; (iii) the nature of the functions they perform; (iv) the nature and scope of governmental authority vested in them; and (v) the laws and regulations under which they operate*'.[799]

In connection to the above-cited criticism of the Panel's reasoning, while not rejecting the Panel's Report in its entirety, the AB dealt with the issue from a different angle. On the one hand, the AB first recalled that while China and the US advocated different definitions of the term, their respective conceptions of 'public body' were not mutually exclusive and considerably overlapped.[800] On the other hand, the AB believed the Panel's interpretation of 'public body' to be lacking a sound legal basis and therefore reversed the latter's finding by adopting a position closer to China's stance.

One could say that the AB opted for a middle-ground solution between the Chinese and the US ways. In fact, the AB did not accept that majority ownership, or the control criterion, alone could be sufficient to establish the public body character of the Chinese State-owned commercial banks. Indeed, the AB held that to be identified as a 'public body', an entity must 'possess, exercised or be vested with government authority'.[801] In other terms, control is 'needed but not sufficient'. It is essential, where necessary, to exercise governmental functions.[802] Nevertheless, the AB found that the USDOC's public body determination regarding State-owned commercial banks was supported by evidence that the latter exercised governmental functions on behalf of the Chinese Government.[803] On this basis, it concluded that State-owned commercial banks in China were 'controlled by the government and that they effectively exercise certain governmental functions'.[804]

---

[799] id. para 44. Visibly, this statement echoes *Maffezzini v. Spain* findings.

[800] *US – AD/CVDs*, Appellate Body Report, WT/DS379/AB/R.

[801] *US – AD/CVDs*, Appellate Body Report, WT/DS379/AB/R, para 335.

[802] Gregory Messenger (n 583), 66. See, *US – AD/CVDs (China)* Appellate Body Report, para 285.

[803] Notably, the Appellate Body noted that the USDOC had included in its public body determinations the acknowledgement that the banking sector in China was almost wholly State-owned.

[804] *US – AD/CVDs*, Appellate Body Report, WT/DS379/AB/R, para 335.

Moreover, the AB held that the Panel had misconstrued the role of the ARSIWA in rejecting China's argument, and it interpreted Article 1.1(a)(1) of the SCM Agreement upon reference to ARSIWA Article 5. In particular, it held that 'despite certain differences between the attribution rules of the ILC Articles and those of the SCM Agreement, our above interpretation of the term 'public body' coincides with the essence of Article 5'.[805] The AB noticed that the ILC Commentary maintains the principle that the 'existence of a greater or lesser State participation in its capital, or ownership of its assets are not decisive criteria for the attribution of the entity's conduct to the State'.[806] The Panel used this argument to reinforce its findings that the term 'public body' in Article 1.1(a)(1) is pivoted on the concept of governmental authority. This is so as State ownership, while not being a decisive criterion, may serve as evidence indicating the delegation of governmental authority in conjunction with other elements.

Therefore, the AB defined the notion of 'public body' starting from the concept of governmental function, which, however, as we have seen so far, remains a highly elusive concept. In this regard, the AB specifically stated that 'just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case'.[807]

---

[805] Consistent with Article 55 of ARSIWA which privileges 'special rules' of responsibility only to the extent that they seek to derogate from the general framework, a WTO panel in Korea – Government Procurement has confirmed the 'residual' application of general international law norms, including ARSIWA, when it stated that they apply 'to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement'. See, Jan Yves Remy, 'The Application of the Articles on Responsibility of States for Internationally Wrongful Acts in the WTO Regime' EJIL Talk! Blog of the European Journal of International Law <https://www.ejiltalk.org/the-application-of-the-articles-on-responsibility-of-states-for-internationally-wrongful-acts-in-the-wto-regime/> accessed 24 February 2022. See also Anna Ventouratou, 'The Law on State Responsibility and the World Trade Organization' (2021) 22(5-6) The Journal of World Investment & Trade 759

[806] *US – AD/CVDs*, WT/DS379/AB/R, Appellate Body Report, para 310.

[807] id. para 317. This approach was maintained in other cases such as the *US – Carbon Steel (India)*, where the AB referred to its findings in *US – AD/CVDs (China)* and recalled that 'the mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body'. *[i]n determining whether or not a specific entity is a public body, it may be relevant to consider 'whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member'. The […] classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies*. See, *United States — Countervailing Measures on Certain*

The AB's decision in *the US – AD/CVDs (China)* sparked substantial political and academic controversies.[808] The very use of the ARSIWA was criticised as a misconstruction of their nature and function.[809] For instance, three of the drafters of the SCM Agreement stated that the AB had pushed for a 'public body' identification grounded in 'a large amount of terminology that is not found anywhere in the [SCM Agreement]'.[810]

On another note, Messenger highlighted how the AB, differently from the Panel, tried to provide for a flexible test that, being 'indeterminate', would aim at serving 'the challenges presented by the plurality of governance structures within the WTO membership'.[811] At the same time, however, the AB also possibly presumed that it could determine what governmental authority or 'function' – if adopting the Chinese terminology – is without engaging with its underlying meaning.[812] This would also explain the heavy reliance on ARSIWA Article 5.

Another criticism raised in this regard is that, beyond the contended legitimacy of employing the ARSIWA in the WTO context, the ARSIWA themselves might not solve the issue of what a public body is and raise additional difficulties. Indeed, by asserting that the interpretation of the 'public body' term essentially coincided with ARSIWA Article 5, the AB opened Pandora's Box of the governmental authority meaning. As Pauwelyn stated, this left

---

*Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/22, Appellate Body Report, 8 December 2014. See also Dukgeun Ahn (n 772), 64.

[808] 'Unless tweaked in future refinements, the AB's test of 'governmental authority/function' is highly questionable as a matter of law, and unlikely to work as a matter of practice'. See, Joost Pauwelyn, 'Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China' (2013) 12(2) World Trade Review 235. See also, Matteo Fiorini, Bernard M. Hoekman, Petros C. Mavroidis, Maarja Saluste & Robert Wolfe (n 811). See as well, Douglas Nelson, 'How Do You Solve a Problem Like Maria? US – Countervailing Measures (China) (21.5), 20 (2021), 556, at 558.' (2021) 20(4) World Trade Review 556.

[809] Joost Pauwelyn (n 811).

[810] Namely Michel Cartland, Gérard Depayre and Jan Woznowski. See, Michel Cartland, Gérard Depayre, Jan Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46(5) Journal of World Trade 979. These authors expressed their concerns about 'a bias favouring SOEs and a significant weakening of subsidy disciplines' created by the AB rulings, see Dukgeun Ahn (n 772), 64.

[811] Gregory Messenger (n 583).

[812] ibid.

trade lawyers facing what could be a rather vague and subjective test of 'governmental authority/function.' As

> *[w]hen does an entity have governmental authority? What is a governmental function? How can any of this be proven? Will governments not find ways to hide delegation of power or instructions, especially if they control the board of a company anyhow? An informal phone call or discussion should suffice, without leaving any trace, so how is a competitor supposed to find evidence of this – as the Panel in this dispute put it, this would amount to finding 'evidence that the Government directed itself'.*[813]

Yet, overall, as discussed in *US – AD/CVDs (China)* and subsequently in *US-Countervailing Measures (China)*[814] and *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*[815], the AB jurisprudence seemed to have arrived at some general conclusions on the notion of 'public body'. First, it seems established that the public body determination should be based on different types of evidence and that the absence of an express statutory delegation of governmental authority does not necessarily preclude a finding that an entity is a public body.[816] Depending on the specific circumstances of each case, such relevant indicia may include:

(i) evidence that 'an entity is, in fact, exercising governmental functions', especially where such evidence 'points to a sustained and systematic practice';[817]

---

[813] Joost Pauwelyn (n 808).

[814] China brought another complaint against 17 countervailing measures imposed by the USDOC. *United States – Countervailing Duty Measures on Certain Products from China* ('*US-Countervailing Measures (China)*'), WT/DS437/ARB, Appellate Body Report, 18 December 2014.

[815] See, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/22, Appellate Body Report.

[816] See, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/22, Appellate Body Report, para 4.10.; *US – Anti-Dumping and Countervailing Duties (China)*, WT/DS437/ARB, Appellate Body Report, para 318.

[817] id.

(ii) evidence regarding 'the scope and content of government policies relating to the sector in which the investigated entity operates';[818] and

(iii) evidence that a government exercises 'meaningful control over an entity and its conduct'.[819]

Amongst such elements, the concept of 'meaningful control' may perhaps deserve a digression. Indeed, the USDOC used 'meaningful control' as the key concept to identify the public body nature of several Chinese entities. In the above-discussed *US – AD/CVDs (China)*, the Panel did not question the US' interpretation that 'public body' could mean an entity that is controlled by a government such that the government can use the resources of that entity as its own. The Panel actually accepted the substantive determination made by the USDOC *vis-à-vis* Chinese SOEs, which had been qualified as public bodies given the Chinese Government's 'meaningful control' such that the entities possessed, exercised or were vested with governmental authority.

In this regard, the Panel explained that the issue of meaningful control was inherently specific to particular factual circumstances and could be established by various relevant factors that should be cumulatively evaluated.[820]

On the other hand, the AB at para 318 of its Report stated that evidence of 'meaningful control' exercised by a Government over an entity and its conduct 'may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions'.[821] Hence, to the AB, meaningful control is conducive, yet no conclusive evidence of the existence of a public body.

However, what does 'meaningful control' mean in practice? It has been put forth that meaningful control requires that the entity's daily operation and decision-making are not

[818] id.

[819] id.

[820] *US – AD/CVDs*, WT/DS379/R, Panel Report, para 7.70.

[821] *US – AD/CVDs (China)*, WT/DS379/ABR Appellate Body Report, para 318. See, Ting-Wei Chiang, 'Chinese State-Owned Enterprises and WTO's Anti-Subsidy Regime' (2018) 49(2) Georgetown Journal of International Law 845.

independent of the government.[822] By way of example, under 'formal control,' the entity's managers would enjoy considerable discretion in making decisions regarding the entity's daily operation 'without much interference from the majority owner'.[823] Conversely, under 'meaningful control', the 'shareholders (majority owners) [would] have extensive control over the managers' decision-making in daily operation of the entity'.[824]

In *US – Carbon Steel (India)*, the Appellate Body was unpersuaded by the United States' understanding of a public body as 'an entity controlled by the government [...] such that the government may use the entity's resources as its own'. [286]

The Appellate Body considered that such understanding was 'difficult to reconcile' with its prior statement that a public body 'must be an entity that possesses, exercises or is vested with governmental authority' in *US – AD/CVDs (China)*. According to the AB in *US – Carbon Steel (India)*, 'a government's exercise of 'meaningful control' over an entity and its conduct, including control such that the Government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body'.[825] Likewise, 'government ownership of an entity, while not a decisive criterion, may serve, in conjunction with other elements, as evidence'.[826] However, the AB reiterated that an investigating authority must 'avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant'.

Interestingly, in the *US–Pipe and Tube Products (Turkey)*, the Panel rejected USDOC's argument that the two Turkish entities, Erdemir and Isdemir, were public bodies and upheld

[822] *US-Countervailing Measures (China)*, WT/DS437/R, Panel Report, July 14, 2014; *US-Countervailing Measures (China)*, WT/DS437/AB/R, Appellate Body Report.

[823] Yingying Wu, 'Reforming WTO Rules on State-Owned Enterprises: SOEs and Financial Advantages' (2019) 39(3) Northwestern Journal of International Law & Business 275, 283.

[824] ibid.

[825] *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/22, Appellate Body Report, para 4.20.

[826] id.

the approach above.[827] Specifically, the USDOC maintained that Turkey exercised meaningful control over the entities through a Turkish Pension Fund (OYAK), which held the majority of shares in Erdemir, which in turn owned more than 92% of Isdemir. However, the Panel was unpersuaded that such an ownership structure was enough to establish that the fund exercised meaningful control over the two entities and attribute the two entities' actions to the Government. The Panel found that the USDOC failed to apply the standard applicable to the public body enquiry in its assessment of meaningful control. Indeed, it failed to establish that the entities possessed, exercised, or were vested with governmental authority to perform a governmental function.[828]

## 2. Parallel Struggles

The 'public body' interpretative challenge faced by the WTO Panels and AB points at more structural[829] and fundamental issues within the WTO system and, to a larger extent, of international economic law.[830] One of those is whether and, if so, to what extent the WTO can handle Chinese State capitalism and other non-market economies within the framework of global trade rules that are, like international investment rules, primarily designed to deal with free-market economies.[831]

---

[827] *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India ('US–Pipe and Tube Products (Turkey)')*, WT/DS436/22/ABR, Appellate Body Report, para 4.20, 1 April 2019.

[828] WTO, *US – Pipe and Tube Products (Turkey)*, WTO Dispute Settlement: One Page Case Summary. As we saw already in the previous Chapters, recent FTAs, like the CTPP or the USMCA, define SOEs mainly through government ownership and control criteria, and this might have been caused by the controversial WTO Appellate Body jurisprudence related to SCM Agreement. See, Julien Chaisse (n 828).

[829] Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, Michelle Q. Zang (ed), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge University Press 2018).

[830] Francesco Montanaro and Federica Violi, 'The Remains of the Day: The International Economic Order in the Era of Disintegration' (2020) 23(2) Journal of International Economic Law 299. See also, Xinquan T Siqi Li, 'Reforming WTO Subsidy Rules: Past Experiences and Prospects' (2020) 54(6) Journal of World Trade 853. See further, Jakob Arnoldi, Anders Ryom Villadsen, Xin Chen, Chaohong Na, 'Multi-Level State Capitalism: Chinese State-Owned Buisness Groups' (2019) 15(1) Management and Organization Review 55.

[831] Dukgeun Ahn (n 772). For an in depth analysis of the issues raised by the Chinese economic model in the global trade system see, Mark Wu (n 5).

Indeed, it is not by chance that such reasoning by the AB resonates with what was discussed so far *vis-à-vis* the ARSIWA's application in ISDS. Indeed, many of the above considerations seem to mirror precisely the ones discussed earlier concerning the difficulty of ascertaining the governmental character of sovereign investors' functions in ISDS. It seems that, when it comes to State capitalist SOEs, the struggle to find factual content as also a set of fixed criteria to pinpoint the highly vague and politically charged governmental authority concept is shared by other economic law branches.

In this connection, the WTO AB has already set a precedent for Chinese SOEs and State-owned commercial banks to be classified as public bodies and, therefore, as entities in which the Chinese Government has a full or controlling ownership interest, 'possess, exercise, or are vested with governmental authority'. Some have wondered whether this ruling could cross-fertilize investment arbitration for attribution of State responsibility or ascertaining the *ius standi* of a Chinese State-owned claimant. As Du stated, it remains to see whether investment tribunals will find it appropriate to borrow the WTO jurisprudence on 'public bodies' in ARSIWA Article 5 analysis.[832] However, even if in the affirmative, this would probably not solve the issue of whether the Chinese SOE exercise 'governmental authority in the specific investment dispute'.[833]

Beyond ARSIWA Article 5, one could also argue that the AB 'meaningful control' approach could be, through cross-fertilization, somehow of guidance in assessing the direction and control of sovereign investors in investment arbitration. However, it is hard to think meaningful control would not be read through the lenses of ARSIWA Article 8 in ISDS. The preliminary question to be asked would be whether investment arbitrators could, if they felt it needed, divert from a strict interpretation of the ARSIWA to embrace a more economic-based approach to the rules of attribution.

Indeed, while extending our analysis to other legal branches may benefit a more comprehensive discussion on this topic, we are not oblivious to the regime-specific differences

[832] Ming Du (n 620), 805. See, Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20(3) European Journal of International Law 749. Robert Howse and Efraim Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (2009) 20(4) European Journal of International Law 1087.

[833] Ming Du (n 615), 812.

among international legal branches. That is to say while looking beyond the IIL reading of the above-analysed economic phenomena might be intellectually appealing to us, the structural distance between legal fields may render a judicial cross-fertilization more of wishful thinking than an actually viable pathway.

Nevertheless, we cannot help but wondering whether assuming that the only possible – and crystallised – interpretation of some economic phenomena, such as sovereign investments' (private or governmental) nature, is not, per se, a political choice that ensues specific legal procedural consequences. Indeed, cross-fertilization is, as Ruiz Fabri and Payne rightly put it, 'a process' which may have the potential to reveal the underrated political dimension of the law.[834] Indeed, this process is 'not just about borrowing by adjudicators'.[835] On the contrary, cross-fertilization is, by nature, a legal development that depends on the degree of adjudicators' discretion on both substantial and procedural issues, the adjudicators' duty to decide over several procedural issues, and sociological considerations concerning the circulation of a small number of personnel across multiple international fora.[836] Without overstepping the scope of our inquiry, we still find value in expanding the gaze on how common issues are being addressed in different branches of the highly fragmented international economic legal field.

### G. INTERIM CONCLUSIONS

Investment disputes have been steadily providing various legal and factual patterns to apply the ARSIWA. In this context, one can see that the breaches of IIAs' standards of treatment alleged by foreign investors are often precisely implemented by State entities, such as SOEs. This statement does not come as a surprise as these entities are often expressly set up to deal with foreign investors. Thus, they are frequently involved in the implementation of foreign investments.[837]

Such entities usually do not form part of the official State structure. However, they are delegated to various degrees to manage governmental functions while retaining an overarching

[834] Hélène Ruiz Fabri, Joshua Paine, 'The Procedural Cross-Fertilization Pull' in Mark P Chiara Giorgetti (ed), *Beyond Fragmentation* (Cambridge University Press 2022).

[835] ibid 85.

[836] ibid.

[837] Simon Olleson (n 365), 472.

commercial (or 'private') purpose and structure. In some contexts, while retaining a private corporate identity, States might, in principle, remotely instruct, direct or control specific conduct for specific goals, which might even be at odds with the entity's interests. As the affairs stand today, one can say that the attribution of responsibility in investment arbitration and the consequent application of the ARSIWA occur in highly complex scenarios where such sovereign entities, which are extremely structurally convoluted – as in the case of SWFs – are involved.

Through the application of ARSIWA Articles 4, 5 and 8[838] to investment disputes involving State entities, investment tribunals have been addressing thorny issues such as the identification of the relationship between the State and its instrumentalities, the delimitation of the notion of 'governmental authority', as also the establishing of State 'control' *vis-à-vis* such sovereign entities.

We noted how the separate legal personality of an entity is valued as an important signal of autonomy form the State even if the State ownership in the entity is over the majority. Indeed, in line with the ILC Commentary, State ownership does not in and of itself constitute a ground for attribution of conduct of a State entity to the sponsoring State. Each State has the right to choose and develop its economic system with all freedom by directly participating in the economy by establishing State enterprises or investing in the market. Time and again, the political use of ownership to pursue a 'specific result' can, on the contrary, constitute a ground for attribution under the ARSIWA. In other terms, the conduct of a State-owned entity is only attributable when it is proven that a State has used its ownership interest in a corporation specifically to induce that conduct. Such conduct, in turn, may have merely commercial goals or (also) strategic angles.[839]

The threshold to prove control is crucial to such an analysis, and investment tribunals have upheld the international law 'effective control' test under ARSIWA Article 8 instead of

[838] Sometimes, as seen, also using ARSIWA Article 11.

[839] However, as seen, arbitrators have sometimes required the pursuance of a particular result at odds with the best interest of the entity.

developing a more context-specific reading of such test that might have been precisely tailored to investment dispute scenarios.[840]

At the same time, however, such consistent reading and application of the ARSIWA might beg some critical reflections. As we discussed in other parts of this work, the ARSIWA were designed to apply in inter-State relations and to attribute international wrongful conduct not originally belonging to the economic field. Moreover, voices have been raised as to the Western capitalist-centred vision that the ARSIWA might bring to the issue of attributing conduct to non-Western State capitalist States.[841] Since the early nineties, prominent scholars have shared criticism of what has been called 'a confusing use of a certain kind of legal ideology in international economics litigation'.[842] For instance, Dupuy noticed how it might be misleading to interpret the conduct of such entities with the very liberal principles designed to protect individual property and private initiative in the Western liberal capitalist countries.[843]

More broadly, the ARSIWA and – as we will see in Chapter IV – State immunity principles uphold a conceptual dichotomy between the public and the private dimensions, which is at the very least reflective of a 'traditional' or Western-based view of the role of the State as of its role in the economy.[844] This traditional appraisal sees an almost stark division

[840] See for instance, *Wintershall A.G., et al. v. Government of Qatar*, Partial Award on Liability, 5 February 1988; *Nykomb v. Latvia*, Award, 16 December 2003, para 4.2.; *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, 26 November 2009, paras 119, 121, 144. See, Kristen E. Boon (n 448).

[841] States which are often the States owning or controlling the sovereign entities involved in international economic disputes. See Jan Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36(4) New York University Journal of International Law and Politics 265.

[842] Richard B. Lillich, Gordon A Christenson, Jane Chalmers, David Caron, Pierre M. Dupuy, 'Attribution Issues in State Responsibility' (1990) 84 Proceedings of the Annual Meeting (American Society of International Law) 51 <http://www.jstor.org/stable/25658529>. Jakob Arnoldi, Anders Ryom Villadsen, Xin Chen, Chaohong Na (n 830).

[843] Richard B. Lillich, Gordon A Christenson, Jane Chalmers, David Caron, Pierre M. Dupuy (n 842).

[844] Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) European Journal of International Law 387, 390. See, Gus van Harten, 'The Public—Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56(2) International and Comparative Law Quarterly 371. Rosalyn

between the public and the private spheres, the State and the market, by assessing the nature of the conduct under scrutiny. This same division has been identified as a critical feature of Western liberal thoughts.[845] In this connection, one could even say that ISDS is an excellent field of observation of how the Western, liberal market economy has shaped States' international economic interactions and international responsibility allocation.

The body of attribution rules is pivoted on a liberal conception of the State as a governmental apparatus embedded in a rather market-based economic model. Some doubted that ARSIWA Article 5 would represent a 'compelling legal device' to enhance States' accountability for the acts of their instrumentalities in the context of 'undefined experiences of State-driven economies and, ultimately, of a non-Western conception of the divide between public and private activities'.[846] In other terms, whether State entities operating within a non-Western social, political, and economic system may be legally captured by the rule of attribution of ARSIWA Article 5 in a way that might be contextually accurate has been seen by some as a 'markedly controversial issue'.[847]

The question to be asked here may transcend the scope of our inquiry but stumbling upon it seems inevitable in our conclusions. Notably, is it even possible to define a constant basis for the distinction between public and private? Some scholarship has argued the negative. Specifically, this would be so as concepts such as public and private are, as Chinkin found,

> *complex, shifting, and reflect political preferences with respect to the level and quality of governmental intrusion. Since there is no constant, objective basis for labelling an activity or actor as 'private', the judiciary regularly resorts to this device to avoid ruling on political issues. This, in turn, obscures the ways in which governmental policy regulates the so-called private sphere.*[848]

---

Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' in Pat Rogers (ed), *Themes and Theories* (Oxford University Press 2009).

[845] Christine Chinkin (n 32).

[846] Richard B. Lillich, Gordon A Christenson, Jane Chalmers, David Caron, Pierre M. Dupuy (n 842)

[847] ibid.

[848] Christine Chinkin (n 32), 389.

Chinkin observes that the claim of the universal applicability of international law instruments (such as the ARSIWA) presumes a commonly accepted rationale for distinguishing between the conduct of State organs and other entities. This, in turn, depends on the 'philosophical convictions about the proper role of government and government intervention', which is, again, mainly Western-based in our field of inquiry.[849] However, the location of any line between public and private activity is 'culturally specific, and the appropriateness of using Western analytical tools to understand the global regime is questionable'.[850] This division between the two spheres is more than a distinction between two forms of social and economic activity 'for it also denies the symbiotic dependency between the two'.[851]

Other scholars have noticed that the criticism toward using Western constructs may not apply with such force to the international legal system.[852] This is so as international law is indeed Western in origin, which entails that 'the distinctions between public and private observed in Western societies still have particular explanatory force in this discipline'.[853] It derives that the underlying ideology and the practical consequences that ensued from it have been exported from the West to the rest of the World through international legal discourse.[854] However, as the international economic order is transitioning from the neoliberal order towards

[849] ibid.

[850] ibid.

[851] ibid. In international economic law, non-regulation of the market, commercial activity is seen as outside State control and, hence, State responsibility. Yet, non-regulation is a political choice, or as Chinkin states, 'an expression of political preference'. Chinkin argued that the argument that State responsibility does not apply to commercial acts that constitute international wrongs committed by states 'seems illogical, especially when there is no immunity accorded to such acts under the restrictive view of sovereign immunity'.

[852] Hilary Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law' in Margaret Thornton (ed), *Public and Private: Feminist legal debates/edited by Margaret Thornton* (Oxford University Press 1995) 252.

[853] ibid.

[854] ibid.

a new geoeconomic order,[855] we wonder how much the Western perception of what is commercial and what is not still has an epistemic value.[856]

To conclude, there is an embedded ideological component, or discourse, to the division between the sovereign/public and the commercial/private spheres operated by international law instruments such as the ARSIWA. Against this background, their application to State entities such as SWFs and SOEs is complex, especially when they are owned or controlled by State capitalist governments. Indeed, the extent to which States are entitled to use commercial channels to pursue strategic and geopolitical purposes lies at the heart of the ideological separation between liberal capitalists and State capitalist countries. However, this discourse finds some limits when it comes to investment arbitration. Indeed, it is not in principle for an arbitral tribunal to bear the weight of inquiring about international geopolitics and statecraft hidden behind the corporate appearances of international economic actors, such as SWFs and SOEs. Investment arbitrators are bound by the limits of the disputes they are called upon to arbitrate and the international instruments they have to interpret, using tools that are the ones of public international law.

Nonetheless, this state of affairs does not prevent us from also capturing the problematics of using interpretative and argumentative tools that may fail to consider the discussed ideological discourse underlying the public-private dimensions. In other terms, we should not forget that the perception of what constitutes sovereign or commercial conduct lies in the eye of the beholder. Perhaps, accounting more for the geopolitical, strategical or non-purely commercial objectives of an act by a State-controlled entity might complement the analysis of the nature of the function test. By way of example, *Bosh v. Ukraine* shows how the nature of the conduct under dispute was ultimately categorised as commercial rather than sovereign on the premises of their ultimate purposes and nature.[857] In this way, such teleological-based

[855] Ming Du (n 615), 811.

[856] See Chapter II. More in detail, see Anthea Roberts, Henrique Moraes Choer, Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22(4) Journal of International Economic Law 655. See also, Edward Luttwak, 'From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce' [1990] The National Interest 17.

[857] Moreover, if transposed into the international public law context, it may well serve in cases dealing with, *e.g.*, the delegation of public functions such as the sensitive activity of the management of public jails by

classification would complement the assessment of the corporate or private form by an equivalent degree of attention to the underlying interest in an international deal by a sovereign entity. In the same vein, the Bayindir approach shows the problematics of applying the effective control test in some investment cases and how an arbitral tribunal may opt for a less stringent standard.

While we do not claim to have found a solution to the underlying issue(s) discussed, we believe these to be exemplificative arguments that might serve as a starter to debates becoming more and more relevant in international economic law.

State-owned entity or the acquisition of shares in corporation dealing with sensitive functions such as biotechnology or food security.

# CHAPTER III – SOVEREIGN WEALTH FUNDS AS CLAIMANTS IN INVESTOR-STATE DISPUTE SETTLEMENT

## A. INTRODUCTION

Beyond acting on the respondent side, State entities like SWFs and, more largely, SOEs can act, under certain circumstances, as claimants in ISDS proceedings. Overall, SWFs have brought disputes as shareholders, direct investors or through owning and controlling the entity acting as the claimant.[858] However, only a few investment cases involving SWFs as claimants are reported as of the day of writing.[859]

One of such instances involves the State General Reserve Fund of the Sultanate of Oman (SGRF) that in 2015 filed an ICSID claim against Bulgaria. Under the Oman-Bulgaria BIT, SGRF raised an almost 90 million claim against Bulgaria over the collapse of one of Bulgaria's largest banks, namely Corpbank, of which SGRF was a shareholder.[860] However, on 10 December 2018, SGRF withdrew its claim with prejudice and settled the dispute with Bulgaria.[861]

In 2016, another SWF – the Emirate Ras Al-Khaimah Investment Authority (RAKIA) – initiated an investment claim against India. Specifically, RAKIA brought the dispute against India under the UAE-India BIT for an alleged termination of a supply agreement.[862] RAKIA claimed the loss of USD 44.7 million due to a breach of a supply agreement it signed in 2007

[858] See, Bianca Nalbandian, 'State Capitalists as Claimant is ISDS', Questions of International Law, [2021]. This Chapter has been developed starting from the research carried out in the above-cited paper.

[859] In addition, where the issue of *locus standi* of a SWF was addressed.

[860] *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No. ARB/15/43, Award 13 August 2019.

[861] Corpbank was Bulgaria's fourth largest lender until it saw a run on deposits in 2014. Since then, the bank's license has been revoked and bankruptcy proceedings initiated, amidst allegations from Bulgarian authorities and parliamentarians that the bank's management hid gaping losses by engaging in a pyramid scheme.

[862] *Ras al-Khaimah Investment Authority v. India*, UNCITRAL, PCA, 2016.

with the Indian provincial government of Andhra Pradesh.[863] In 2016, Andhra Pradesh cancelled the agreement following significant opposition due to the government's plan to mine on reserved tribal lands.[864] However, as the hearing is yet to take place, it is unknown whether the SWF standing might constitute an issue for the UNCITRAL tribunal.[865]

In the meantime, other cases involving SWFs have been filed, such as the 2020 *Qatar National Bank v. the Republic of South Sudan and Bank of South Sudan*.[866] As mentioned, SWFs may own or control a given company bringing an investment claim against other States. Such is the case here as the Qatar National Bank – fifty per cent owned by the Qataris SWF QIA – filed a sovereign default-based claim against both the South-Sudanese State and its Central Bank. However, in this case, the Tribunal has not yet addressed the issue of QNB standing as the dispute is still at its early stages.[867]

[863] To construct and operate an alumina and aluminium refining plant. Under the contract, the Andhra Pradesh Mineral Development Corporation, a State enterprise under the control of the provincial government, was to supply bauxite to Anrak Aluminium, an Indian company the investment authority set up to establish the refinery.

[864] Though only citing unfavourable terms and irregularities in the agreement. See Zoe Williams (n 867). See also, Douglas Thomson, 'UAE Investment Authority Takes on India' [2017] Global Arbitration Review <https://globalarbitrationreview.com/uae-investment-authority-takes-india> accessed 23 September 2021. Also see, Jarrod Hepburn, Luke E Peterson and Ridhi Kabra, 'India Round-Up: Updates on Five Pending Investment Treaty Arbitrations, Including Rulings (on Liability in Deutsche Telekom Case), Tribunals and Anti-Suit Injunctions' [2018] <https://www.iareporter.com/articles/india-round-up-updates-on-five-pending-investment-treaty-arbitrations-including-rulings-tribunals-and-anti-suit-injunctions/> accessed 23 September 2021.

[865] Zoe Williams (n 867).

[866] See, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/40> accessed 25 March 2021. See, Vladislav Djanic, 'Banking Dispute Leads to South Sudan's Second Ever ICSID Arbitration' (9 October 2020) <https://www.iareporter.com/articles/banking-dispute-leads-to-south-sudans-second-ever-icsid-arbitration/> accessed 26 March 2021.

[867] Yet, one may wonder how the tribunal will address, if raised, the issue of the QNB's standing, especially given the sensitive matter of the South Sudanese sovereign default.

Other cases involve the Libyan Investment Authority (LIA) that reportedly brought several claims against some African States. It is unclear if these disputes were of an investment treaty nature or of a commercial character, given the sparse information available on these disputes.[868]

Some considerations may be drawn concerning the paucity of disclosed ISDS claims directly filed by SWFs. First, it may be an expression of SWFs preference to rely on diplomacy rather than investment arbitration, consequently emphasising their public/sovereign nature over their commercial activities. Such reluctance by SWFs in making direct use of ISDS might be rooted in the convenience, when investing abroad, of maintaining a low-profile investment strategy. Indeed, as seen, it is widely known that Western economies have often perceived State-capitalist investors such as Arab and Chinese SWFs (and SOEs) as a threat to national security and a challenge to fair market competition.[869] Secondly, it is helpful to recall how the FDI activity by SWFs seems to be a relatively recent phenomenon.[870]

---

[868] 'The LIA secured a USD 380 million Award in a London-based arbitration against Zambia for nationalising Zamtel, a Zambian telecom company in 2011. It was also reported that the LIA brought similar claims against other African countries, including Rwanda and Chad. The LIA alleges in these proceedings that these States took advantage of 'Libya's political turmoil to nationalise assets belonging to the country's 66 billion USD sovereign funds' following the eight-month-long conflict that ended Muammar Gaddafi's forty-year rule'. See, I-Arb Africa, 'Zambia Pays First Installation of 380 Million USD Award' [2017] <https://www.iarbafrica.com/f/17-news-list/news/544-zambia-pays-first-installation-of-380-million-usd-award> accessed 23 September 2021.

[869] See, Chiara Albanese and John Follain, 'Italy Blocked Chinese Semiconductor Bid, Draghi Says' *Bloomberg* (8 April 2021) <https://www.bloomberg.com/news/articles/2021-04-08/italy-s-draghi-seeks-broader-shield-from-chinese-corporate-bids> accessed 10 April 2021, and Lu Wang, 'Chinese SOE Investments and the National Security Protection under IIAs' in Julien Chaisse (ed), *China's international investment strategy: Bilateral, regional, and global law and policy/ edited by Julien Chaisse* (International economic law series, First Edition. Oxford University Press 2019) 68.

[870] 'While the amounts invested by SWFs in the form of FDI remain relatively small, they have been growing in recent years. Only 0.2% of their total assets in 2007 were related to FDI. However, of the $39 billion investments abroad by SWFs over the past two decades, as much as $31 billion was committed in the past three years. Their recent activities have been driven by the rapid build-up of reserves generated by export surpluses, changes in global economic fundamentals and new investment opportunities in structurally weakened financial firms'. See, UNCTAD, 'World Investment Report 2008: Transnational corporations and the Infrastructure Challenge' (2008) xvi <https://unctad.org/system/files/official-document/wir2008_en.pdf> accessed 20 October 2021.

Nonetheless, according to recent projections, the participation of SWFs to ISDS is expected to grow in the future given the ever-increasing number of SWFs, the growth in their cross-border investment activity and 'broader awareness' of the ISDS mechanism in the face of prospective disputes.[871] In this connection, we are seeing the ICC have reported an increase in arbitration cases involving State entities and State-owned parties, with a 67% increase over the past five years, with 20% of cases involving such entities in 2019.[872] In 2020 this number raised by another 19.8%.[873]

Interestingly enough, while SWFs have seldom brought investment claims against foreign States, SOEs often have.[874] This fact is of particular interest to our research for several reasons. To begin with, SWFs might invest and control SOEs that subsequently file investment claims. Secondly, tribunals may adopt similar approaches when dealing with SOEs and SWFs, primarily when the latter are structured under the legal form of an SOE. Indeed, as seen in Chapter I, while there are significant differences in terms of their organisational structure (e.g. their legal personality, which bear implications for their treatment in investment arbitration) between SWFs structured as funds and SOEs[875], plenty of SWFs are structured as public

[871] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 20.

[872] International Chamber of Commerce, 'ICC Dispute Resolution 2019 Statistics' (2020) <https://globalarbitrationnews.com/wp-content/uploads/2020/07/ICC-DR-2019-statistics.pdf> accessed 30 May 2022.

[873] International Chamber of Commerce, 'ICC Dispute Resolution 2020 Statistics' (2021) <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdfZ> accessed 30 May 2022.

[874] See, *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No. ARB/15/43, Award (not disclosed), August 13, 2019. Excerpts of the Award may be found at <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4966/DS15952_En.pdf> accessed 4 March 2021.

[875] Indeed, suppose an entity does not have a separate legal personality from the State. In that case, it might be more convincingly argued that such an entity should not have standing as an investor under most IIAs and the ICSID. Shima Yuri, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey' [2015] OECD Working Papers on International Investment 1 <http://www.oecd.org/investment/investment-policy/WP-2015-01.pdf> accessed 25 February 2021 See, *infra*, at 20 et seq.

entities or as State-owned enterprises (to name one, the Chinese CIC).[876] Hence, it does not seem farfetched to proceed with an analogical examination of the extensive arbitral tribunals' analysis of SOEs standing in investment disputes to inquire how tribunals would treat SWFs when acting as claimants.

Overall, the common trend in investment arbitration has been to recognise sovereign investors as SOEs with *locus standi* whenever acting as claimants.[877] This approach is grounded in the appraisal of sovereign investors' behaviour as international economic actors, primarily set up to perform commercial activities. Following this rationale, sovereign investors should then be treated as privately owned corporations.[878] However, such 'rule' finds its caveat in sovereign investors acting as agents of States or carrying out governmental functions. In other terms, when a sovereign investor is not distinguishable from the State in terms of operational management or is performing a governmental function, arbitral tribunals should, in principle, not equate it to a (private) investor but to a State.

Hence, if one were to accept that investment agreements should be available to sovereign claimants acting as private actors,[879] the question would shift, as anticipated in the General Introduction, on how to differentiate sovereign from private, or more precisely, governmental from commercial conduct.[880] Tribunals usually address such questions at the jurisdictional phase of an arbitral proceeding. In the specific instance of a claim brought by a sovereign

[876] As mentioned, depending on their designs, SWFs and SOEs may have somewhat different functional and operational relations with their sponsoring State.

[877] Alessandro Spano, 'State-Owned Enterprises in ISDS: European Perspective' in Yuwen Li, Tong Qi and Cheng Bian (eds), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (The rule of law in China and comparative perspectives, 1st. Routledge 2020); Alessandro Spano (n 877).

[878] Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31(1) ICSID Review - Foreign Investment Law Journal 24.

[879] We refer to sovereign investors with sufficient independence from their sponsoring States (i.e., not acting as agents of States and in their commercial capacity). As we will see below, investment agreements are usually silent on the matter of sovereign investors' inclusion within the meaning of 'national' of the other contracting party.

[880] Feldman (n 878), 25.

investor, a tribunal shall first verify under the relevant IIA, pursuant to the *kompetenz-kompetenz* principle, whether it possesses jurisdiction over the subject matter of the dispute, ergo whether the dispute relates to a qualified investment (*i.e.*, jurisdiction *ratione materiae*), and whether the sovereign entity qualifies as an investor (*i.e.*, jurisdiction *ratione personae*).[881] Moreover, if the claim is pursued in fora such as ICSID, then the selected forum of choice rules may also prove decisive in this respect.[882]

Overall, the assessment of a sovereign claimant's *locus standi* is akin to analysing the *prima facie* attributability at the jurisdictional phase and the analysis of attribution of IAs' breaches that we have seen in Chapter II. This is so as investment tribunals are presented with the same identification issue regarding the sovereign entity's relationship with its sponsoring State and the character of its activity. Self-evidently, the main point of divergence between such two assessments lies in the subject of the inquiry. Tribunals establish their *ratione personae* jurisdiction vis-à-vis either the claimant or the respondent's status, which, in the latter case, has to be of a sovereign rather than a private character. Whereas, in the context of attribution of wrongful conduct, tribunals address the international responsibility of States for breaches of IAs.

## B. JURISDICTION *RATIONE MATERIAE*: SWFS 'INVESTMENT'

### 1. SWFs 'Investment' under IIAs

The 'investment' concept delineates the scope of protection provided by a given investment treaty and the jurisdiction *ratione materiae* of investment arbitration tribunals based on that same treaty.[883] The *ratione materiae* requirement refers to the traits and characteristics of the

[881] As whether the respondent is a State.

[882] Paul Blyschak (n 21); Chen Sonia, 'Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration' (2013) 6(2) Contemporary Asia Arbitration Journal 299 <https://ssrn.com/abstract=2397668> accessed 25 March 2021. Dafina Atanasova, 'Definition of Investment' (2021) <https://jusmundi.com/en/document/wiki/en-definition-of-investment> accessed 28 September 2021.

[883] Dafina Atanasova (n 882). See also, Julian Davis Mortenson, 'The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law' (2010) 51(1) Harvard International Law Journal 257. Engela C. Schlemmer, 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski, Federico Ortino, Christoph Schreuer (ed), *The Oxford handbook of International Investment Law* (Oxford University Press 2008). Barton Legum, 'Defining Investment and Investor: Who is Entitled to Claim?' (2006) 22(4) Arbitration

subject matter of a dispute that falls under the jurisdiction of an arbitral tribunal, which has to be an investment dispute.[884] As a result, arbitrators will have to verify whether the dispute arises out of a qualified investment under the relevant treaty definition.[885] Albeit no generally accepted definition of investment is traceable, different instruments such as IIAs, foreign investment laws and conventions such as the ICSID[886] and arbitral practices recognise 'a large variety of operations to constitute an investment'.[887]

The vast majority of IIAs (over 98%) contains a specific definition of 'investment'. More than 90% of such IIAs describes the concept of investment explicitly through an asset-based definition, in that they list some protected 'assets', such as movable and immovable property, shares, intellectual property rights, claims to money and others.[888]

Other IIAs use a company-based definition, which requires an asset to be linked to a 'company' or an 'enterprise' or, less often, to a full list of protected assets in order to qualify for protection.[889] In addition, some contracts exclude certain types of assets from their investment definition, usually ordinary business transactions and government debt and portfolio investments.[890] Therefore, most IIAs broadly define the term 'investment', including direct shares in target companies or indirect ownership of the investment through other

International 521. Emmanuel Gaillard and Jennifer Younan (ed), *State Entities in International Arbitration* (IAI series on international arbitration no. 4, Juris Publishing 2008).

[884] Simon Weber, 'Jurisdiction Ratione Materiae' (2021) <https://jusmundi.com/en/document/wiki/en-jurisdiction-ratione-materiae> accessed 28 September 2021.

[885] As well as the existence of a 'dispute' in connection with the investment.

[886] As also, for instance, the Agreement on Trade-Related Investment Measures (TRIMs) (1994) adopted on 15 April 1994.

[887] Dafina Atanasova (n 882).

[888] ibid.

[889] ibid. OECD, 'International Investment Law: Understanding Concepts and Tracking Innovations' (Paris).

[890] UNCTAD, *Scope and definition: UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD series on issues in international investment agreements II, United Nations 2011).

investment vehicles to extend protection to varied assets.[891] On the other hand, SWFs usually invest in host States through direct acquisition of non-controlling companies' shares or indirectly by investing in special purchase vehicles or private equity funds.[892]

In this connection, some issues may arise in the context of an ICSID arbitration, especially when SWFs are restricted from holding certain types of investment by the host-State.

## 2. SWFs 'Investment' under Institutional Rules Definitions and Arbitral Jurisprudence: the Case of the ICSID Convention

Starting from issues related to the ICSID framework, if a dispute is resolved under the ICSID Convention aegis, the claimant has to satisfy a 'double-barrel test' as, in addition to the investment treaty definition of 'investment', it has to meet the definition of 'investment' under Article 25 of the ICSID Convention.[893]

Article 25 recites that

> *[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State* […].

The second paragraph defines a 'National' of another Contracting State as

> *(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit*

[891] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29).

[892] 'A Special Purpose Vehicle (SPV) is a separate legal entity created by an organization. The SPV is a distinct company with its own assets and liabilities, as well as its own legal status. Usually, they are created for a specific objective, often to isolate financial risk. As it is a separate legal entity, if the parent company goes bankrupt, the special purpose vehicle can carry on'. See, <https://corporatefinanceinstitute.com/resources/knowledge/strategy/special-purpose-vehicle-spv/>, accessed 1 October 2021.

[893] Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature 18 March 1965, entered into force 14 October 1966, (ICSID Convention) (International Centre for Settlement of Investment Disputes).

*such dispute to conciliation or arbitration […] and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. 3. Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.*

All this being said, as Article 25 of the ICSID Convention does not really 'unpack' the meaning of the term 'investment',[894] arbitrators have developed their own pools of criteria to establish it.[895] Perhaps the most notorious ICSID judgment on this matter is the *Salini v. Morocco,* which gave rise to the well-known 'Salini Test'. Indeed, in such a case the Tribunal listed four elements delineating what an investment is under ICSID Article 25. These elements were the investment contribution, duration, risk and promotion of the economic development of the host State.[896]

While the usage of such a test is not compulsory for investment arbitrators, tribunals often assess whether an investment exists using at least some of the Salini criteria, such as, for instance, the requirements of an investment contribution. Moreover, some recent treaties, clearly inspired by the Salini, require assets to exhibit certain characteristics, such as a certain duration, assumption of risk and commitment of capital in order to qualify as an investment.[897]

---

[894] Emmanuel Gaillard, 'Identity or Define? Reflection on the Evolution of the Concept of Investment in ICSID Practice' in Christina Binder (ed), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009).

[895] Laurens J.E. Timmer, 'Meaning of Investment as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre' (2012) 29(4) Journal of International Arbitration 363.

[896] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52.

[897] Yala Farouk, 'The Notion of 'Investment' in ICSID Case Law: a Drifting Jurisdictional Requirement? Some "Un-Conventional" Thoughts on Salini, SGS & Mihaly' (2005) 22(2) Journal of International Arbitration 105.

Interestingly enough, the mentioned criterion can spur different views on whether the ICSID Convention applies to SWFs investments.[898] Indeed, it is widely recognised that a contribution can be either a cash contribution or contribution in-kind, such as equipment, expertise, personnel or services.[899] For instance, tribunals have found that the price the claimants might have paid for the purchase of shares, as also other plans to finance the target companies, may constitute a contribution.[900] In this regard, if a SWF structures its investments using a limited partnership, trusts, or other complex structures, some issues may arise.[901]

By way of example, in *Eiser v. Spain*, the Respondent claimed that one of the Claimants (specifically the General Partner of a limited partnership) had not made any 'investment', being the funds provided by the limited partners.[902] In its 2017 Award, the Tribunal held that even assuming the ECT and the ICSID Convention required that an investment possessed the characteristics invoked by the Respondent, which they did not, the investment at issue had these characteristics.[903] Hence, the Tribunal dismissed the Respondent's argument by considering that 'the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction'.[904]

---

[898] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 36) 25.

[899] ibid 25.

[900] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, para 105. Precisely the Tribunal Stated that '[…] not only the purchase price for the shares paid for the shares but also the Claimants' other commitments and plans towards the financing of Socomet constitute 'contributions' satisfying this first element under the Salini test'.

[901] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29).

[902] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para 227-228.

[903] The Tribunal held that 'the Claimants made significant investments of funds in the form of share purchases, loans and injections of capital into the Spanish entities that own and operate the […] plants at issue. Respondent urged that the funds invested were not the Claimants' own and were derived from the limited partners [in the Spanish company]'. id. para 213.

[904] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, para 228. Similarly, see, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras 157-60.

In the 2019 *Mason Capital v. Korea* Award, the Tribunal delved into the analysis of whether the Claimant had made any contribution in kind, given that it had not made any cash contributions.[905] The Tribunal stated that though the General Partner did not make any cash contributions to the Partnership and that the funds originated from the Limited Partner's cash contributions, it 'did not deem necessary to decide whether the origin of the capital used to acquire the shares plays a role in determining whether the General Partner has made its own contribution'.[906] In the Tribunal's view, the General Partner's investment decision-making, management and expertise constituted a commitment of 'other resources' in the sense of the relevant FTA.[907] Furthermore, the structure of an investor such as a SWF can be relevant for establishing whether the ICSID Convention would cover its investment. For example, concerning trustee funds, the *Blue Bank v. Venezuela* Tribunal considered it had no jurisdiction over the dispute because the claimant itself as trustee had not contributed any funds to the investment.[908]

In this respect, it might be appropriate to recall that, were a SWF unable to satisfy ICSID jurisdictional requirements, other venues would be available for filing an investment treaty claim under other arbitration rules, which may also have less stringent requirements.[909] In fact, the UNCITRAL, the Stockholm Chambers of Commerce (SCC) or the ICC Rules do not impose as strict jurisdictional limitations as the ones set by the ICSID Convention and, more specifically, they do not impose definitional limitation when it comes to the item of investment.

[905] *Mason Capital LP and Mason Management LLC v. Republic of Korea*, Case No 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, paras 206-207.

[906] id. para 206.

[907] id. para 207.

[908] *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No ARB 12/20, Award, 26 April 2017, paras 163 and 172. Vis-à-vis the (im)possibility of categorising a trustee as a State organ, see *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para 152.

[909] Or being ad hoc or administered by another arbitral institution as the PCA, the SCC, the ICC or indeed ICSID. Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 25.

Lastly, State-to-State dispute resolution is a potentially underestimated avenue for a SWF to bring a claim against the host State of its investment.[910] Indeed, a SWF may request its home State to espouse its claim against the host-State of its investments.[911] As in an indirect claim, the home State would act in its own name to seek redress for the wrong done to its nationals.[912] Alternatively, if the SWF is a State organ under domestic law of the home State, the latter could pursue the dispute on its own behalf as a direct claim.[913] However, historically inter-State arbitration has undeniably been an underused venue for the composition of investment disputes.

### 3. SWFs and Pre-Establishment Rights

Another issue concerning the protection of investments by SWFs is whether IIAs afford protection from the host State's pre-investment measures. As discussed, SWFs growing investment activity in foreign jurisdictions have attracted a great deal of attention by many States, which, as seen, have adopted domestic measures to regulate SWFs investment entry in their territories. Specifically, certain States have established pre-admission screening measures applicable to SWFs before their investments may be admitted into the host State.[914]

In this regard, as mentioned in Chapter I, a question that may be raised is whether SWFs would be protected under IIL from an impairment of their investments caused by one of such measures. Indeed, investment-screening measures can, in principle, 'hinder investments from SWFs and subject SWFs to potentially discriminatory or arbitrary regulatory or administrative treatment', potentially breaching IIAs standards.[915] Nonetheless, it might not always be straightforward for an affected SWF to invoke IIA protection and bring a dispute against the host-State before an arbitral tribunal. Indeed, if the SWF is subject to such measures before its

[910] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 28.

[911] See, *Italian Republic v. Republic of Cuba*, and Dissenting Opinion of Attila Tanzi, *supra*, at 99. See, Enrico Milano (n 911).

[912] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 36) 28.

[913] ibid.

[914] ibid.

[915] ibid 25.

investment is made, the availability of investment arbitration to solve such disputes strongly depends on whether the relevant IIA covers 'pre-investment' or 'pre-establishment' rights.

IIAs usually do not deal with the entry nor with the establishment of foreign investments.[916] Contrariwise, IIAs usually provide that this phase be subject to the host State's internal laws or they may contain only weak protections relating to this phase, such as those in the form of 'promotion and encouragement' obligations.[917] As most IIAs do not provide a general right of admission or establishment, 'the host State's foreign investment regime generally governs not only whether foreign investment is permitted to operate, but also the conditions applying to the entry of foreign investments'.[918] Therefore, it seems logical to assume that when the relevant IIA is silent, the treaty protection may not extend to pre-admission rights, and therefore not cover the host State FDI screening reviews. Thus, in this case, an investment tribunal may hardly establish its jurisdiction to hear a dispute brought by a SWF arising out of a pre-investment measure.

Another approach adopted by some IIAs is to expressly condition the admission of an investment on the respect of host State laws and policy.[919] An IIA of the like may provide that each Contracting Party 'shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and policy'. In such a case, if a host-State denies admission to a SWF in breach of its own legal framework existing at the time the SWF has sought to make its investment in the host State, then the latter would also be in breach of the relevant IIA. Nevertheless, if the host-State's 'laws and policy' were such that they lawfully provide a screening mechanism filtering investments by SWFs, then the IIA would not be breached.

Furthermore, there are IIAs such as the US-style treaties, which afford stronger, yet not complete, protection to investment in their establishment phase. Such treaties usually follow

[916] ibid.

[917] Jeswald W. Salacuse, *The Law of International Investment Treaties* (Oxford international law library, Oxford University Press 2010), 191 *et seq*.

[918] Andrew Newcombe and Lluís Paradell, *Law and practice of investment treaties: Standards of treatment/ by Andrew Newcombe, Lluís Paradell* (Wolters Kluwer 2009) 133.

[919] See, for instance, the Morocco-Nigeria BIT, cited in Chapter I vis-à-vis foreign investment screenings.

the so-called 'pre-entry model' concerning the NT or MFN standards of protection.[920] Beyond the US, other countries have been adopting such a model in their international investment agreements. For instance, the provisions in Chapter 8 of the CETA provide a case in point. Even though Chapter 8 does not cover investor-State dispute settlement, some of the substantive investment protection provisions set out in this Chapter expressly regulate the investment establishment phase.[921]

Other 'pre-entry model' IIAs specifically state that unfair investment screening measures affecting an investor may give the latter the right to file a treaty claim against the host State. In the case of a SWF, this, however, may necessitate the SWF demonstrating that it acted 'in like circumstances' and that the host-State did not treat domestic and foreign investors on the same footage.

Considering the nature of SWFs, obtaining an appropriate yardstick to satisfy the 'in like circumstances' criterion may be challenging. As some have noticed, it is doubtful that any national investor would have at once the financial resources of a SWF, its affiliation with a foreign State, or like national and economic interests at heart.[922] Furthermore, pre-entry NT or MFN provisions may be subject to exclusions outlined in the relevant IIA, such as national

[920] UNCTAD – United Nations Conference on Trade and Development, 'Most Favoured Nation Treatment – UNCTAD Series on Issues in International Investment Agreements II' (2010) <https://unctad.org/system/files/official-document/diaeia20101_en.pdf> accessed 10 November 2021.

[921] Comprehensive Economic and Trade Agreement (CETA), signed 30 October 2016, <https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 10 November 2021. See, specifically, Arts. 8.4, 8.5 and 8.6.

[922] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29).

security exceptions.[923] In this regard, an issue that could emerge in such a scenario is whether the relevant exception is 'self-judging' or not.[924]

Indeed, national security clauses have spurred a huge debate to the point it has been even defined as 'the Achilles' heel of international law'.[925] Historically, the debate on the self-judging character of international treaties' clauses was spurred by the 'national security exception', especially in international trade law. The self-judging language at the beginning of subparagraph (b) of Article XXI GATT 'overwhelmed the debates relating to Security Exceptions in both GATT and WTO, as it served as a basis for the responding parties to claim that neither GATT nor WTO has the jurisdiction over the provision'.[926] The debates surrounding such exception are notorious in international law in the WTO as in the ICJ jurisprudence and later on, even in investment arbitration with the Argentinian sovereign default saga.

[923] See the Chapter dedicated to FDI screening regulations and National Security in the previous Part I. See, United Nations Conference on Trade and Development (n 923). Michele Barbieri, Pia Acconci, Mara Valenti, Anna de Luca, 'Sovereign Wealth Funds as Protected Investors under BITs and the Safeguard of the National Security of Host States' in Giorgio Sacerdoti, Pia Acconci, Mara Valenti, Anna de Luca (ed), *General Interests of Host States in International Investment Law* (Cambridge University Press, Cambridge 2014).

[924] The controversial nature of the self-judging language is illustrated in the exemplary case *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, Judgment, 1986, ICJ Rep. 14 (dated 27 June 1986), para 115.

[925] Hannes L. Schloemann and Stefan Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93(2) American Journal of International Law 424. See, also Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' in Armin von Bogdandy and Rüdiger Wolfrum (eds.) (ed), *Max Planck Yearbook of United Nations Law Online* (Volume 13: Issue 1. Brill | Nijhoff 2009).

[926] See Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?' (2016) 19(2) Journal of International Economic Law 417, 427. See *United States – Trade Measures Affecting Nicaragua*, Report by the Panel, L/6053 (dated 13 October 1986). *US – The Cuban Liberty and Democratic Solidarity Act* and the *Nicaragua – Measures Affecting Imports from Honduras and Colombia* or the more recent *Russia—Traffic in Transit* case where the WTO Panel interpreted Article XXI GATT 'security exceptions' drawing a line between the imperative of trade liberalization and the protection of Members' essential security interests.

That is so as, whenever an international legal obligation is imposed on a State, the notion of national security gives rise to a 'loophole', which is often shaped as an explicit national security exception. While the right of any state to protect itself in times of serious crisis 'by employing otherwise unavailable means' has been considered as 'a bedrock feature of the international legal system', the interpretation of its scope of application under international law is not as clear cut.[927] In turn, this may entail that the answer to whether a SWF investment is protected by a relevant treaty could be determined by how the NT (or the MFN) clause is drafted.

## C. JURISDICTION *RATIONE PERSONAE:* SWFS AS 'INVESTORS' UNDER INVESTMENT TREATY DEFINITIONS

To satisfy the *ratione personae* jurisdiction requirement, an investor must usually be a national of a State party to the IIA under which the investor is bringing the claim. Therefore, to pass the jurisdictional phase, a SWF has to qualify as a 'protected investor' under the relevant IIA.[928] Each IIA might have its specific definition; however, three major trends regarding the definition of investor vis-à-vis SWFs are distinguishable.

The first trend consists of treaties directly including sovereign investors as protected investors. The wording in Art. 1(2)(b) of the China-Uzbekistan BIT provides an example as it defines the term 'enterprise' as 'any entities, including companies […] and other organisations […] irrespective of whether or not for profit and whether it is owned or controlled by private person or government or not'.[929]

[927] Stephan Schill and Robyn Briese (n 925) 64.

[928] Domenico Di Pietro, Kevin Cheung, 'The Definition of Investor in Investment Treaty Arbitration' in Julien Chaisse, Leïla Choukroune, Sufian Jusoh (ed), *Handbook of International Investment Law and Policy* (Springer Singapore 2021).

[929] Also see, the Agreement between the Czech Republic and the State of Kuwait for the Promotion and Protection of Investments (signed 8 January 1996, entered into force 21 January 1997) (Czech Republic-Kuwait BIT), Art. 1.2. (b).

Other IIAs specifically extend protection beyond government-controlled entities by encompassing governments. For example, the Korea-US FTA defines 'investor of a Party' as 'a Party or State enterprise thereof, or a national or an enterprise of a Party […]'.[930]

Other treaties expressly including 'governmentally-owned' or 'government-controlled' entities are, for instance, the NAFTA which includes within the definition of enterprises 'any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association'.[931] Furthermore, the 1999 US-Bahrain BIT includes a broad definition of 'company' comprising 'all types of legal entities constituted or organized under applicable law, whether or not for profit and whether privately or governmentally owned or controlled, and includes, but is not limited to, a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization'.[932] The definition explicitly covers not-for-profit entities, as well as entities that are owned or controlled by the State. 'Company of a Party' is defined in the US-Bahrein BIT as 'a company constituted or organized under the laws of that Party'. Also, some treaties expressly including 'State-corporations' as the China-Ghana BIT which define 'investor' in respect of Ghana,

[930] Free Trade Agreement between the United States of America and the Republic of Korea (signed 30 June 2007, entered into force 15 March 2012) (US-Korea FTA), Art. 11.28. Art. 11.16 recites that a claimant 'may submit a claim referred to in paragraph 1: (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention; (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention; (c) under the UNCITRAL Arbitration Rules; or (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.' Shall the occasion rise of one of the Contracting Parties to act as claimant in an arbitration, in light of Art. 1(2) and 25(1) ICSID Convention, its forum of choice might probably be other than ICSID.

[931] NAFTA, Article 201: Definitions of General Application.

[932] Bahrain - United States of America BIT (signed 20 September 1999), entered into force 30 May 2001, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/362/bahrain---united-states-of-america-bit-1999-> accessed 23 March 2023.

including ‘State-corporations and agencies and companies registered under the laws of Ghana which invest or trade abroad’.[933]

Similar wording is adopted in the 2017 Rwanda-UAE BIT, which, though not expressly including SWFs in the definition of ‘investor’, still includes ‘legal entities’ and the ‘Government of [a] Contracting Party’.[934] It is, however, noteworthy that Article 8(7) of this same treaty would provide that

> *[n]otwithstanding the provisions of this Article, sovereign assets and sovereign wealth funds shall not be subject to nationalization, exploration, sequestration, blocking or freezing by a Contracting Party nor shall be subject to any of these measures directly or indirectly by a request of a third party.*

This is a substantive protection afforded to SWFs and sovereign assets from both lawful and unlawful expropriation through which SWFs are treated as instrumentalities of the contracting governments akin to sovereign assets. However, SWFs remain distinct from sovereign assets as they stand protected explicitly from any interference of the other sovereign party to the treaty.

Overall, according to a 2015 OECD report, less than one per cent of the investment treaties surveyed mentions State-owned investment funds such as SWFs and includes them in the investor definition.[935] Understandably, agreements following such a minority trend are often concluded by countries where large SWFs play an essential role in the national economic development, as in Qatar, Kuwait, Saudi Arabia and the UAE.[936] For instance, all six Saudi-

[933] Agreement between the Government of the People's Republic Of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments (China - Ghana BIT); signed 12 October 1989, entered into force 22 November 1990.

[934] Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (Rwanda – UAE BIT); signed 1 November 2017, entered into force 17 January 2020.

[935] Shima Yuri (n 875).

[936] Chijioke Chijioke-Oforji, ‘Sovereign Wealth Funds and State-Owned Enterprises as Claimants under International Investment Agreements and ICSID’ in Tom Mortimer and Chrispas Nyombi (eds), *Rebalancing International Investment Agreements in Favour of Host States* (Wildy 2018). See also, Anne K. Hoffmann,

Arabia BITs entered into 2000-2011 expressly refer to the Saudi Arabian Monetary Agency (SAMA), the Saudi SWF.[937]

However, it has to be borne in mind that the new generation of investment and trade agreements seems to increasingly encompass sovereign entities within their coverage. For instance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), similarly to the US-Korea FTA, contains State parties and enterprises in investor definition and includes State entities as a form of covered enterprise. Moreover, such an agreement has dedicated an entire chapter to SOEs regulation, which expressly defines SOEs and SWFs mainly based on an ownership threshold rationale. Specifically, CPTPP Article 17 defines a SWF as 'an enterprise owned, or controlled through ownership interests, by a Party that

> *(a) serves solely as a special purpose investment fund or arrangement for asset management, investment, and related activities, using financial assets of a Party; and (b) is a Member of the International Forum of Sovereign Wealth Funds or endorses the Generally Accepted Principles and Practices ('Santiago Principles') issued by the International Working Group of Sovereign Wealth Funds, October 2008, or such other principles and practices as may be agreed to by the Parties, and includes any special purpose vehicles established solely for such activities described in subparagraph (a) wholly owned by the enterprise, or wholly owned by the Party but managed by the enterprise'.*

Article 17 also defines an SOE as 'an enterprise that is principally engaged in commercial activities in which a Party:

> *(a) directly owns more than 50 per cent of the share capital; (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or*

'Middle Eastern Investors as Claimants in Investment Treaty Arbitrations' (2016) 3 BCDR International Arbitration Review 389.

[937] Very few IIAs contain exclusion of sovereign entities from their protection. See Jo En Lo, 'State-Controlled Entities as "Investors" under International Investment Agreements' (8 October 2012). Columbia FDI Perspectives on topical foreign direct investment issues 80 <https://academiccommons.columbia.edu/doi/10.7916/D8VH5X1G/> accessed 25 February 2021.

*(c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.* [938]

As already mentioned, the structure of a SWF (and its investment) may also play an essential role in the context of IIAs textual analysis by investment tribunals. SWFs are sophisticated investors that can take many forms and structures. They can opt for structuring their investments specifically to improve tax efficiency 'and ensure the investment meets regulatory requirements'.[939] To this aim, SWFs are often structured as funds being more akin to pools of assets than legal entities. This is similar to the situation of trusts or other unincorporated bodies.

Indeed, SWFs 'may operate as or invest through a Limited Partnership or a Trust to obtain tax efficiency or because they invest together with General Partners of private equity funds. In this case, there may be an issue to determine if the SWF is a qualifying 'investor''.[940] As recalled by the Tribunal in this regard there are two school of thought in investment arbitration. The 2015 Annulment Decision in *Occidental v. Ecuador* illustrates the first one. [941] Here the Tribunal stated that in cases where the legal title 'is split between a nominee and a beneficial owner international law is uncontroversial' as it grants standing and relief to the owner of the beneficial interest – not to the nominee.[942]

The other school of thought finds that there is no principle under general international investment law, according to which only the beneficial owner fulfils the characteristics of an investor. This was clearly highlighted by the Tribunal in the 2019 *Mason Capital* Award where

[938] Chapter 9 and Chapter 17 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which incorporates the text of the TPP see, <https://wtocenter.vn/chuyen-de/12782-full-text-of-cptpp>, accessed 17 December 2021. See also, Mark McLaughlin (n 60). European Commission, 'State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post Crisis Context: Institutional Paper' (July 2016) 031 <https://ec.europa.eu/info/sites/default/files/file_import/ip031_en_2.pdf> accessed 12 December 2021.

[939] Hussein Haeri, 23.

[940] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 23.

[941] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Annulment Decision, 2 November 2015.

[942] id. para 259. The Tribunal cited Bederman David J. Bederman, 'Beneficial Ownership of International Claims' (1989) 38(4) The International and Comparative Law Quarterly 935

the arbitrators recalled that in *Saba Fakes v. Turkey*[943] the Tribunal on the division of legal title and beneficial ownership maintained that

> *the division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a fiduciae or any other similar structure. Such structures are in no way indicative of a sham or a fraudulent conveyance, and no such presumption should be entertained without convincing evidence to the contrary. The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction, which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT. Along the same lines, the tribunal in Von Pezold v. Zimbabwe considered prima facie evidence of legal ownership sufficient to establish jurisdiction […].*[944]

In turn, this may give rise to questions of jurisdiction and SWFs *locus standi* and the question of whether protection is granted to investments that the host-State had made itself, *e.g.* when the assets of the SWF structured as a fund belonged to the home State itself.[945] Nevertheless, time and again, an arbitral tribunal will primarily consider the specific provisions of the applicable IIA.

It is worth mentioning that SWFs may invest directly in a company as also through complex shareholding structures. In this scenario, a SWF might be the parent company or a

---

[943] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para 134. See also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 5 February 2005, para 170.

[944] See *Mason Capital LP and Mason Management LLC v. Republic of Korea*, Case No 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, paras 166-70. Also see, for instance, *Saba Fakes v. Republic of Turkey*, ICSID Case No ARB/07/20, Award, 14 July 2010, para 134; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, para 314; *Blue Bank v. Venezuela*, ICSID Case No ARB/12/20, Award, 26 April 2017, para 172; *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 August 2016, para 331.

[945] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29).

shareholder of a claimant. Nonetheless, depending on the wording of the relevant IIA provisions, tribunals have generally established their jurisdiction over disputes brought by non-controlling and indirect shareholders as shares in companies incorporated in the host-State are usually covered by the definition of protected investment.[946]

As noted, SWFs may operate as corporations, which, contrary to the fund model, is an investment structure that may positively affect the SWF's *locus standi* in an investment dispute.[947] Generally, corporations are used as structuring devices to benefit from investment treaty protection being established with a separate legal personality under many domestic legal systems. However, some IIAs may require the company's seat or principal business seat to be in the home State of the investors. Moreover, beyond requiring the corporation be incorporated in the home State, IIAs may also require the corporation to have its effective management, significant economic activities or substantial operation activities in the place of its seat or in the home State. Therefore, in case a SWF operates through a Special Purchase Vehicle (SPV) – that is a subsidiary company with separate legal status created by the parent to isolate financial risk – [948]

> *to obtain tax efficiency and the applicable BIT contains a seat requirement, the SPV would not likely be suitable as a means of providing effective investment treaty protection. Similarly, SPVs may not be the effective centre of administration of the business operations. Arbitral tribunals have considered that the term 'substantial' qualifies the content of the business activity of the claimant- investor as an activity of 'substance, and not merely of form.*[949]

For instance, the 2016 Slovakia-Iran BIT expressly includes SWFs as covered investors, stating that

[946] Whether held directly or indirectly.

[947] As an investor-State tribunal's jurisdiction *ratione personae*.

[948] Adam Hayes, 'What Is a Special Purpose Vehicle (SPV) and Why Companies Form Them' (23 August 2022) <https://www.investopedia.com/terms/s/spv.asp> accessed 17 June 2023.

[949] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29), 23. See, 97 *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain*, ICSID Case No ARB/14/1, Award, 16 May 2018, para 254; *Limited Liability Company Amto v. Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 69.

*[t]he term 'investor' means the following natural persons or entities that […] are: enterprises (other than branches and representative offices), sovereign wealth funds [...] provided that they: 1. are either incorporated or constituted, as well as maintained, in accordance with the laws and regulations of the Home State; 2. have their registered office, central administration or principal place of business in the territory of the Home State; and 3. maintain substantial business activities in the territory of the Home State.* [950]

In this case, SWFs are listed amongst the possible declination of the term 'investor', as long as they are in line with the home-State legal framework with respect to their establishment and maintenance and have their place of business and place of business activities in their home State.

Another recent IIA containing provisions on SWFs is the 2018 EU-Singapore Investment Protection Agreement. Here, it is interesting to note how the treaty seems to be comparatively more concerned with SWFs regulation than with their protection.[951] Indeed Article 4(2), the only express provision of this treaty referring to SWFs, reads '[e]ach Party shall encourage its sovereign wealth funds to respect the Generally Accepted Principles and Practices – Santiago Principles'.[952]

Article 9(1) of the CPTPP defines 'investor of a Party' as 'a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party'. In turn, Article 1.3. defines an enterprise as[953]

*any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any*

[950] See, Article 1(3) of the Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia-Iran BIT); signed on 19 January 2016, entered into force 30 August 2017.

[951] EU-Singapore Investment Protection Agreement; signed on the 15 October 2018.

[952] Article 4(2) of the EU - Singapore Investment Protection Agreement (2018), ibid.

[953] Article 9.1. of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); signed 8 March 2018, entered into force 30 December 201).

*corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation.*

Moreover, Article 17, which however deals with designated monopolies and not with dispute resolution, expressly defines SWFs as an 'enterprise owned, or controlled through ownership interests, by a Party that'[954]

(*a) serves solely as a special purpose investment fund or arrangement for asset management, investment, and related activities, using financial assets of a Party; and (b) is a Member of the International Forum of Sovereign Wealth Funds or endorses the Generally Accepted Principles and Practices ('Santiago Principles') issued by the International Working Group of Sovereign Wealth Funds, October 2008, or such other principles and practices as may be agreed to by the Parties, and includes any special purpose vehicles established solely for such activities described in subparagraph (a) wholly owned by the enterprise, or wholly owned by the Party but managed by the enterprise*.

Moreover, it defines an SOE as an enterprise which principally engage in commercial activities in which one of the States parties to the treaty either directly owns more than 50% of the share capital; controls, through ownership interests, the exercise of more than 50% of the voting rights; or holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

Interestingly enough, such treaty subjects the inclusion of an entity under the 'SWF' umbrella based on the entity affiliation to the IFSWFs or in the alternative to its adherence to the Santiago Principles. This, in turn, should assure a minimum standard of transparency in the SWFs' investment activities and overall pursuance of economic/financial goals.[955]

From a dispute resolution perspective, whenever an IIA expressly includes sovereign investors within the definition of 'national' or 'protected investor', then the treaty's ordinary

[954] See Article 17(1) of the CPTPP.

[955] Likewise, the newly agreed upon EU-China Agreement on Investment also tackles SOEs at great length. EU – China Comprehensive Agreement on Investment (CAI); agreed in principle 30 December 2020.

meaning will primarily set the interpretative issue of whether a SWF has standing in the dispute, according to Art. 31(1) VCLT.[956]

Similarly, the interpretation of a SWF standing in a proceeding would be swiftly resolved in cases where an IIA expressly excludes SWFs or akin sovereign investors from the investor or national definitions. This is the case of treaties falling under the 'second trend'. For instance, the 2004 Singapore-US FTA includes in its investment provisions, under the general definition of 'investor of a Party', governmentally owned or controlled enterprises for purposes of protection and claims against the United States as host State.[957] In contrast, this FTA explicitly rules out from its definition of 'covered entity' 'government enterprises organized and operating solely for the purpose of: (i) investing the reserves of the Government of Singapore in foreign markets; or (ii) holding investments referred to in clause (i)' and more specifically 'Temasek Holdings (Pte) Ltd'.

As of today, the most common approach to SWFs (or what we call 'third trend') is to neither exclude them nor include them expressly. In other words, the majority of IIAs remain silent on this matter. 'Investor' is indeed often defined in general terms as a 'national' or as a 'legal entity' of a party that makes an investment entitled to protection under a given IIA. Consequently, if confronted with an ISDS claim by a sovereign investor based on a silent IIA, the respondent State may have the opportunity to object that the sovereign entity is not a 'national' within the meaning of the relevant treaty, challenging the tribunal's jurisdiction *ratione personae*.

As a result, the tribunal would have to evaluate whether, in the original intention of the Contracting Parties, such unspecified terminology was meant to encompass sovereign investors or not. In this scenario, the ordinary meaning of the terms and the treaty object might not settle the interpretative issue of whether sovereign investors have standing. Hence, in such instances,

[956] Indeed, as a matter of treaty interpretation, IIAs shall be construed in light of Art. 31 – 32 of the VCLT. United Nations, *Vienna Convention on the Law of Treaties, 23 May 1969*, United Nations, Treaty Series, vol. 1155, p. 331 <https://www.refworld.org/docid/3ae6b3a10.html> accessed 2 March 2021.

[957] Free Trade Agreement between Singapore and the United States of America United (Singapore-US FTA); signed 6 May 2000, entered into force 1 January 2004. <https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf>, accessed 15 November 2021.

arbitrators might have to revert to Art. 31(3) VCLT and the supplementary means of interpretation set forth 32 VCLT. At any rate, as will be seen, tribunals usually interpret the silence of a treaty as not barring sovereign entities from bringing investment claims. Indeed, it might be argued that tribunals 'should not infer exceptions in the absence of express provisions excluding sovereign entities even when such State Enterprise acts in the governmental capacity'.[958] However, such treaty silence may be grounded in either of two opposite rationales. The first one reads this silence as an indicia of IIAs original intention to regulate private investor-State relationships and, consequently, not being drafted to include sovereign entities.

Conversely, the second one, which UNCTAD also endorsed, speaks of the need to interpret the term 'legal entity' comprised in IIAs through the lens of its plain meaning exclusively.[959] In other words, a 'presumption' in favour of extending the treaty protection to sovereign entities should apply every time there is no express exclusion from the treaty protection. Still, it is established practice in investment arbitration that any investigation into the scope of consent to arbitration given by States to an IIA should be conducted without presumptions in favour or against the tribunal jurisdiction.[960]

In this connection, specific remarks on whether sovereign investors are protected under specific arbitral institutional rules as the ICSID Convention are set out below.

[958] Reza Mohtashami and Farouk El-Hosseny, 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?' (2016) 3(2) BCDR International Arbitration Review 371, 381 See also Feldman (n 881), 29.

[959] UNCTAD, 'International Investment Agreements: Key Issues, Volume I' (2004) 142 <https://unctad.org/system/files/official-document/iteiit200410_en.pdf> accessed 26 March 2021.

[960] See *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985, para 63.

## D. JURISDICTION *RATIONE PERSONAE*: SWFS AS 'INVESTORS' UNDER ARBITRAL INSTITUTIONAL RULES' DEFINITIONS AND ARBITRAL JURISPRUDENCE

### 1. ICSID Convention and ICSID Case Law: Aron Broches' Statement

As declared in its Preamble, the ICSID Convention was primarily designed to foster private international investment for economic development purposes.[961] In this spirit, the devising of an ISDS mechanism was aimed at depoliticising disputes between foreign investors and host-States so to avoid reverting to diplomatic protection. This rationale is reflected in the Convention, which conceives ISDS as a dispute resolution other than to State-to-State arbitration and commercial arbitration. As mentioned, a tribunal constituted under the ICSID Rules will have to assess its jurisdiction both under the relevant investment treaty and under the specific requirements (or 'outer limits') set forth by Art. 25(1) ICSID Convention. Such provision recites that '[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State […] and a national of another Contracting State'. Therefore, an ICSID tribunal is compelled to decline jurisdiction if 'it finds that two parties assimilated with a State, are before it, which seek to resolve a dispute'.[962]

At the drafting stage of the Convention, the question arose as to the standing of sovereign entities under the ICSID regime, precisely on whether the latter were to be included in the 'national of another contracting State' requirement. Aron Broches, the first ICSID Secretary-General, argued against following the distinction between the public and the private dimensions, categorising it as too 'outdated' to provide a valid guidance on the matter. He proposed to rely instead on two alternative factors,[963] concluding that a mixed economy company or government-owned corporation 'should not be disqualified as a 'National of

[961] See also Christoph Schreuer, *The ICSID convention: A commentary on the convention on the settlement of investment disputes between states and nationals of other states* (Loretta Malintoppi, August Reinisch and Anthony Sinclair tr, 2. ed. Cambridge Univ. Press 2009).

[962] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015, para 79. Here, the tribunal recalls Professor Dolzer's arguments in the Report submitted in the interests of the Respondent State.

[963] Csaba Kovács, *Attribution in International Investment Law* (International arbitration law library volume 45, Kluwer Law International B. V 2018).

another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function'.[964]

From such statement, arbitral tribunals have drawn a fully-fledged test for the assessment of sovereign investors standing under Article 25(1) of the ICSID Convention, which identifies two alternative, non-cumulative, exceptions to the general rule of 'openness' of the ICSID Convention to both private and public investors, namely when they acts as governmental agents or discharge governmental functions.[965] Alas, Broches did not define the exact meaning of the terms 'agent' and 'essentially governmental function' used in his statement, leaving the door open for interpretations. Nevertheless, such terms have been already used in other branches of public international law. Specifically, they seem to mirror the customary international law rules on attribution. More specifically, there is a resemblance with the customary rules of attribution as later codified by the ILC in the ARSIWA.[966] As we will also see from the analysis of ICSID tribunals' application of the Broches test, the meaning of the terms 'agent' and 'essentially governmental function' has so far been construed through the looking glass of the public international law rules of attribution, of which they may be a reflection of or, at the very least, highly influenced by.[967]

In this connection, instead of the Broches test, in some cases tribunals have directly applied the ARSIWA. This becomes even more important as virtually in every investment dispute involving a State entity, be it a sovereign investor acting as a claimant or as a respondent, the issue of attribution of conduct to its controlling States arises. In such a setting, it is clear how the customary attribution rules turn out to be fundamental. Indeed, as already

[964] Chris Maina Peter, 'Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law. By Aron Broches. Martinus Nijoff Publishers, Dordrecht/Boston/London, 1995.' (1996) 11(2) ICSID Review - Foreign Investment Law Journal 500; Christoph Schreuer (n 961); Schreuer Christoph, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A commentary* (2nd ed. Cambridge University Press 2009).

[965] Consequently, whether an ICSID tribunal might establish its *ratione personae* jurisdiction over a claim.

[966] David D. Caron (n 378), 858. On this topic, see Chapter IV. James Crawford, *State Responsibility* (n 458) 36–37.

[967] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368). See Paul Blyschak (n 21), 35; Feldman (n 881), 28; Cortesi (n 27), 110–112.

analysed in Chapter II, when actions of a State entity allegedly harm the rights of a foreign investor under the applicable IIA, the foreign investor may try to resolve the dispute through ISDS. Yet, for the claim to stand through the proceeding, a nexus of attributability has to be established between the State entity and the controlling State, as only sovereign States can generally be the respondents in ISDS disputes.

## 2. The Broches Exceptions in Light of the ARSIWA

It bears repeating that attribution may be seen as having a two-fold relevance 'for both jurisdictional purposes and the merits of a dispute'.[968] Indeed, as anticipated, beyond being employed for attributing conduct to States, the linking methods identified by the ARSIWA have been *mutatis mutandis* applied in investment disputes to enquire about the relationship between an entity of a public or private nature and a potentially controlling State with the view of ascertaining the tribunal's *ratione personae* jurisdiction.[969] In words used by the *Tupil v. Turkey* Tribunal

> *[t]he issue of attribution relates both to the Tribunal's jurisdiction and to the merits of this dispute. Attribution is relevant in the present context to ascertaining whether there is a dispute with a Contracting State, here Turkey, for the purposes of the BIT and Art 25 of the ICSID Convention. At the same time, the claims presented in this investment arbitration* […] *may only succeed if they are attributable to the State. In that sense, the issue of attribution is also relevant to the merits of the dispute* […].[970]

Therefore, it is not entirely surprising if the rules on attribution provided a logical and theoretical basis for interpreting tests such as the Broches, as the latter aims at investigating the same State-investor link the rules of attribution are interested in, yet in the context of the

[968] See Micheal Feit, 'Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28(1) Berkeley Journal of International Law 142. Also see Cortesi (n 27), 114.

[969] *Vis-à-vis* the qualification of the investor as a national of the other contracting State, whichever the definition of the relevant IIA and arbitral rules may provide.

[970] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, para 276.

determination of the claimant's *ius standi* as an investor.[971] Even though this analogy has not been exempted from criticism,[972] the rationale underlying the Broches test seems to resonate with the ILC Articles as, like Feldman observed,

> *if a claim has been submitted by [a sovereign investor] whose conduct would be attributable to a State under customary international law, the question arises whether such claim should still be considered the claim of an 'investor', rather than that of a 'State'.*[973]

As said, Broches' statement envisages two exceptions to the 'national of another contracting State' status: acting as a governmental agent or discharging governmental function. Such terms resonate with ARSIWA Articles 5 and 8. Precisely, the first exception echoes Article 8, for the latter seeks to establish the relationship between the State and private entities, embodied in an agency link possibly revealed by State's instructions, direction or control exercised over the entity. The second exception, on the other hand, clearly echoes ARSIWA Article 5 inasmuch as the latter provision enquires the link between the State and 'entities' which, though not State organs, are nonetheless empowered by domestic law to exercise the authority usually reserved to the latter.

At this point, one may wonder if certain activities by a sovereign entity investing abroad might fall under the governmental function umbrella because attributable to the State or because covered by immunity from foreign courts' jurisdiction. However, a conduct or an act can be attributable to the State or covered by sovereign immunity because it is of a governmental character and not the other way around. In those cases, scholars have maintained that investment arbitrators should determine, under the language of the applicable treaty, whether such governmental conduct prevents a claimant from qualifying as an 'investor'.

---

[971] Paul Blyschak (n 21), 27-35.

[972] *Etat d'Ukraine c/ société Pao Tatneft*, Paris Court of Appeal 14/17964 (Pôle 1 – Ch. 1), Judgment 29 Novembre 2016 available at <https://hsfnotes.com/arbitration/wp-content/uploads/sites/4/2017/09/500_532_JF_Franc_Merget.pdf> (last accessed 29 October 2021), 502.

[973] Feldman (n 878). Nonetheless, as Blyshack stressed, one has to bear into mind that the ARSIWA and the Broches Test though echoing one another, still serve different purposes and are applied in different scenarios.

Nonetheless, borrowing the words of the Tribunal in *F-W Oil Interests v. Trinidad and Tobago*, there is 'a whole gamut of possibilities, whose application to particular situations depends upon an amalgam of questions of law and questions of fact which will vary from case to case according to the circumstances'.[974]

*i. The First Exception: the Term 'Agent of the Government'*

To talk about the first exception of the Broches Statement means to (re)perform an exegesis of the term 'agent of the government' through the looking glass of ARSIWA Article 8. As seen in Chapter II, such provision has been described as notoriously difficult to comprehend, especially regarding the test required for establishing the agency link between a private actor and a State.[975]

As discussed, the ILC identified three non-cumulative subcategories of factual links between non-State actors and States: instructions, direction, and control exercised by state or State organs over the entities.

As discussed, the ICJ first used such links for attributing *ad hoc* conducts of extraterritorial-armed bands to States remotely directing the activities by the controlled bands.[976] In that context the ICJ enucleated the 'effective control' test, setting a rather stringent threshold to prove that an entity's conduct is, in fact, under the control or direction of a State within the meaning of ARSIWA Article 8. In other terms, attribution should occur only when 'there is evidence that individuals have been specifically charged by State authorities to commit a particular act, or carry out a particular task of some kind on behalf of the State'.[977] Conversely,

[974] *F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 26 March 2006, para 203.

[975] International Law Commission, 'Report of the ILC on the work of its twenty-fifth session, draft Articles on State Responsibility with commentaries' (n 495) Commentary to Article 4, para. 2. Also see *Prosecutor v Tadic*, ICTY, Trial Chamber, para 117.

[976] See Chapter II.

[977] International Law Commission, 'Report of the ILC on the work of its twenty-fifth session, draft Articles on State Responsibility with commentaries' (n 495) Commentary to Article 4, para 2.

the Appeal Chamber of the ICTY adopted a more lenient approach, the so-called 'overall control test'.[978]

In turn, it is the ICJ approach is the one adopted by investment tribunals, which require a high degree of control to attribute conduct under ARSIWA Article 8, according to the 'effective control' test. Indeed, the effective control test, as interpreted by investment tribunals, requires a general control of the State over the entity and specific control of the State over the act of the attribution under scrutiny. In turn, this double-barred assessment has primarily been recognised as highly demanding by some arbitrators.[979]

Consequently, as we have seen in Chapter II, when applying ARSIWA Article 8 in the context of investment cases, tribunals have been somewhat deferential in searching for 'effective control'. This concept transposed from the context of armed bands to the corporate framework, means that State ownership might be preliminary seen as the key criterion to determine if a State has been instructing, directing or controlling an entity.

In this connection, the *Maffezzini v. Spain* Tribunal famously stated that a finding that a State owns an entity, directly or indirectly, 'gives rise to a rebuttable presumption that it is a State entity'.[980] However, investment tribunals have usually established that State ownership of a company alone does not constitute sufficient ground for attributing a company's conduct

[978] See *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999. *See* paras 118 – 119, 141. Antonio Cassese (n 676), 657-658. As Cassese reminded, the Chamber 'favoured both the 'effective control' test (as enunciated by the ICJ) and another test, better suited to instances where the persons whose conduct may or may not be attributed to a State, make up an organized and structured group, normally of a military or paramilitary nature'. See idem.

[979] See *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 179.

[980] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 77. At first, as Schicho noted, this seems to suggest that the Tribunal set a rebuttable burden of proof, meaning that full ownership would raise a presumption of attribution of conduct rebuttable by the respondent showing that the wholly-owned State entity was nonetheless acting independently in that instance. Yet, this reasoning was put forth at the jurisdictional phase and explicitly limited to the question of whether the entity could qualify as a State entity to establish the Tribunal jurisdiction over the dispute.

to the State.[981] On the contrary, State ownership may grant general control over a company or a fund but is not expressive of effective control over conduct carried out by that entity.[982] State ownership has been regarded as relevant insofar as it allows the State to exercise direct control over the members of the decision-making body of the entity involved in the dispute. In a way, additional evidence of more pervasive control, especially regarding the decision-making body's selection and operation, are usually required.

The requirement of such evidence by tribunals is grounded in the acknowledgement by arbitrators of the general principle of the separateness of the legal personality of a corporate vehicle from its shareholders. Indeed, States may be shareholders in companies or funds without this automatically entailing their control over such vehicles.[983] Under international law, the caveat to the separateness of the corporate form principle, and therefore the only cases where the 'corporate veil' can be lifted, and the shareholders treated as one with the corporate vehicle, is when the corporate form is used as a vehicle for fraud or evasion.[984]

The ILC Commentaries expressly hold corporate entities as *prima facie* separate, and their conduct in carrying out their activities as not attributable to the State, although owned by

[981] *Inter alia*, see *CSOB v. Slovakia, supra*; *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, paras 827-829.

[982] Ownership and control are indeed to be disentangled. See, *Vento Motorcycles v. Mexico Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, paras 221-224; *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020, paras 198-202; *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, paras 214-215; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, para 104; *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para 160.

[983] Indeed, as we will see, not even full ownership is usually regarded as sufficient to establish control over that company.

[984] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, paras 56-58. See also, from the part of State Immunity, *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 27. *Infra*, at 71.

and in that sense subject to the control of the State.[985] This, until the there is no evidence 'that a corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question [would be] attributed to the State'.[986]

*ii. The Second Exception: 'Discharging Essentially Governmental Function'*

The second limb of the test echoes ARSIWA Article 5. In Chapter II, we discussed how this provision sets a double-layered analysis.[987] Firstly, a structural exam (or structural test) of the link between the entity 'empowered by the law of the State to exercise elements of governmental authority' and the State is required.[988] Secondly, it has to be evaluated whether the entity's conduct qualifies as a governmental function (functional test). The Broches test seems to only relate to the latter the last step. In this regard, the ILC refrained from including any element that could define the concept of 'governmental authority' in the draft Articles and delimitate its application in particular cases. Some investment tribunals have noticed that the notion of governmental authority shall be judged in the round, in the light of the area of activity in question, and in the light of the history and traditions of the country in question.[989] Precisely, the *F-W Oil Interests v. Trinidad and Tobago* Tribunal highlighted that

> *[t]he notion is intended to be a flexible one, not amenable to general definition in advance; and the elements that would go in its definition in particular cases would be a mixture of fact, law and practice. Moreover – and the point is of some*

[985] Yet adding, 'unless they are exercising elements of governmental authority within the meaning of article 5'. International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 368), commentary to ARSIWA Article 8.

[986] ibid.

[987] See *infra*, Chapter III.

[988] See, *Maffezzini v. Kingdom of Spain*, ICSID Case no. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paras 51-52 and 75-77. See also Guy S. Goodwin-Gill, 'System of the Law of Nations: State Responsibility. Part I. By Ian Brownlie.' (1985) 79(2) American Journal of International Law 471, 132 et seq.

[989] *F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago*, para 203. International Law Commission, 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries' (n 666) Commentary to Article 5 para 6.

*importance – it is not the case that the same answer would necessarily emerge on every occasion; in some of its activities a State enterprise might fall on one side of the line, in others on the other.* [990]

While consciously intended by the ILC drafters who sought a flexible governmental authority notion that could be adaptable to the cases' specific circumstances, such a lack of a definition has understandably reflected in divergent interpretations by investment tribunals. Indeed, the absence of a general definition of what constitutes 'governmental authority' might be seen as having a particular impact on investment arbitration, as legal traditions of capital-exporting countries often differ from those of capital-importing countries.[991] However, an activity is usually seen as an essentially governmental function if it is under the sovereign's exclusive competence or governmental units or State agencies.[992] Therefore, public policy prerogatives included legislative activities, administrative action, and public policy development. In the context of investment arbitration, these prerogatives would entail granting licenses, approving or blocking commercial transactions, imposing quotas, and fees, or expropriating companies.[993]

Though certain functions such as the legislative, adjudicative and executive or those related to State security may be seen as clearly sovereign under most societies, the activities usually at issue in investment cases belong to more 'blurred realms'. In addition, determining its meaning becomes even more challenging when the issues under scrutiny by arbitrators relate 'to new fields of economic activity, concerning which no governmental regulation exists'.[994] In turn, in investment arbitration, it might be incredibly challenging to ascertain whether conduct fits only under the label of governmental authority or under one of the purely commercial activities.

[990] id. para 53.

[991] Consequently, an activity or function that can be categorised as governmental in one State might at the same time being considered commercial in another State. Luca Schicho (n 382) 127.

[992] Mark McLaughlin (n 66), 12.

[993] Reza Mohtashami and Farouk El-Hosseny (n 958).

[994] Luca Schicho (n 382) 127See, David M. Lawrence (n 994).

Overall, as seen in Chapter II, one of the main criteria often used to recognise governmental from non-governmental conduct is the 'nature' of the activity. This approach echoes the 'commercial transaction' test under the law of State immunity, which also finds its ground in the famous distinction between *acta jure imperii* and *acta jure gestionis*. Against this background, as we will see, the Broches test seems consistent with such theories of State immunity and State responsibility vis-à-vis the methodology used to discern commercial acts from sovereign acts.[995] Indeed, under the restrictive theories of State immunity, States are not immune when under scrutiny it is the State's participation in commercial acts, transactions or activities in which the State has engaged in the same manner as a private person. This approach mainly focuses on the nature of the acts and, as we will see, has indeed been applied by many domestic courts to determine their jurisdiction over foreign States' actions. However, it has to be anticipated how other domestic systems also look at the purposes or the surrounding circumstances to identify whether an act, a function, is commercial or sovereign.[996]

As we will see below, ICSID tribunals have stably applied determinative tests pivoted on the nature of the activities rather than on their purposes.[997] However, tribunals have sometimes interpreted the function's public aim as a factor indicating its governmental character and, seldom, as even a sufficient ground for attribution.[998] Nonetheless, such an approach has been criticised as the tribunals might have conflated the two steps of the analysis embedded in ARSIWA Article 5, namely the structural and the functional tests.[999] Indeed, in the context of the law of State responsibility, it is generally believed that a tribunal cannot neglect the analysis of whether the acts or omissions imputed to an entity that might perform public objectives were taken in the exercise of governmental authority in connection to that public objective.

---

[995] Yas Banifatemi, 'Jurisdictional Immunity of States – Commercial Transactions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).

[996] See Gaukrodger (n 50), 19. See also *supra*.

[997] See, for instance, *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Award, 17 December 2003, para 17. See also, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para 212.

[998] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, para 33.

[999] See *infra* Chapter IV.

## E. THE BROCHES TEST APPLIED

*CSOB v. Slovakia* is the first ICSID dispute where the Broches statement was applied as also the case that made the statement a fully-fledged test for all successive investment tribunals.[1000] This case had its roots in the privatization of Czechoslovakia's foreign trade bank, CSOB, following the dissolution of the former Czechoslovak Republic. By the time of the dispute, CSOB was a Czech commercial venture majority-owned by the Czech government, with Slovakia holding a minority stake.[1001] Slovakia raised jurisdictional objections arguing that the Tribunal lacked jurisdiction because the dispute was not between 'a Contracting State and a national of another Contracting State' as required by Article 25(1) of the ICSID Convention. According to Slovakia, CSOB was a State agency of the Czech Republic and the real interested party was the Czech Republic.

The Tribunal started its analysis by affirming that the soundness of the Respondent's arguments had to be tested against the Broches statement. The arbitrators observed that the Czech Republic owned CSOB for 65% of its shares.[1002] However, according to the Tribunal, this factor demonstrated that CSOB was a public sector rather than a private sector entity, but 'under the here relevant test', it did not disqualify CSOB from filing a claim at ICSID.[1003] Hence, the Tribunal excluded CSOB as an agent of its home State by considering that both the ownership and control factors were not in and of themselves sufficient to disqualify the entity as an investor of another contracting State.

It then shifted the analysis onto the second exception identified by the Broches test, addressing the alleged governmental character of the function exercised by CSOB. Indeed, the Respondent expressly argued that CSOB was a government agency, which had been discharging essentially governmental functions throughout its operational life and, more

[1000] *Ceskoslovenska Obchodni Banka A.S. v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para 15-31.

[1001] Thus, the Slovak Republic found itself in the unusual position of being sued at ICSID by a company in which it was a (minority) shareholder.

[1002] And that the Slovak Republic owned 24%.

[1003] id. para 18.

specifically, 'with regard to all events pertinent to this dispute'.[1004] Although admitting that CSOB had promoted the State's governmental policies, the Tribunal also held that 'the activities themselves were essentially commercial rather than governmental in nature'.[1005] In such a second assessment, the Tribunal expressly stated that the spotlight should have been given to the nature of the financial activities carried out *vis-à-vis* the Slovak State and Slovak corporations and not to their purpose.[1006] Hence, Slovakia's objection to the Tribunal's jurisdiction was ultimately dismissed as the investment activity carried out by CSOB was found to be commercial in character.

Given that the CSOB Tribunal set, to a varying degree, the standard for the Broches test application, some methodological observations should be offered concerning its reasoning. First, contrary to what the word 'or' contained in Broches' statement would seem to suggest to the reader, i.e., a disjunctive application of the two exceptions, the CSOB Tribunal applied the two limbs of the Broches test conjunctively. This interpretation would render the Respondent's burden of proof even higher than what seems to have been initially designed by Broches. This applies especially as the Broches statement identified two exceptions to the general rule, whereas the Tribunal reading regarded the governmental function exception as decisive and, more precisely, the 'nature of the function test' over the 'agent exception'. Indeed, the first limb of the test appears as almost bypassed by the Tribunal, which rushed to analyse the activities carried out by CSOB. Not surprisingly, the Tribunal addressed that majority ownership and degree of control did not automatically entail an agency link following the cited majority view on the matter of State ownership. Yet, it also holds true that the Tribunal sidestepped the analysis of what can be considered sufficient to disqualify an entity as a State agent under the Broches test.

Secondly, as mentioned, the ultimate most crucial issue was whether the activities performed by CSOB were essentially commercial rather than governmental. Here, the

[1004] id. para 19. Specifically, the Tribunal recalled '[i]n this regard, Respondent seeks to show that since its inception CSOB has served as agent or representative of the State to the international banking and trading community, that its subsequent reorganization has not changed its status, and that, moreover, the instant dispute arises out of the functions CSOB performed in that capacity'.

[1005] id. para 20.

[1006] id.

arbitrators considered only the nature of the activities, while neither purposes nor contexts were deemed relevant to complete such an assessment.

Subsequent tribunals, such as, for instance, the 2017 *Beijing Urban Construction (BUCG) v. Yemen* acknowledged a similar approach to the CSOB in applying the Broches test.[1007] In this case, Yemen argued that the Claimant was an agent of the Chinese Government discharging governmental functions even in carrying out its seemingly commercial activities. In substantiating such argument, the Respondent cited ARSIWA Article 5 as a legal basis.

Here, the arbitrators began the examination of such objection by recalling that the ICSID dispute resolution mechanism is not available to claimants who are State-owned companies acting as agents of the State or engaging in activities where they exercise governmental functions. The Tribunal expressly stated that '[t]he Broches factors are the mirror image of the attribution rules in Articles 5 and 8 of the ILC's Articles on State Responsibility. The Broches test lays down markers for the non-attribution of State status'.[1008]

The Tribunal acknowledged that the Claimant was a publicly funded, wholly State-owned entity established by the Chinese Government, recalling it was 'one of the top 500 State-owned enterprises' in China.[1009] The Respondent also submitted evidence that BUCG was subject to the overall direction of a Board that was the representative of the State interests and the operation decision-making organ.[1010] According to the Respondent, such an organ was responsible for the value maintenance and increment of the State-owned assets within the scope of authorisation.

Moreover, the Respondent put forth that in State-owned enterprises such as BUCG the Chinese Communist Party Committees were responsible for 'monitoring the implementation

[1007] *Beijing Urban Construction (BUCG) v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras 29-47. See also *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID No. ARB/13/33, Award, 5 May 2015, paras 80, 124, 170, 237. *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 11 March 2016, paras 259-290.

[1008] id. para 34.

[1009] id. para 32.

[1010] id.

of the scientific concepts of development and national policies, to promote enterprises to play a leading role in carrying out political and social responsibility'. The Respondent referenced the statement made in the *Maffezini v. Spain* case, where the tribunal looked at various factors such as ownership, control, the nature, purposes, objectives of the entity under scrutiny, as well as to the character of its actions to establish whether a particular entity was a State body.[1011] However, in the *Beijing Urban* Tribunal's view, the fact that the Chinese Government was the ultimate decision-maker for the Claimant, a contractor for an international airport project in Yemen, was not decisive to define it as a State agent. Specifically, it held

> *[t]hese corporate controls and mechanisms are not surprising in the context of PRC State-owned corporations. […] the issue is not the corporate framework of the State-owned enterprise, but whether it functions as an agent of the State in the fact-specific context.*[1012]

The Tribunal insisted that the focus should have been on the BUCG's functions in the specific case under dispute, namely the construction of the Sana'a International Terminal project. Regarded in that particular capacity, the Tribunal maintained that no evidence could be found that 'BUCG was discharging a PRC governmental function rather than a commercial function'.[1013] The Tribunal then went on to reject the second argument made by Yemen, that BUCG was discharging governmental functions that failed, in words used by the Tribunal for 'essentially the same reasons as its 'agency' argument'.[1014]

Unlike in CSOB, the BUCG Tribunal applied the Broches test limbs disjunctively and cared (comparatively more) for examining the agency link and the distinction made by the test between economic activities and essential governmental functions. Nevertheless, similarly to the CSOB case, in addressing the functions undertaken by the Claimant, no consideration was given to the underlying context in which BUCG's activities were carried out, as BUCG's deep ties with the Chinese Communist Party were admittedly regarded as typical within the Chinese State-led economy, hence dismissed as a 'convincing but largely irrelevant' factor. Thus,

[1011] id. para 38.

[1012] id. para 39.

[1013] id. para 42.

[1014] id.

notwithstanding the different factual backgrounds and the slightly different application of the test, the BUCG arrived rather swiftly at the same conclusions of the CSOB Tribunal by focusing on the nature of the conduct carried out by the Claimant.

Taking a step back, as already explained, the Broches Test conceptually mirrors some of the attribution methods provided by the ARSIWA. However, the Broches Test and the ARSIWA are separate legal tools designed to fulfil two different purposes, which are *prima facie* conceptually separate. Such distinction was used as part of the Claimant's arguments in the 2018 ECT-based dispute *Masdar v. Spain*, which, interestingly enough, is also one of the few cases whereby a SWF was involved in the dispute from the claimant's side.[1015]

In this case, the Respondent State grounded its objection to the Tribunal's jurisdiction *ratione personae* on the degree of connection between Masdar, a Dutch-incorporated company, and the government of Abu Dhabi, relying expressly on ARSIWA Articles 5 and 8. Spain objected that the dispute was an inter-State dispute camouflaged as an investor-State arbitration because the Claimant was a company owned and controlled by Abu Dhabi Future Energy Company (ADFEC), which, in turn, had been established, owned and managed by Mubadala Development Company, the UAE's SWF wholly owned by the government of Abu Dhabi.

Here, the Respondent based its reasoning on the ARSIWA, which, in its view, while admittedly not directly applicable for jurisdictional purposes, could still be relevant to jurisdiction, as the CSOB and other tribunals previously confirmed. Spain then recalled the attributive methods under ARSIWA Articles 5 and 8 and admitted that it could find nothing to support the argument that the Claimant exercised any public function prerogative.[1016] On the contrary, it insisted on focusing on the relationship structure between the Claimant and the Government of Abu Dhabi. It argued that there were 'indicia of general control, direction and instruction of Abu Dhabi', given that the 'key goals of the claimant' were determined and defined expressly by Abu Dhabi and those were the objectives of economic and social policy goals of Abu Dhabi.[1017] Specifically, the critical goals listed were the following: (i) to contribute to the economic diversification of Abu Dhabi; (ii) to maintain, and later expand,

[1015] See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras 145-146, 170.

[1016] *Masdar Solar v. Spain*, para 148.

[1017] id. para 150.

Abu Dhabi's position in evolving global energy markets; (iii) position Abu Dhabi as a developer of the technology, rather than an importer; and (iv) to make a meaningful contribution towards sustainable human development.

The Respondent also put forth that control was manifest in the fact that any investment made by the Claimant had to be approved by the Abu Dhabi Government through Mubadala. It concluded that '[i]n essence […] Claimant is a special purpose vehicle to which Abu Dhabi provided funding and, through Mubadala, guarantees for the investments in issue in this arbitration'.[1018]

On the opposite, the Claimant argued that being the dispute administered under the ICSID Rules, the correct test to apply to the case was the Broches' one as construed by the CSOB Tribunal and not the ARSIWA.[1019] In ruling over the matter, the Tribunal underlined that the question to examine was 'whether the acts of the Claimant, as a separate entity, [could] be attributed to the State of Abu Dhabi, either because it exercise[d] governmental authority ('*prérogatives de puissance publique*') or because it [was] under the effective control of the State in its investment activities'.[1020] It replied to this question by adopting the CSOB reasoning, recalling that it had to be proved that Masdar was acting as an agent for the government of Abu Dhabi or discharging essentially governmental functions.[1021] In assessing the two exceptions, the Tribunal found that, on the one hand, Respondent admittedly did not find that the Claimant exercised any public prerogative. On the other hand, it also stated that Spain had not proven any element, 'showing in a convincing manner that the State of Abu Dhabi was exercising both a general control over the Claimant and a control over its investment decision' so dismissing the jurisdictional objection.[1022]

[1018] id. para 155.

[1019] Given this, the Claimant highlighted how, according to its internal structure and management policy, it was essentially a commercial entity and that the investment under dispute was also 'quintessentially commercial'. id. paras 159-165.

[1020] id. para 169.

[1021] The Tribunal seemed to have however disjunctively applied the two limbs of the test, unlike in the CSOB.

[1022] id. para 171.

Some methodological observations can preliminarily be offered also with respect to this Tribunal's reasoning. Indeed, while the *Masdar* Tribunal invoked the Broches test, it also seemingly stated it had to establish attributability of the Claimant's conduct to Abu Dhabi, either because the conduct was of a governmental character or because the Claimant was an agent of the Government. In this way, the arbitrators seem to have equated the two legal instruments of the ARSIWA and the Broches test and the two different purposes they seek to achieve, respectively attributing conduct to the State for establishing international responsibility and establishing the true nature of an applicant in an ISDS dispute under ICSID. If we were to regard these instruments as indeed fungible, one could question what would then be the legal value of a Broches test in the first place. While it holds true that attribution has a double-layered function, i.e., identification of the link between the State and entities linked to it and attributability of their conduct to the State, attribution as a legal process is combined of both steps, which could individually give way to a specific test. Hence, it is one thing to employ the attribution process as a reading key for a test such as the Broches, whereas it is another thing entirely to assert that the identity of a Claimant is verified depending on the attributability of its acts to the State. As we discuss below, a preliminary answer to such a remark might be that these instruments are not interchangeable in their structure and purposes and that, perhaps, there has been some conflation in their combined application.

## F. NON-ICSID ARBITRATION

By looking at non-ICSID jurisprudence, one would notice that tribunals have adopted approaches akin to those used at ICSID.[1023] For instance, in *China Heilongjiang and others v. Mongolia*[1024] and *Taftneft v. Ukraine*[1025], the corporate structure, context and purposes of the claimants' actions were dismissed as non-decisive, and the respondents' objections on the claimant's sovereign status were rejected.

[1023] Paul Blyschak (n 21). Arbitral rules such as the UNCITRAL and the ICC Arbitration Rules were designed to administer commercial disputes between private parties. Accordingly, their jurisdictional provisions are concerned with that the parties consented to arbitration and the proper formation of the arbitral tribunal.

[1024] *Beijing Shougang and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, para 417.

[1025] *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction, 28 September 2010, paras 140-148. See also Oleg Alyoshin, Olha Nosenko and Ivan Yavnych (n 724).

In *China Heilongjiang and others v. Mongolia*, seemingly to the analysed ICSID cases, the Respondent State maintained that the Claimant entities were not functionally independent from China, as they were 'quasi-instrumentalities of the Chinese government' not driven by profit logics but rather by the Chinese government foreign investment policy goals. The UNCITRAL Tribunal rejected such arguments maintaining that 'the fact that the Chinese State directly or indirectly own[ed] Beijing Shougang and China Heilongjiang ha[d] no relevance for their qualification as 'economic entities' under Article 1.2. of the Treaty', concluding that the claimants qualified as investors under the relevant treaty.[1026]

In *Taftneft v. Ukraine*, the Respondent State argued that the Tribunal lacked jurisdiction to hear the case as the dispute was between Ukraine and Russia. Based on Article 8 of the ILC Articles, Ukraine maintained that Tatneft was under the control of Tatarstan and was overall dependent on the government furthering the region's energy policies. Ukraine maintained that the nature and the purpose of Tatneft's activities pointed to the exercise of governmental functions, which precluded its protection as an investor under the Russia-Ukraine BIT, thus resulting in the Tribunal's lack of jurisdiction in this dispute. The Respondent recalled the CSOB decision, maintaining that the principles therein applied were not confined to ICSID. On the contrary, they were grounded in international customary law as reflected in the ARSIWA. Here the Tribunal adopted an approach akin to the one discussed so far. It dismissed Ukraine's argument that Taftneft was a separate entity from the regional government. Firstly, according to the Tribunal, the Tatar government did not exercise enough control over Taftneft activity to amount to an agency relationship. Secondly, the Tribunal also analysed the activity of Taftneft through the 'functional test' lenses and found that the kind of measures taken by the company in the pursuit of its business did not differ in their nature from actions any other major oil company may take.

The arbitrators arrived at such conclusions notwithstanding Tatneft acknowledgement of the Tatarstan Government's power to considerably influence its corporate structure, which was even used in the past to mandate oil sales and to raise capital for its benefit or even to pay its debts when independently Taftneft would not have entered into such transactions.[1027] In the Tribunal's analysis, the arguments under Articles 5 and 8 of the ILC Articles, and therefore

[1026] *Beijing Shougang and others v. Mongolia*, para 417.

[1027] *OAO Tatneft v. Ukraine*, paras 140-148. See, Oleg Alyoshin, Olha Nosenko and Ivan Yavnych (n 729).

whether there was governmental dependency and control over Tatneft and whether Taftneft was a *de jure* or *de facto* instrumentality of the State were analysed simultaneously.[1028] Similarly to other cases, the Tribunal concluded that the Respondent had not proven Taftneft was dependent upon the State, holding that it was not uncommon for governmental and commercial interests to coincide in a foreign business project.

Setting aside the conflation between Articles 5 and 8, from a public international law standpoint, the legal analysis of the Tribunal is in line with the approach adopted by the vast majority of investment tribunals. However, let us assume we may look at such analysis through a corporate law lens. In that case, it might become puzzling that the combination of a golden share granting the State the right to veto, the ownership of 36 per cent of the company's stocks by the Tatarstan Government, and the Regional Minister's post as Chairman in the company's Board of Directors excluded State control over the company. In this regard, while the Tribunal tackled the company's corporate structure, which can be regarded as a welcomed practice, the fact that the State owned less than 50% of the stocks in the company was not accompanied by an assessment of the remaining shareholding composition aimed at excluding with all certainty that the government was not the largest shareholder. Indeed, a government may exercise significant influence over a single corporate decision even when it owns a small number of shares or when its 'remote' from the specific function under scrutiny. That is why assessing governmental control over a company or its decisions must involve judgement.[1029]

Interestingly, after Taftneft, the Tatarstan Region itself and the Ministry of Land and Property Relations of the Republic of Tatarstan filed a claim against Ukraine. While in Taftneft, the Claimant was an entity in which the Russian Region of Tatarstan held 36% of stocks, in *Tatarstan v. Ukraine*, the applicants were, at least on the surface, direct emanations of the State.[1030]

---

[1028] ibid.

[1029] See International Monetary Fund, 'Chapter 3 State-Owned Enterprises: the Other Government' (n 6) 47.

[1030] *Ministry of Land and Property of the Republic of Tatarstan v. Ukraine Tatarstan* (unpublished). Here, the claimants filed a claim against Ukraine over the changing the shares of stockholders in the oil refinery PJSC Ukrtatnafta.

The UNCITRAL Tribunal found that the Republic of Tatarstan did not qualify as an investor. By contrast, the Ministry was granted access to arbitration, notwithstanding being an organ of the State.[1031] Unfortunately, the decision is unpublished, yet its outcome may nonetheless spur some questions. Firstly, it is obscure why the Republic of Tatarstan was barred from having standing while its fully-fledged organ, the Ministry, was allowed to. Recent scholarship suggests that a cursory enquiry into Russian law would find that the Ministry could entertain civil law relations as a government institution.[1032] However, one may still find it puzzling that the Region of Tatarstan – the actual asset owner – was barred from arbitration and that, by contrast, the Ministry, which only held the assets on a limited operational management title, was conversely accepted as an investor.[1033]

Secondly, one could wonder what could have happened if the Ministry had acted as respondent instead of as claimant. By applying customary international law on State responsibility as codified by the ARSIWA, the Russian State could have been held responsible for the actions or inactions of any of the federal or sub-federal level organs, regardless of their commercial or non-commercial nature. Yet, when acting as a claimant, it seems that such a stringent link between the Ministry and the State might be overlooked for the organ to qualify as an investor. Even though one were to assume that attribution of conduct to the home State of a sovereign entity is not enough to exclude its standing in arbitration, as some have argued, this decision still seems not to see eye to eye with the very ultimate aim of investment arbitration, that is as some have said, to solve disputes between non-sovereigns and host-States.[1034]

---

[1031] Vladislav Djanic, 'BIT Claim Against Ukraine is Allowed to Proceed, but One of the Claimants - The Republic of Tatarstan - Fails to Clear Jurisdictional Hurdle' (18 February 2020) <https://www.iareporter.com/articles/claim-against-ukraine-is-allowed-to-proceed-but-one-of-the-claimants-fails-to-clear-jurisdictional-hurdle/> accessed 5 March 2021 Even though the decision has not been released and does not explicitly concern SOEs or SWFs standing, the main issue raised by such a jurisdictional determination connects to our inquiry.

[1032] Szilárd Gáspár-Szilágyi and Maxim Usynin, 'Procedural Developments in Investment Arbitration' (2020) 19(2) The Law & Practice of International Courts and Tribunals 269.

[1033] ibid.

[1034] ibid 273.

## G. APPRAISAL OF TRIBUNALS' ANALYSIS

The Broches test and the tests used in non-ICSID cases to establish the *locus standi* of sovereign investors as claimants have not been exempted from academic criticism and challenges by respondent States. In this last respect, for instance, in *Rumeli Telekom A.S., Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. The Republic of Kazakhstan*, the Respondent argued that Aron Broches made its statement during the cold war, 'when, for a multilateral treaty to be effective, he needed to address the peculiarities of genuinely commercial enterprises which happened to be State-owned for political reasons'.[1035] The Respondent concluded that the test formulated by Broches had no application in that arbitration as Broches did not have in mind the factual situations, such as the case brought by the Claimant when drawing the two exceptions.[1036]

Overall, two levels of remarks can be made regarding the tests employed in investment arbitration when addressing the *locus standi* of a sovereign entity like SOEs or SWFs. Such remarks question the afore-discussed tests' capability to effectively capture the complex contemporary nature and business activity of actors such as SWFs. In turn, the first remark is directed explicitly at the thresholds used for addressing the identity of the sovereign investors in ISDS. The second one is of a more general methodological character and pertains to the appropriateness of applying seemingly the 'same' test in a different context and for apparently different purposes. As the tests used in ICSID and non-ICSID arbitrations described above are substantially alike, we will address them together.

The above-cited investment case law shows that tribunals rely on ARSIWA Articles 8 and 5 to assess sovereign investors' standing. First, they usually inquire whether the sovereign investor is an agent of the State, under the latter's instructions, direction, or control. As shown, the test under public international law for attributing actions or omissions to a State for conduct that it may have instructed, directed or controlled is set extremely high, as it has also been

[1035] *Rumeli Telekom A.S.,Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. The Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para 293-296.

[1036] ibid. paras 240-336.

acknowledged in investment arbitration.[1037] As McLaughlin rightly pointed out, this entails that sovereign entities' investment decisions shall be deemed to be at the State's instruction, direction or control 'only where there is an unequivocal, specific and targeted factual bases to so conclude'.[1038] While agreeing on this point, one should nonetheless notice how, in principle, this should call for arbitral tribunals to engage in the in-depth analysis of the factual link between the enterprise decision-making body and its home State.

Nevertheless, in the discussed tribunals' analysis, there is little to no room for enquiring the agency link between the sovereign claimant and its home State. Indeed, tribunals do not usually step into an exhaustive analysis that goes beyond the mere ownership structure nor assess the round that may comprise a chain of control, publicly mandated policy objectives of the sovereign entities under enquiry and voting rights.[1039] More precisely, even when such analysis is present, tribunals do not attribute value to any of such 'factual bases' as they are not, in principle, able to show complete dependence of the company over the sponsoring State.

On the one hand, this approach is to be understood in the light of the fact that tribunals focus exclusively on direction and control under ARSIWA Article 8 and the functional test under ARSIWA Article 5. In this way, a 'structural' analysis of the link between the State and a corporate entity, as required under ARSIWA Article 5 structural test, is not explicitly requested by the Broches test nor really employed by non-ICSID tribunals.

On the other hand, because tribunals read the Broches test strictly through the prism of the law on State responsibility (or directly apply the ARSIWA) to establish claimants' *locus standi*, they also import into a corporate framework analysis a specific *modus arguendi. That is* an analytic framework that – at least originally – was applied for attributing responsibility of international wrongful acts in inter-State disputes often times related to context distant from economic scenarios (like military and paramilitary-armed bands' activities). This means importing in ISDS challenging benchmarks like the 'effective control' test. This also means

[1037] *White Industries Australia Limited v. The Republic of India*, UNCITRAL Award, 30 November 2011, para 5. 2. 25.

[1038] Mark McLaughlin (n 60), 12.

[1039] This reluctance becomes even more puzzling given that most investment treaties tackling sovereign entities categorise them based on their ownership and chain of control structure.

adopting the very same demanding threshold for establishing *locus standi*, rather than attributing international liability.[1040] Hence, the yardstick against which arbitrators evaluate the *locus standi* of a corporation or a SWF has been designed in (and for) settings conceptually very distant from international investment case scenarios and for other purposes.[1041] In turn, this mainly translates into adopting rather stringent thresholds in order to prove that the Claimant is indeed a State agent or is exercising a governmental function. In this regard, transposing these rules into investment cases might be methodologically incorrect and detrimental for international law logical consistency.[1042]

In the law of State responsibility, as also in the analysis of the claimants' *locus standi*, State majority ownership and majority voting rights have been recognised by investment tribunals as means for exerting general control over corporate vehicles[1043], yet alone as insufficient grounds for attributing conduct under ARSIWA Article 8, because it does not prove effective control over that specific conduct. Indeed, even in cases where 100% ownership was undisputed, tribunals still required effective control over the conduct. However, as also noted by the IMF, a State may hold a direct minority shareholding in a company but still exercise significant control over strategic decisions through, for instance, a golden share giving it special

[1040] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US), supra.*

[1041] See also, Jurgen Kurtz (n 1041).

[1042] As Judge Crawford sharply put it, these Articles have come 'in handy' as a *tabula in naufragio* to the 'sinking' boat of investment tribunals. However, good practices in the employment of such Articles by investment tribunals have been acknowledged by the same authoritative voice James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (n 393). See *Hamester v. Ghana*, Award, para 179.

[1043] *Joshua Dean Nelson v. Mexico* ICSID, Final Award, 5 June 2020, para 198 and para 202. 'Moreover, it is undisputed by the Parties that majority ownership is a manner of legal control for purposes of NAFTA Article 1117. Claimant's position is that on 29 March 2016, as a result of Mr. Sacasa's transfer of shares, he gained majority ownership of Tele Fácil (with 60% of the shares).162 Respondent's position is that Mr. Sacasa's transfer of shares to Mr. Nelson is invalid and of no legal effect, which would mean that Mr. Nelson's never became the majority owner of […]. The evidence on the record as to corporate control resulting from the ownership of the majority and the decisive vote of the shareholders of Tele Fácil is more than sufficient to conclude that Mr. Nelson had legal control of Tele Fácil. But, the Tribunal notes that, in addition, Mr. Nelson was the sole financer of Tele Fácil during the critical start-up period, allowing the company, inter alia, to hire staff, lawyers and accountants, to obtain a telecommunications concession, pay the rent and litigate'.

voting privileges.[1044] Indeed, a State can control a company through other mechanisms, such as indirect ownership, whereby the government owns stakes in SWFs or public banks and public pension funds that own shares a company.[1045] However, this may not prove control under the effective control test. In turn, the effective control requirement is such a demanding threshold, which can lead tribunals to address the agency link by almost only analysing ownership that, however, alone will never be sufficient to establish control, while also rendering pointless the examination of other circumstantial elements. In this way, corporate framework, socio-political context, political interests and, more generally, factors that may lie behind ownership are not factored-in or valued in the context of this enquiry.

This remark may be reinforced by the argument that when compared to other tribunals' analyses of corporate structures carried out in other contexts, such as the assessment of investors' nationality, tribunals' inclination towards more in-depth or more comprehensive analysis is traceable. It has been argued that investment tribunals seem more prone to pierce the corporate veil of a private corporation to assess its 'true' nationality than when sovereign investors' standing is at stake.[1046] Indeed, to bring a claim against a State under a certain IIA, an investor must possess the nationality required under that specific treaty, as emphasised by the ICSID Convention Article 25.[1047] When the investor is a corporation, nationality analysis

[1044] International Monetary Fund, 'Chapter 3 State-Owned Enterprises: the Other Government' (n 6) 50.

[1045] ibid. The IMF recalls as an example how, the German State of Lower Saxony 'has only 20 percent of the voting rights in Volkswagen but, legally, also has a veto right over key decisions such as factory closures, mergers, and acquisitions'. Andreas Cremer, 'German state conservatives take tougher line on VW oversight' *Reuters* (8 August 2017) <https://www.reuters.com/article/us-germany-election-lowersaxony-vw-idUSKBN1AO08Z> accessed 11 November 2021.

[1046] Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (International arbitration law library, Kluwer Law International 2014) 160 See also, W. Mark C. Weidemaier, 'Piercing the (Sovereign) Veil: The Role of Limited Liability in State Owned Enterprises' (2021) 46(2) Brigham Young University Law Review, UNC Legal Studies Research Paper 795.

[1047] According to ICSID Article 25 (2) (b) States can decide to enlarge ICSID jurisdiction through establishing that 'National of another Contracting State' means any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

focuses on the corporate composition and who has the legal capacity to control it. In this context, tribunals have sometimes used the concept of legal capacity to control an entity. The Tribunal in *Aguas del Tunari v. Bolivia* explained the meaning of 'indirect' or 'direct control'. It stated that '[t]he phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity'.[1048] The Tribunal also specified that

> *[s]ubject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held. In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these*.[1049]

From this passage, it is inferable how, not so different from the analysis of arbitrators regarding ARSIWA Article 8, even in cases where only a minority stake is held in a company, the capacity to control can stem, directly or indirectly, from a combination of the percentage of shares held and other elements such as voting rights. This seems confirmed by other tribunals' analysis, such as the 2020 *Vento v. Mexico* Award, where it expressly specified, 'control is not limited to 'corporate control' as exercised through voting rights'.[1050]

The Tribunal stated that in the context of addressing the meaning of 'control' exercised over an investment by the Claimant under Article 1117 NAFTA, and therefore of the entitlement of the Claimant to bring a claim, relevance should have been given to the plain meaning of control. This entailed that, according to the Tribunal, control could mean both the legal capacity to control and *de facto* control. The Tribunal recalled the finding in *Thunderbird International v. Mexico* vis-à-vis the notion of control as the arbitrators explained how

[1048] See, *Aguas del Tunari v. Bolivia Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 Oct 2005, para 264.

[1049] id.

[1050] *Vento Motorcycles v. Mexico* ICSID, Award, 6 July 2020, para 221-224.

> *[i]t is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise* […]. [1051]

Along these lines, the *B-Mex Tribunal* recalled the definition of control provided in an 'Understanding' with respect to Article 1(6) of the Energy Charter Treaty (ECT), virtually identical in language to Article 1117 NAFTA.

> *For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after such an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body [...].*[1052]

Furthermore, as amply discussed, a 100% State ownership has been seen as a rebuttable presumption of control to address an investor nationality in *Maffezzini v. Spain* and, later, in *Occidental v. Ecuador (II)*.[1053] In this latter case, the Tribunal held that there is 'a general presumption that a majority shareholder also controls the company, a presumption which can only be rebutted if there are special elements which create doubts about the owner's control and Ecuador has pled no such special elements'.[1054] In addition, in *Mobil v. Venezuela* the Tribunal found that Venezuela Holdings owned 100% of the share capital of two American subsidiaries, which in turn owned 100% of the share capital of the two Bahamas subsidiaries. Thus, the Tribunal held that 'the share capital of Venezuela Holdings (Netherlands) in those

---

[1051] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para 214. Moreover, in footnote n. 3 at p. 36, id. para 106.

**[1052]** *B-Mex and others v. Mexico*, ICSID, Partial Award, 19 July 2019, para 214-215.

[1053] *Emilio Agustín Maffezini v. The Kingdom of Spain*, *supra*, para 77.

[1054] *Occidental v. Ecuador (II)* ICSID, Decision on Annulment of the Award, 2 November 2015, para 104.

subsidiaries makes it possible for it to exercise control on them. The Tribunal does not have to consider whether or not such control was exercised in fact'.[1055]

By contrast, the dissenting Declaration in *Aguas del Tunari v. Bolivia* notes that the commentary on the drafting of the ICSID convention 'makes it clear that share ownership at a level greater than 50% might not be controlling'.[1056] The dissenting Declaration also remarks that tribunal awards have established that an investor with minority share ownership can control a company, 'thereby providing counterexamples to the assertion that majority share ownership and majority voting rights are sufficient to establish control'. Moreover, it concludes, '[m]ajority shareholding and majority voting rights do not *per se* constitute control'.[1057] Other tribunals have considered that there was no 'formula' to establish control.[1058]

Against this backdrop, Badia have argued in favour of adopting the veil-piercing doctrine for assessing the status of sovereign investors in the same fashion as for assessing a private companies' nationality. Specifically, Badia maintains that veil-piercing theory completes the State attribution process by widening its scope of enquiry on a company's corporate structure. This is so as 'veil piercing tunes with the paramount objectives of due process, fairness and full equality, striking a balance between claimant investors and respondent States'. He finds that even though private laws do not rule sovereigns, they rule corporations. Hence, 'if modern States avail themselves of corporations to carry out business, then they must abide by the same rules and exceptions that are applicable to non-State actors, and this includes full observance of the veil-piercing remedy'.[1059]

In this connection, one ought to remember that according to the international law theories on veil piercing, only fraud and malfeasances could justify lifting the corporate veil.[1060] While we do recognise a valid point in this proposition, we also do not think investment tribunals

[1055] *Mobil and others v. Venezuela* ICSID, Decision on Jurisdiction, 10 June 2010, para 160.

[1056] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Declaration of José Luis Alberro-Semerena, 21 October 2005, paras 36-39.

[1057] id.

[1058] id.

[1059] Badia (n 1046) 203.

[1060] id.

should force their hands on claimants so to, as already egregiously explained by Professor Weil in *Tokios Tokeles*, 'look behind the legal structure chosen by the parties to discover some hidden 'reality' or the 'hidden investor'.[1061] At the same time, however, we believe that the threshold required to assess the agency link for addressing the identity of a sovereign investor might be so high to be ill suited to capture the sophistication of contemporary sovereign investors such as SWFs and of some SOEs.[1062]

This is even more so as the analysis of the second limb of the tests, which focuses on governmental function, only considers the nature of such function/conduct.[1063] As seen, there is no definition of 'governmental authority' in the ARSIWA Commentary and, besides certain blatantly public functions, the activities usually at issue in investment cases belong to more 'blurred realms' concerning which it might be challenging to ascertain whether conduct fits only under the label of governmental authority or under one of the purely commercial activities.

In this same regard, as discussed, tribunals afford almost sole account to the nature of the functions carried out by the claimant. Here, tribunals also automatically disregard the purposes and the context of the 'governmental' activity under scrutiny following the *acta jure imperii* and *acta jure gestionis* division. This seems in line with the application of the ARSIWA Articles to the extent that tribunals focus on the role of the sovereign investor *in the particular projects* and the facts alleged to give rise to its claims. Arbitrators are mindful that the ultimate purpose of the Broches test is evaluating whether the claimant is another contracting State in that specific context.[1064] This would explain the focus on the nature of the activity/function carried out by a sovereign investor.

By contrast, from an investment policy perspective, the need to focus on sovereign investors' geopolitical goals has emerged as a more pressing matter in recent years, as explained in Chapter I.[1065] Indeed, even if acting in their private capacity, the pursuance of public policy objectives might still constitute (at least partially) the underlying rationale to

[1061] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion, 29 April 2004, para 27.

[1062] id.

[1063] In this regard, see James Crawford, *State Responsibility* (n 459), 113.

[1064] Kovács (n 513) 279.

[1065] See *supra*, Chapter I, at 55.

sovereign investors' activity, especially given that many of such entities' sponsoring governments are, as mentioned, State capitalists in their domestic economic approach.[1066] This finds confirmation in the various international regulatory activities developed by international organisations such as the OECD or even by SOEs and SWFs themselves, where such actors' operational and functional independence from their sovereign owners/controllers constitute an essential focus of the whole policy discussion.[1067]

Suppose we match the exclusive focus on the nature of the activity when addressing the character of the function/conduct carried out by a sovereign investor with the high threshold required to establish the agency relationship between the sovereign investor and the sponsoring State. In this way, the tests employed by arbitrators risk almost setting a pre-established finding, which may be summarised in the establishment of the lack of an agency link between the claimant and the sponsoring State (because no effective control can be established) and the non-governmental character of the claimant's function (because of its commercial nature). In other words, such tests risk missing the broader complexity of the contemporary corporate and financial world, whereby concepts such as effective control and essentially governmental function may not be the best to capture the relationship between States, their sovereign funds or entities and the global economy.

Moreover, as anticipated, we have a more general remark that relates to the fact that investment tribunals use the ARSIWA for a different purpose than establishing State responsibility. In the way they are spelt out, the Broches test and the test used in non-ICSID arbitration cases are strongly influenced by, if not based on, the rules codified by the ARSIWA. We do agree on the fact that the ARSIWA may be seen as composed of a two-pronged analysis, the one enquiring about the link between States and entities and the one of attributability of conduct, whereas the 'whole sets of tests' designed by the ILC Commission was meant to

[1066] See, for instance the Chinese debt-swap activity with under-developed countries. Yunnan Chen, 'Chinese Debt and the Myth of the Debt-Trap in Africa' (24 July 2020) <https://www.ispionline.it/it/pubblicazione/chinese-debt-and-myth-debt-trap-africa-27024> accessed 26 March 2021.

[1067] Mitsuo Matsushita and C. L Lim, 'Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules' (2020) 19(3) World Trade Review 402; Kim (n 628).

attribute wrongful acts to States and not to exclusively to ascertain the identity of actors. Indeed, as anticipated, we sometimes trace a conflation in applying these two legal tools by investment tribunals. For instance, as mentioned, in *Masdar v. Spain* the arbitrators said that it had to examine whether the acts of the claimant, as a separate entity, could be attributed to the State of Abu Dhabi, either because it exercised governmental authority or because it was under the effective control of the State in its investment activities.[1068] However, as we have seen, attribution under ARSIWA Article 5 requires examining both a structural test and a functional test, as the entity exercising governmental authority must be entitled by domestic law to so doing, which is missing in the analysis of sovereign claimants' *locus standi*.

While such an application of these tests read through the interpretative lenses of the ARSIWA is utterly understandable given the treaty-based nature of investment law and investment arbitration, one might dare to wonder if other approaches could be taken into consideration by investment tribunals. This is even more so as one has to remember that other courts and tribunals in different fields of international (and European) law have tackled the issue of sovereign entities' standing. An example is provided by the ECtHR, which has been employing a functional test on a case-by-case basis, reaching varying outcomes depending on the features of the disputes, also taking into account the interests advanced by the sovereign entities under scrutiny. For instance, in *Transpetrol v. Slovakia*, the ECtHR assessed 'the overall procedural and substantive context of the application and [...] its underlying facts', concluding that the Transpetrol displayed features of both a governmental and non-governmental organization. In this case, the application was ruled inadmissible expressly because of the perceived unity of interest between the State shareholder and the company.[1069]

The ECtHR developed a pool of criteria with which to identify whether a State is liable for conducts of a State-owned enterprise, which also applies to the analysis of whether State-owned enterprises can be admitted to lodging a claim at the Court under Article 34 and 35 of the European Convention of Human Rights (ECHR).[1070] However, this pool of criteria seems

[1068] *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, para 155.

[1069] See ECtHR, *Transpetrol v. Slovakia*, Appl. no. 28502/08, Judgment of 15 November 2011, at 6. See also, Chijioke Chijioke-Oforji (n 936) 336.

[1070] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Arts. 34 and 35.

relatively flexible to allow the Court to employ a functional test on a case-by-case basis reaching varying outcomes depending on the features of the cases and taking into account the interests advanced by the sovereign entities under scrutiny.

An example is provided by the *Ljubljanska Banka D.D. v. Croatia*, where the applicant bank was deemed by its nature not to be entitled to lodge an application under Article 34, given the absence of 'sufficient institutional and operational independence'.[1071] Such institutional and operational relationship between the entity and the State was established based on: the company's legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control).[1072]

Drawing from the ECtHR example, we notice that investment tribunals can – and perhaps should – develop a pool of criteria that 1) be flexible enough to be applied in the different contexts in which they are used and 2) be reflective of the contemporary sophistication of the corporate world. These aims might be achieved through a hands-on interpretation of the 'agency link test' and the 'nature test' read against the background of the socio-political context in which they are invoked. For instance, one may construe the part of the tests dealing with the agency link as complementary to the analysis of the nature of the investor's activities. Specifically, one could bring attention to a different aspect of the sovereign investor's business as the type and degree of connection between the company or the fund, which undertook the activity under scrutiny, and its home State, which – regardless of the nature of such activity –

[1071] *Ljubljanska Banka D.D. v. Croatia* (29003/07) 12 May 2015, para 114. See also, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia [GC]*, no. 60642/08, 16 July 2014, para 114-116; *Slovenia v. Croatia*, Application no. 54155/16, Decision 18 November 2020, para 33-43. *Ex multis* also see, *Yershova v. Russia*, Application no. 1387/04, Judgment, 8 April 2010; *Islamic Republic of Iran Shipping Lines v. Turkey*, Application no. 40998/98, 13 December 2007, para 81. *R. Kačapor and Others v. Serbia*, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, §§ 92-99, 15 January 2008). Judgment (Merits and Just Satisfaction); *Municipal Section of Antilly v. France* (dec.), no. 45129/98, ECHR 1999 VIII; *Mykhaylenky and Others v. Ukraine*, nos. 35091/02, 35196/02,35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, §§ 43-46, ECHR 2004-XI; *Cooperativa Agricola Slobozia-Hanesei v. Moldova* (Application no. 39745/02), 3 April 2007.

[1072] id.

might have remotely directed it to pursue, for instance, geopolitical goals, strategical interests, competition objectives etc.

This is even more so as tests such as the Broches' is, before being a test, a statement made more than 50 years ago. While it might have been reflective of the contracting parties' original will, and therefore in line with the treaty interpretation under Article 31 VCLT of the ICSID Convention, it is neither *travaux préparatoires* and, most importantly, nor it is *per se* self-judging. Tribunals may indeed choose a contextual application of such a statement to give space to considerations that may today have a conceptual dignity that did not have when the ICSID Convention was signed.[1073] Time and again, among those is that the contemporary sovereign actors and their activity might be difficult to categorise by completely disregarding context, purpose, and the degree of influence a government may have in a given political context.

## H. INTERIM CONCLUSIONS

As discussed, State ownership through SOEs and SWFs has been fast expanding in developing countries.[1074] In such context, sovereign investors file investment claims against the host States of their investment. Now, there is no single answer to whether SWFs can use investment arbitration protection as investors. As shown, this largely depends on the treaty's text, which is used for making a claim, on the forum of choice's rules, and last but not least, on the SWF structure and type of investment made.

As of today, many IIAs still lack clear guidance in this respect. As general arbitral jurisprudence interprets, both IIAs and the ICSID Convention allow SOEs to bring investment claims against foreign States.[1075] This interpretational trend finds its root in the pivotal role that the nature of a sovereign investor's activity plays in the assessment of admitting it as a claimant in ISDS and in the high threshold required to ascertain an agency relationship between a State

[1073] As, for instance, the concept of, competitive neutrality could be used as a complementary criterion to integrate the private contractor threshold under the law of sovereign immunity. See OECD, 'State Owned Enterprises and the Principle of Competitive Neutrality' (n 512).

[1074] See *infra*, the discussion in Chapter I. Also see, Carolina Abate and others (n 280). See also, Oxford Business Group (n 1075).

[1075] Cuervo-Cazurra and others (n 57).

and a sovereign investor. On the one hand, the 'nature' of the activity test, as mentioned, is not accompanied by equal attention to the disputed sovereign activity's purposes nor to the company's underlying structure. However, distinguishing the nature of the activities from their purpose might prove virtually impossible, especially if the action under scrutiny is justifiable both commercially and geopolitically-strategically.[1076] On the other hand, the sovereign entity's status under the sponsoring State's domestic law, and therefore whether the entity is used to further its policy objectives, is regarded as irrelevant. Hence, tribunals usually refrain from thoroughly evaluating the degree of control the governments exert on the entities to establish if it is acting as an 'agent', as the assessment shifts on ownership considerations (which are never enough for exerting effective control) and on the nature of the function, which is virtually always commercial. As a result, to successfully argue that a sovereign investor is indeed a State agent or is discharging governmental functions in an investment proceeding is a rather daunting task.

Moreover, investment tribunals tend not to go beyond the Broches test or the ARSIWA for such assessments. However, much has changed since tests like the Broches' were once formulated.[1077] State capitalist SOEs and SWFs are behemoths in today's global markets. SWFs, historically passive stockholders, have become proactive cross-border investors. Hence, the sovereign claimants that could initiate an ISDS claim today might likely be by-products of a thriving State capitalist economy rather than companies undergoing privatisation processes.[1078] Against this backdrop, rightly or wrongly, many have regarded contemporary sovereign investors as potentially geopolitically driven.

It is in this specific context that, therefore, arbitrators might have to address the issue of determining which approach to employ when evaluating a sovereign claimant's standing in investment arbitration. Overall, a tribunal may choose to dismiss the investors' corporate structure, the interests and the purposes of their investment activities as non-decisive factors to

[1076] Hence, the difficult task of objectively 'divine the motives' of a sovereign investor. See Mark McLaughlin (n 60), 14.

[1077] Indeed, '[w]hen Broches formulated his test in 1972, there were virtually no SWFs, the Berlin Wall was still in place, and Deng Xiaoping had not yet embarked on China's economic transformation'. Reza Mohtashami and Farouk El-Hosseny (n 958). See also Mike Wright and others (n 60).

[1078] As was the case in earlier arbitrations like *CSOB*.

the benefit of sound legal reasoning grounded in the sole evaluation of the nature of the investments. Nevertheless, even more so, it remains vital to question what might be the consequence of such a strict de-contextualised application of tests developed more than forty years ago and, in the case of the ARSIWA, for purposes other than addressing *locus standi*.

In this connection, as mentioned, investment law scholars have raised doubts vis-à-vis the appropriateness of the methods employed by investment tribunals.[1079] The main concern related to the above-analysed practices is that State capitalist investors' multifaceted global economic activity, such as Chinese or Middle Eastern SOEs and SWFs, might risk being misconstrued. For instance, as applied so far by arbitral tribunals, the Broches test does not consider that more than 300 Chinese SOEs that are singularly investing abroad in their commercial capacity, if combined, are also furthering China's 'going out' policy, which specifically entrusted Chinese State-owned enterprises with fostering cross-border activity to 'actualise China's economic and policy goals'.[1080]

Applying the mentioned test entails not pondering about government bodies' coordinating role, such as SASAC.[1081] The presence of party organisations and Chinese Communist Party members in Chinese SOEs may 'raise eyebrows' vis-à-vis these enterprises' structural and operational independence from the Chinese State and its public policy.

In this regard, as the investment tribunals' approaches stand today, it is unlikely that jurisdiction over claims brought by SWFs or SOEs will be declined on the ground of a *ratione personae* jurisdiction objection. However, if one couple lacks a pervasive analysis of the entities' corporate structures with complete disregard for their activities' purposes, the risk of reaching a pre-set answer that is always the same becomes high regardless of the circumstances. Moreover, adopting an approach that overlooks the way policymakers often perceive such

[1079] See Badia (n 6) and Badia (n 1046); Mark McLaughlin (n 60) Also see Chijioke Chijioke-Oforji (n 936). The unconditional acceptance and application of the Broches Test to ICSID disputes has also been disputed.

[1080] The Economist, 'China's "going out" strategy - The Chinese put reserves to work' *The Economist* (21 July 2009) <https://www.economist.com/free-exchange/2009/07/21/chinas-going-out-strategy> accessed 3 March 2021; Chijioke Chijioke-Oforji (n 936) 336; Jude Blanchette, 'Confronting the Challenge of Chinese State Capitalism' (22 January 2021) <https://www.csis.org/analysis/confronting-challenge-chinese-state-capitalism>.

[1081] See *supra* Chapter I, at 9.

sovereign investors as tools of economic Statecraft rather than as private investors might be seen as dismissing *a priori* to analyse the roots of State-capitalist actors' foreign investment activities.[1082]

To conclude, we wonder if arbitrators' 'conservative' attitude based on a rather classic public/private dualism could fail to grasp the many elusive facets of SWFs and other sovereign investors' activities. Borrowing Thornton's wiser words

> *[i]n more recent history, the growth of capitalism and the regulatory State caused a veritable minefield of ambiguities to emerge and disrupt any notion that a simple dualism of public and private could be sustained. Nevertheless, the fiction of separate spheres remains normatively and ideologically significant, and it may be that a simplistic division offers an appealing, albeit treacherously false, sense of security in the face of complex and elusive phenomena that operate at a number of levels of meaning.*[1083]

The growth of State capitalist actors and their global financial activities seems to conceptually defy or even disrupt such 'simplistic division', which, as Margaret Thornton stressed, today might be more a fiction than a reflection of the socio-economic reality. [1084] In turn, one could imagine how this would impinge on one of the very foundations of ISDS that is, adjudicating investor-States disputes, contributing to the undermining of its institutional legitimacy in the eye of policymakers and civil society.

To conclude, we do not aim much at challenging the merits of a tribunal's jurisdictional decision that a SWF is an investor that may avail itself of ISDS. SWFs can and indeed do act as privates with a financial return at heart, and in such instances, they should be treated as such. However, from a procedural law perspective, we wonder if a decontextualized interpretation of the structural, legal foundations upon which tests such as the Broches' build remains the

[1082] States are equally raising barriers against acquisition by foreign States entities through the amendment or enactment of FDI screening mechanisms in almost a surge of a renewed investment protectionism. Newcombe and Paradell (n 918).

[1083] Margaret Thornton (ed), *Public and Private: Feminist legal debates/edited by Margaret Thornton* (Oxford University Press 1995) 4. One has to specify that this author's words were contextualised in feminist debates.

[1084] ibid.

best analytical approach to capture the character of such SWFs activities. We believe that the specifics of the cases, the surrounding circumstances and the final purposes of their activities, should complement the analysis of the activities' nature. Moreover, we think it might be open to debate whether concepts such as effective control – which are imported from the law of State responsibility and enucleated in the contexts rather remote from the investment sector – should still be the lynchpin of the assessment of State control over sovereign actors in economic law based scenarios.

# CHAPTER IV. SOVEREIGN WEALTH FUNDS AS ASSETS OF THE STATE IN AWARD ENFORCEMENT PROCEEDINGS AND IN THE LAW OF STATE IMMUNITY FROM ENFORCEMENT

## A. INTRODUCTION

It is common knowledge in international investment arbitration that an investor receiving a favourable award has merely won a battle, yet not the war. Indeed, victory can only be claimed once the successful party has paid the sums awarded by the arbitral tribunal.[1085] While a succumbing party should, in principle, comply with an investment award, several possibilities may still unfold in the post-award phase.[1086] By way of example, a recalcitrant State may try to stay the award, annul it and resist it at the place where the enforcement is sought.[1087] In all such scenarios, State creditors can proceed by enforcing the award, locating the debtor's assets and trying to attach them.[1088]

---

[1085] James Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75(4) American Journal of International Law 820. See also Johannes Koepp, Yarik Kryvoi and Jack Biggs, 'Empirical Study: Annulment in ICSID Arbitration' (London 2021) <https://www.biicl.org/documents/10899_annulment-in-icsid-arbitration190821.pdf> accessed 27 July 2022.

[1086] Esra Yıldız Üstün, *International Investment Dispute Awards: Facilitating Enforcement* (Lloyd's arbitration law library, 1st, Informa Law from Routledge 2022), 15 et seq. Maria Fogdestam-Agius and Ginta Ahrel, 'Swedish Supreme Court Weighs in on Immunity of Sovereign Wealth Fund Assets under Central Bank Management' [2022] Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2022/03/07/swedish-supreme-court-weighs-in-on-immunity-of-sovereign-wealth-fund-assets-under-central-bank-management/> accessed 27 May 2022.

[1087] Award enforcement against States may be the outcome of both an ISDS arbitration and also commercial arbitration. See, Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Second edition, Globe Law and Business 2021). See Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (Sixth edition, Oxford University Press 2015). See, Chiara Giorgetti, *Litigating International Investment Disputes: A Practitioner's Guide* (International litigation in practice vol 8, Brill 2014).

[1088] Alexander A Yanos and Kristen K Bromberek, 'Enforcement Strategies where the Opponent is a Sovereign' in William J. Rowley, Emmanuel Gaillard, Gordon E. Kaiser, Benjamin Siino (ed), *The Guide to Challenging and Enforcing Arbitration Awards* (Second edition. Law Business Research Ltd 2021), 174.

Enforcement of an arbitral award is a broad term often used to refer to post-award phases.[1089] Specific definitions of this post-award – post-judgment phase may differ between jurisdictions. In this Chapter, we interchangeably refer to the terms 'enforcement', 'execution' and 'attachment' to indicate the entirety of legal proceedings that may occur in the post-award phase.[1090] Precisely in such a post arbitration context, investors who have received a favourable award, thus becoming States' creditors, might find themselves in a predicament. That is, State assets identified for attachment could be covered by immunity from enforcement.[1091] In general, it holds true that award creditors could seize State assets used for non-governmental/commercial purposes. Nevertheless, whether such assets are considered assets of the State and used for commercial purposes subjectable to enforcement can vary substantially between jurisdictions and depend on the facts of each case.[1092]

In this connection, attaching and executing against assets held or controlled by State entities and SWFs could be a viable option to award creditors, sometimes even the only option.[1093] Yet, whether SWFs may benefit from State immunity from enforcement is not

[1089] We do not refer, therefore, to pre-award measures like preliminary measures of constraint. See also Burzū Ṣabāḥī, Noah Rubins, Don Wallace, *Investor-State Arbitration* (Second edition, Oxford University Press 2019).

[1090] However, there are some practical and technical differences between these concepts: enforcement has a broader meaning and identifies the reduction of a foreign judgment or award into a domestic legal system. In this phase, the legal remedies of the place of enforcement are made available to the award creditor. Execution, on the other hand, refers to the specific 'process by which a court takes control of the specific property'. Practically, this is implemented through different measures of constraint, like attachment, seizure and freeze of assets etc. Mark A Cymrot, 'Enforcing Sovereign Arbitral Awards – State Defences and Creditor Strategies in an Imperfect World' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 352. See, Cymrot (n 1090) 352; Antonio R. Parra, *ICSID: An Introduction to the Convention and Centre* (Oxford University Press 2020).

[1091] Emmanuel Gaillard and Ilija Mitrev Penusliski, 'State Compliance with Investment Awards' [2021] ICSID Review - Foreign Investment Law Journal.

[1092] Alexander A Yanos and Kristen K Bromberek (n 1088).

[1093] We leave out the cases whereby a SWF may try to attach assets of another State because of a favourable judgment or award. Also, a legal instrument available to claimants to avoid the scenario of a recalcitrant succumbing State is the security for costs interim measure. In this regard see, Bianca Nalbandian, 'Security for Costs' [2020] Max Planck Encyclopaedias of International Law [MPIL] 1

entirely clear. As Fox has observed, the extent to which immunity 'should be enjoyed by agencies, connected to the State but not so closely as to constitute central organs of government, remains a perennial problem in the law of State immunity'.[1094]

In this last regard, we have seen in the previous chapters that an underlying tension exists between, on the one hand, the separate legal personality of a State entity, such as a SWF or an SOE, as divorced from the State itself[1095] and, on the other hand, its function within the State apparatus. In principle, we can preliminarily say that immunity is only available to such entities if their activities and assets can fall under the 'governmental umbrella' of sovereign functions.

In this Chapter, we specifically enquire whether SWFs can enjoy State immunity from enforcement. We specifically question whether the domestic courts' treatment of immunity from enforcement regime applicable to SWFs might have 'crystallised'. Is there a customary rule applicable to SWFs in terms of immunity from enforcement? What we can say at this stage is that, assuming no explicit waiver to immunity from enforcement has been given by a SWF or its sponsoring State, whether SWFs may benefit from immunity from enforcement mainly depends on two factors.

First, the invocation of State immunity by a SWF is related to its position vis-à-vis the State. There is the fundamental threshold question of whether SWFs amount to the emanations of their sponsoring States or not. As seen, this is a question that is raised in the context of attribution of conduct of SWFs and SWFs standing in ISDS disputes. *Mutatis mutandis*, it also applies to the determination of the application of State immunity to these actors.[1096] This is, self-evidently, a structural analysis.

---

<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2766.013.2766/law-mpeipro-e2766> accessed 25 May 2023.

[1094] Hazel Fox, *The Law of State Immunity* (1st, Oxford University Press (OUP) 2004).

[1095] When the SWF has a separate legal personality, which may not always be the case.

[1096] Andrew Cannon and Hannah Ambrose, 'In Practice: Dealing with Sovereign Wealth Funds: Immunity Concerns and Practical Steps to Mitigate Them' <https://hsfnotes.com/arbitration/wp-content/uploads/sites/4/2020/12/dealing-with-sovereign-wealth-funds-immunity-concerns-and-practical-steps-to-mitigate-them.pdf> accessed 30 may 2022.

If a SWF forms part of the State (or of an organ of the State such as a central bank), it may, in principle, plead immunity from enforcement. Therefore, the application of immunity to a SWF strongly depends on how the fund is structured, the extent of its autonomy from the State and the mandate under which it operates (as also, as we will see, how its assets are employed).[1097] Depending on whether they are structured as funds devoid of independent legal personality or as SOEs, immunity pleas may yield different results.

From this follows that if a SWF forms an integral part of the State, the fund can be held liable for State debts and may be attached by a State creditor. At the same time, this entails that the SWF could, *prima facie*, claim immunity from enforcement as part of the State apparatus. By contrast, if a SWF is effectively a separate entity from the State, the former might not, in principle, be attached by a State creditor. However, in this last case, the SWF may not plead immunity to shield its assets from attachment by its own creditors.

Second, the successful plead of immunity from enforcement depends on whether the SWFs assets were used to pursue sovereign purposes. Again, we find another question which has been raised in the context of attribution of conduct and *ius standi* of SWFs, namely, what character can be associated with their functions. This question calls for a functional analysis, which, in the context of immunity from enforcement, is the analysis of the use of the SWFs or of the SWFs assets. If such use or purpose is sovereign, the fund and its assets may be covered by immunity from enforcement. If the answer is in the negative, even if the fund forms part of the State structure, a foreign court may lift immunity from enforcement.

Therefore, SWFs may be, in principle, able to claim State immunity from enforcement to prevent the execution of an arbitral award against their assets. It bears repeating that if a SWF benefits from State immunity, this may create an obstacle in enforcing a court judgment/arbitral award against it or its assets. Moreover, the issue of SWFs immunity from enforcement is broader than only post-award attachments. We preliminary ought to specify that enforcement procedures may indeed be addressed directly at a SWF or indirectly at a SWF seized for debts of the sponsoring State, as is usually the case of enforcement of investment arbitral awards.

[1097] Similarly to what we have encountered in the previous chapters vis-à-vis SWFs standing as claimants in ISDS and as the bearers of international responsibility for IIAs violations.

In the words of Bassan, immunity from enforcement against SWFs has an 'active' and a 'passive' dimension. The first dimension of immunity from enforcement stems from illicit conduct directly committed by the fund, such as market manipulation, insider-trading matters, or irregularities connected to domestic companies or security law. On the other hand, the passive side of immunity from enforcement applied to SWFs relates to enforcing administrative, judicial or arbitral measures of an investment host State or concerning prejudgment measures.[1098] In this work, we will only focus on the second dimension, namely, on enforcing States' debts against SWFs. In the case of ISDS, and more specifically in the case of successful investors-claimants, these debts are embedded in the compensation and damages sum awarded to claimants and to be paid by succumbing States. That is the passive side of immunity form enforcement applied to SWFs.

As of today, no specific legislation or soft-law instrument has dealt with sovereign immunity issues of SWFs.[1099] For instance, neither EU law nor the OECD Declaration on SWFs and Recipient Country Policies or its Guidance on SWFs deals with sovereign immunity issues. The GAPP[1100] only indicate in a footnote that recipient countries may grant SWFs certain privileges, such as sovereign immunity and sovereign tax treatment, based on their governmental status. This entails that the GAPP does not envisage sovereign immunity in judicial proceedings involving SWFs or their property but only concerning regulatory issues. In light of the lack of specific regulatory measures dealing with SWFs' immunity, reviewing the general rules and case law concerning other State entities becomes essential.

State immunity, as a rule, also incorporates immunity from enforcement. As mentioned, immunity from enforcement will be the focus if this Chapter, which therefore will not engage in the study of the jurisdictional dimension of immunity of States.

Against this backdrop, our research on SWFs characterisation in the law of immunity from enforcement calls for an enquiry about the broader doctrine of State immunity from

[1098] Fabio Bassan, *The Law of Sovereign Wealth Funds* (Edward Elgar 2011), 92. See also Emmanuel Gaillard and Jennifer Younan (ed) (n 883) 189.

[1099] Victorino J. Tejera, 'The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds' (2016) 25(1) University of Miami Business Law Review 1, 14.

[1100] Santiago Principles, see Chapter I.

enforcement under public international legal instruments and domestic legislations (when present) as also domestic case law.

Therefore, evaluating the applicability of State immunity to SWFs requires a prior understanding of the doctrine of the law of State immunity and, as we will see, its regulation under international law and conventions. Yet, in this last regard, it bears saying that, unlike the issues of standing and conduct attribution in ISDS, the issue of State immunity from enforcement is somewhat grounded in domestic law,[1101] especially immunity from enforcement.[1102] Indeed, the assertion of State immunity is contingent on the law under which the claim is brought which, therefore will be cursorily discussed.

Therefore, we briefly overview the leading theories on the law of State immunity, specifically immunity from enforcement. In this context, we can tackle the structural relationship between a SWF and its sponsoring State under the law of State immunity from enforcement. This means studying the delimitation of the notion of 'State' under the law of State immunity from enforcement as codified in international law and applied by courts. For the same reasons explained in the previous Chapters, we also rely on cases involving SOEs, being SWFs often structured as independent enterprises (much like SOEs). In this regard, we will notice that international and domestic systems seem to have a similar understanding of SWFs structured as separate legal entities. By contrast, the most controversial cases involve SWFs structured as funds and managed by entities such as central banks.

Moreover, the qualification of commercial and sovereign activity under the law of State immunity from enforcement will be addressed. Precisely, we discuss the so-called 'commercial exception' from the point of view of both international law and domestic legal systems. The commercial exception is the pivot of the contemporary restrictive doctrine, and it is vital to establish SWFs sovereign or private 'nature' and the character of SWFs activities from a

[1101] Sompong Sucharitkul, 'Asser Institute Lectures on International Law: Developments and Prospects of the Doctrine of State Immunity – Some Aspects of Codification and Progressive Development' (1982) 29(02) Netherlands International Law Review 252, 259.

[1102] Phillip Allott (n 382), 3–5. As for the interaction between domestic law and international law see, Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(1) ICLQ 57.

functional point of view.[1103] One will see that the issue that steered the State immunity doctrine evolution is linked to what we try to address in this work. Namely, the characterisation of the State's presence in the market as either sovereign or commercial. Indeed, SWFs standing as claimants in ISDS, and the attribution of conduct to their sponsoring States much depends on whether SWFs and their activities are regarded as either public/sovereign or private/commercial. Similarly, the availability of the procedural defence of State immunity from jurisdiction and enforcement is affected by the characterisation of SWFs and their activities as either sovereign or commercial.

To complete our study of SWFs treatment under the immunity regime, we perform an *ad hoc* case law analysis of specific award enforcement proceedings lodged against two SWFs. One of such funds is structured as a pool of assets managed by the State central bank, while the other is structured as an SOE. These cases stemmed from two arbitral disputes, namely *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan* (*AIG v. Kazhakhstan*) [1104] and *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan* (*Stati v. Kazhakstan*).[1105]

Given the relevance of the SWFs corporate structure in such an analysis, the case law study of enforcement proceedings is primarily divided between SWFs main structural typologies: funds managed by a public institution like central banks and independent companies with a separate legal personality from the State like SOEs.[1106]

## B. STATE IMMUNITY

### 1. Nature and Origins

In its broadest definition, 'immunity' relates to any instance in which a State and its subdivisions are immune from all manifestations of another State's legislative, administrative,

[1103] And, therefore, whether sovereign immunity applies in principle.

[1104] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003.

[1105] *Stati v. Kazhakstan.*

[1106] They can also be managed by private entities or by SOEs set up by their sponsoring States.

or judicial power.[1107] Theoretically speaking, the ultimate aim of State immunity would be to protect the State sphere so that its politics can be conducted unencumbered or, as Klabbers stated, 'free from all other concerns'.[1108]

The entitlement of a State to claim immunity before national courts is recognised not merely as a 'prescription with the force of law but also as a rule of international law'.[1109] This is so as State immunity is regarded as a corollary of the principle of equality of States, reflected in the celebre adagio '*par in parem non habeat jurisdictionem*' believed to be coined by Bartolus of Saxoferrato.[1110] State immunity is recognised as a (procedural) rule of customary character.[1111] Moreover, domestic courts recognise the international character of the rule of sovereign immunity that is given effect domestically.[1112] Therefore, it could be inferred that

[1107] It may also refer to exemption from various forms of taxation.

[1108] Jan Klabbers, 'The General, the Lords, and the Possible End of State Immunity' (1999) 68(1) Nordic Journal of International Law 85.

[1109] Hazel Fox and Philippa Webb, *The Law of State Immunity (3rd Edition)* (Oxford University Press 2013) 13. See also Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21(4) European Journal of International Law 853, whereby he states that State immunity is a legally binding principle rather than an international rule based on the comity of the forum State. See also, *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, para 56.

[1110] See Xiaodong Yang (n 50) 43–58 where he addresses the legal basis of the principle of State immunity and discusses how the principle of sovereignty and '*par in parem non habeat jurisdictionem*' are, according to him, not the theoretical underpinnings to State immunity. Sovereignty, independence equality and dignity all collectively serve the purpose of being basis to State immunity.

[1111] See, Lori Fisler Damrosch, 'The Sources of Immunity Law – Between International and Domestic Law' in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019). See, Jasper Finke (n 1109). See also, Christian Tomuschat, 'The International Law of State Immunity and Its Development by National Institutions National Institutions' (2011) 44(4) The International Law of State Immunity and Its Development by National Institutions National Institutions 1105; Christian Tomuschat, 'The International Law of State Immunity and Its Development by National Institutions National Institutions' (n 1111).

[1112] Hazel Fox and Philippa Webb, *The Law of State Immunity* (The Oxford international law library, Revised and updated Third edition, Oxford University Press 2015) 13. Gerald G Fitzmaurice, 'State Immunity from Proceeding in Foreign Courts' (1933) 14 British Yearbook of International Law 101. See as for the UK: *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Case No. [2006] UKHL 26,

the applicability of the doctrine of sovereign immunity to SWFs is regulated by customary international law, and of course, by domestic law whenever present.

When one speaks of immunity, it usually refers to immunity from jurisdiction. One can say that State immunity from enforcement is an element of the overarching concept of sovereign immunity.[1113] However, immunity from jurisdiction and immunity from execution are, to a certain extent, disconnected.[1114] On the one hand, a State is considered to be immune from the territorial jurisdiction of the courts of another State, 'which effectively means that the sovereign or governmental acts of one State are not matters on which the courts of other States will adjudicate'.[1115] In the same vein, State property located in a foreign territory is not subject to attachment and execution unless specific exceptions apply.

Immunity from adjudication and immunity from enforcement differ in scope and exceptions admitted to their restrictions. To borrow the ICJ words, immunity from 'enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts'.[1116] Even if a judgment has been lawfully rendered against a foreign State, it does not

<http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm> accessed 4 October 2022. See also, *Belhaj and another (Respondents) v. Straw and others (Appellants),* [2017] UKSC 3 [2014] EWCA Civ 1394.

[1113] Nikita Kondrashov, 'Sovereign Immunity from Execution (in Enforcement)' (2022) <https://jusmundi.com/en/document/publication/en-sovereign-inmunity-from-execution-in-enforcement> accessed 7 October 2022.

[1114] Sucharitkul, 'The ILC Draft Articles on Jurisdictional Immunities of States and Their Property's First Special Rapporteur, described State immunity from enforcement as the 'last bastion of State Immunity'. See, ILC Commentary to Art 18, para 1. See Fox and Webb, *The Law of State Immunity (3rd Edition)* (n 1109) 484. See also René V Dmitri Zdobnõh, 'State Immunity from Execution: In Search of a Remedy' (2010) 4(161-183) <https://ssrn.com/abstract=2792055> accessed 5 August 2022.

[1115] David Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors OECD Study' (2010/02). OECD Working Papers on International Investment. Also see, Leo J. Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution' (1979) 10 Netherlands Yearbook of International Law 3, 3 Rosalyn Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (n 844). In the refined words of Rosalyn Higgins, from the point of view of domestic law, such type of immunity is a 'mere' exception from the ordinary jurisdictional elements of forum States.

[1116] See *Jurisdictional Immunities*, para 113, cit., n. 62.

follow *ipso facto* that the State against which judgment has been rendered 'can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question'.[1117] Consequently, any waiver by a State of its jurisdictional immunity before a foreign court does not entail that a State 'has waived its immunity from enforcement as regards property belonging to it situated in foreign territory'.[1118]

Their difference in scope mainly depends on the different rationales upon which such two immunities lie.[1119] Enforcement involves the use of more invasive coercive measures than the ruling of a national court regarding a State liability.[1120] This follows that the bar against which one applies coercive measures to a State property is higher than immunity from adjudication.[1121] That is why the ICJ expressly stated that the rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity 'are distinct, and must be applied separately'.[1122]

As a result, some have spoken of 'two dimensions' or a dual character to the State immunity doctrine.[1123] The first dimension – jurisdictional immunity – identifies a *ratione personae* sphere as it regards the State as such. Indeed, jurisdictional immunity under international law remains strictly an attribute or prerogative of the State: it belongs to the State

[1117] id.

[1118] id.

[1119] And the purposes they serve.

[1120] Fox and Webb, *The Law of State Immunity* (n 1112) 23.

[1121] ibid.

[1122] See, *Jurisdictional Immunities*, para 114. We anticipate here that they call for the consideration of different criteria, such as the nature of the activity in the context of immunity of jurisdiction and the purpose of such activity in the context of immunity from enforcement. Xiaodong Yang (n 50) 362.

[1123] August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17(4) European Journal of International Law 803. See also Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 British Yearbook of International Law 220; Peter-Tobias Stoll, 'State Immunity' [2011] Max Planck Encyclopaedia of Public International Law 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106> accessed 25 November 2021.

itself.[1124] The second dimension – immunity from enforcement – identifies a *ratione materiae* sphere since it applies to State property and, depending on the purpose and use by the State of such property, immunity will either apply or be lifted by domestic courts.[1125]

Be as it may, at its origins, sovereign immunity was initially conceived as an attribute of the sovereign/monarch to shield his person from unduly foreign courts' interference with his affairs.[1126] According to the 'Vattelian' doctrine of absolute immunity,[1127] proceedings against foreign sovereigns were inadmissible without their consent, with no derogation to such a general rule. Consequently, the monarch's property was also shielded from foreign coercive measures. State immunity was then seen as absolute in all its meanings.[1128] Throughout the centuries, States started to move away from the absolute doctrine to endorse a restrictive view (*rectius* restrictive doctrine).

This might have been for different factors, among which we can identify at least two. The first might be seen as ideological in origin, yet also practical in its manifestation, and stems from changes in the perception of sovereignty.[1129] Indeed, historically speaking, changes in immunity policy tend 'to result from a more fundamental transformation of State function' or

[1124] Xiaodong Yang (n 50) 230.

[1125] Leo J. Bouchez (n 1115). Concerning the connection between jurisdiction and enforcement, the ILC Draft Articles on Jurisdictional Immunities of States and Their Property ('ILC Draft Articles on Immunities'). See Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries 1991, 56.

[1126] Académie de droit international de La Haye, *Recueil Des Cours, Collected Courses* (vol 85, 1954). For reasons of conciseness, we are obliged to summarise the description of the origins and the development of the doctrines of State immunity. For further readings For further readings on the topic see, Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (n 1123) 220.Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 The British Yearbook of International Law 220

[1127] Emmerich de Vattel and Joseph Chitty, *The Law of Nations* (Cambridge University Press 2015).

[1128] See, French Cour de cassation, Sirey 1849, I, 81. Also see, *I Congreso del Partido*, [1983] 1 AC 244, 64 ILR 307.

[1129] Wenhua Shan and Peng Wang, 'Divergent Views on State Immunity in the International Community' in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 67. Attila Massimiliano Tanzi, 'Su immunità ed evoluzione della società internazionale' in Alessandra Lanciotti and Attila Tanzi (eds), *Le immunità nel diritto internazionale: Temi scelti: atti del convegno di Perugia 23-25 maggio 2006* (G. Giappichelli 2007).

of the position of the State in domestic and international relations.[1130] As States became involved in commercial activities, some courts began to adopt a more restrictive approach to the law of immunity by referencing the type of activity carried out by the State.[1131] Indeed, as Sornarajah recalled, 'the more important reason advanced for abandoning absolute immunity of foreign sovereigns has been the ending of a *laissez-faire* economic system and the beginning of trading through public corporations'.[1132] Therefore, State trading was the pivot to such restrictive doctrine's development, as States and State corporations entering into business relationships with third parties should not have been shielded from their commercial obligations through the plea of sovereign immunity.[1133]

The second factor flows from the first one and is exclusively functional. That is, States started to adopt a 'formal approach to reciprocity', i.e., what has been called a *de jure* reciprocity approach.[1134] The underlying rationale to this approach is that a State should recognise a foreign State's and its officials' immunity as long as, and to the same degree of, that foreign State recognises the former's. Because of the spreading of the restrictive doctrine,

[1130] Wenhua Shan and Peng Wang (n 1129) 67. See also Xiaodong Yang (n 50) 10 and 21. The Institut de droit international acknowledged this factor already in 1891 James Brown Scott, *Resolutions of the Institute of International Law Dealing with the Law of Nations* (Oxford University Press (OUP) 1916), 91.

[1131] Ernest Angell, 'Sovereign Immunity. The Modern Trend' (1925) 35(2) The Yale Law Journal 150. Rosanne Van Alebeek's interesting monograph challenges the linear development from the absolute immunity theory to the restrictive immunity courts. See, Rosanne van Alebeek, 'State Immunity' in Rosanne van Alebeek (ed), *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008), 13.

[1132] Muthucumaraswamy Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity' (1982) 31(4) International and Comparative Law Quarterly 661, 662.

[1133] Bernard Fensterwald, JR. 'Sovereign Immunity and Soviet State Trading' (1949-1950) 63(4) Harvard Law Review 614.

[1134] Wenhua Shan and Peng Wang (n 1129) 67.

many States started implementing it through a reciprocity rationale. For instance, Iran,[1135] Russia,[1136] China[1137] and India[1138] seem to function partially based on reciprocity.

Under the restrictive doctrine, courts recognise immunity only for acts carried out by a State in the exercise of its sovereign authority.[1139] The doctrinal push from absolute to restrictive theory began with civil law jurisdictions.[1140] Specifically, Italy,[1141] Belgium,[1142] and Egypt[1143] were among the first jurisdictions that openly accepted the restrictive doctrine in the

[1135] United States, Law Library of Congress – Global Research Center, 'Law Lifting Sovereign Immunity in Selected Countries: Cuba, Iran, Libya, Russian Federation, Sudan, Syria' (May 2016,) <www.loc.gov/ law/ help/ sovereign- immunity/ lifting- sovereign- immunity.pdf> accessed 29 May 2023.

[1136] Federal Law on Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation, No. 297- FZ 3 November 2015, in force 1 January 2016, Russian Immunity Law (Russia), Article 5.

[1137] China's position on the immunity of foreign central banks is partially based on considerations of reciprocity.

[1138] Wenhua Shan and Peng Wang (n 1129) 67.

[1139] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (n 629), 79. L. Oppenheim, R. Y Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. Longman 1996), i 355 – 63.

[1140] Pierre-Hugues Verdier and Erik Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (2015) 59(2) International Studies Quarterly 209, at 211 where it is stated that in the late nineteenth century, some scholars started advocating restrictive immunity as, for instance, Weiss and De Visscher. See also Institute of international law, 'Draft International Regulations on the Competence of Courts in Suits against Foreign States, Sovereigns, or Heads of States' (1891) <https://www.idi-iil.org/app/uploads/2019/06/Annexe-1bis-Compilation-Resolutions-EN.pdf> accessed 3 October 2022. However, scholars like Anzilotti and Van Praag still supported the absolute State immunity theory. See van Alebeek (n 1131), 15.

[1141] *Hamspohn v. Bey di Tunisi*, Corte di Appello di Lucca, Udienza 14 marzo 1887 in, l Foro Italiano, 1887, Vol. 12, PARTE PRIMA: GIURISPRUDENZA CIVILE E COMMERCIALE (1887). For more cases see, Fox and Webb, *The Law of State Immunity* (n 1112) 154.

[1142] *Société pour la fabrication de cartouches v. Colonel Mutkuroff*, Tribunal civil of Brussels, Ministre de la Guerre de Bulgarie (1888), (1889-III) Pasicrisie belge 62. See, Eleanor Wyllys Allen, *The Position of Foreign States before Belgian Courts* (Macmillan Co. 1929). Fox and Webb, *The Law of State Immunity* (n 1112) 153.

[1143] Egyptian Mixed Courts were also amongst the first jurisdictions to draw the line between the public and the private acts of the governments, see Mark S W Hoyle, *Mixed Courts of Egypt* (Arabic and Islamic laws

late nineteenth century. The acceptance of the restrictive doctrine kept growing in the aftermath of the Second World War.[1144]

The embrace of the restrictive doctrine came a bit later for common law jurisdictions. By way of example, the United Kingdom[1145] did not adhere to the 'mainstream international

series, Graham & Trotman 1991). See for other Egyptian cases *Monopole des tabacs de Turquie v. Régie co-intéressée des tabacs de Turquie* 5 AD 123, case no 79 (Egypt, Mixed CA, 1930). Sir Lauterpacht conferred particular meaning to the early and consistent acceptance of the restrictive doctrine by the Mixed Courts of Egypt. Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (n 1143). This also in light of their international composition of the Court.

[1144] With the Second World War came public economic warfare leading to a proliferation of production and purchasing government corporations. See, Sigmund Timberg, 'Sovereign Immunity, State Trading, Socialism and Self-Deception' (1961-1962) 56(1) Northwestern University Law Review 109. See, *Hoffmann v. J Dralle, Re, Hoffmann v. Czechoslovakia*, Final appeal/cassation, OGH 1 Ob 167/49, OGH 1 Ob 171/50, ILDC 2833 (AT 1950), SZ 23/143, (1950) 17 ILR 155, [1950] Intl L Rep 155, 10th May 1950, Austria; Supreme Court of Justice [OGH]. See, Fox and Webb, *The Law of State Immunity* (n 1112) 160. See *Claim against the Empire of Iran Case*, Federal Republic of West Germany, Federal Constitutional Court, 30 April 1963, International Law Reports 45 (1972). <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20176/v176.pdf> accessed 27 September 2022. This case has attracted much attention also for its survey of the status of State immunity doctrines at the time. See also, *Administration des Chemins de fer du Gouvernement Iranien v. Société Levant Express Transport*, Cour de cassation (1ère chambre civile) [1968], in *Revue critique de droit international privé*, 1970, pp. 102-103. See, Stephan Wittich, 'Article 10' in Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013), 168.

[1145] Alexander Orakhelashvili, 'State Practice, Treaty practice and State Immunity in International and English Law' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation* (Cambridge University Press 2015) 447. The Charkieh (1873) L.R. 4 A&E 59. See also Rosalyn Higgins, 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom' (1977) 71(3) American Journal of International Law 423, footnote 2. However, it holds true that English courts started to express 'signs of acceptance' of the restrictive doctrine already in the nineteenth century.

law'[1146] on State immunity until 1977 with the compelling cases of *Trendtex*[1147] and, subsequently, *I Congreso del Partido*.[1148]

In many countries of civil law tradition, the principle of State immunity has been established 'as a result of judicial interpretation or application of legal provisions'.[1149] Indeed, civil law jurisdictions tend not to codify the rule of immunity. Nevertheless, some States have provisions regulating only specific aspects of State immunity (like Belgium, France or Sweden).[1150]

By contrast, codifications of the doctrine of State immunity are often present in common law countries' domestic legislation. For instance, the 1976 US Foreign Sovereign Immunities Act (FSIA) is historically the first national statute governing sovereign immunity.[1151] Subsequently, the United Kingdom followed in 1979 with the UK State Immunity Act (UK SIA), Canada in 1982 with the Canadian State Immunity Act (Canada SIA),[1152] Australia in 1985 with the Australian State Immunity Act (Australia SIA)[1153], as also other countries of common law tradition.[1154]

---

[1146] Cameron Miles (n 52), 35.

[1147] *Trendtex Trading v. Bank of Nigeria* [1977] 1 QB 529, 552–3.22.

[1148] *I Congreso del Partido (HL)* [1983] I AC 268. The House of Lords held in the latter case that the conduct of a State is not a sovereign act and attracts no immunity if it is an act, which could be performed by any private actor, even if the situation related to a highly contingent political context.

[1149] Second Report on the Jurisdictional Immunities of States and Their Property, U.N. Document A/CN.4/331 and Add.1, p.225, para 106 [citations omitted] (11 April and 30 June 1981).

[1150] States has individual legal provisions referring to public international law (such as Austria, Croatia, Germany, Italy, The Netherlands and Spain).

[1151] Foreign Sovereign Immunities Act of 1976, pub. L. 94-583, 90 Stat. 2891 (codified scattered sections of 28 USC.).

[1152] Canada, State Immunity Act R.S.C., 1985, c. S-18.

[1153] Australia Foreign States Immunities Act 1985 No. 196, 1985.

[1154] See the Malaysian Immunities and Privileges Act 1984; the State Immunity Ordinance of Pakistan in 1981; The State Immunity Act of Singapore 1979 and the Foreign Immunities Act of South Africa in 1981. For other common law jurisdictions see Fox and Webb, *The Law of State Immunity* (n 1112) 148–150.

In all such countries where the restrictive doctrine has been embraced, courts distinguish between acts committed by States in their sovereign capacity (*acta jure imperii*) and acts committed by the States in their commercial capacity (*acta jure gestionis*). Only the former are covered by immunity, whilst the latter, carried out privately, are exempted from immunity protection.[1155] In terms of immunity from enforcement, this translates into shielding only some sovereign assets, namely those used for sovereign purposes and not those employed for commercial objectives.

As a general remark, it is true that State immunity exists as a rule of international law and that State should transpose it at the domestic level in a consistent manner. However, it is equally true that the concrete application of the State immunity defence 'depends substantially on the law and procedural rules of the forum', especially in the case of immunity from enforcement.[1156] This is visible from a lack of uniformity in the application of the rules of State immunity between States and the internal jurisprudence of States.[1157] Transposed in the enforcement stage, when States resist enforcement of arbitral awards claiming State immunity, the applicable rules of State immunity will be those of the forum in which the immunity is invoked.[1158]

Against this backdrop, courts treatment of the plea of State immunity against the enforcement of arbitral awards is at time inconsistent.[1159] This inconsistency in approach has exactly spurred preferences of award-creditors in choosing a forum rather than another for

[1155] Carlo Focarelli, *International Law* (Edward Elgar Publishing 2019) 366–377.

[1156] Indeed, as stated by Crawford, the rules of public international law on State immunity seem to 'have grown out of rules adopted by states and their national courts'. James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019), 488.

[1157] See Report of the International Law Commission on the Work of its Thirtieth Session, UN Doc. A/33/10 (1978), 152.

[1158] See Report of the International Law Commission on the Work of its Thirtieth Session, UN Doc. A/33/10 (1978), 152-153. See Ben Juratovitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards' (2016) 6(2) Asian Journal of International Law 199, 200.

[1159] Phoebe D. Winch, 'State Immunity and the Execution of Investment Arbitration Awards' in Catharine Titi (ed), *Public Actors in International Investment Law* (Springer International Publishing 2021).

commencing enforcement proceedings and ultimately executing an award.[1160] This on the basis that some forum have shown a more 'pro-enforcement' attitude compared to others.[1161] In any event, the success of these attempts in enforcing awards against foreign State assets has often prompted legislative intervention in several jurisdictions in order, for instance, to clarify the rules on State immunity from execution also in a way that safeguards foreign State property against attachment, as, we will see, in the case of France.

## 2. Developments under International Law

State immunity has notoriously been the subject of academic debate for quite some time.[1162] By way of example, the Institute of International Law Plenary Assembly addressed the sovereign immunity issue in 1891 and again in 1954.[1163] In 1932, Harvard University,[1164] the International Law Association in 1952,[1165] and the International Bar Association in July 1960[1166] undertook different initiatives on the subject.

[1160] ibid.

[1161] Such as Belgium or Sweden.

[1162] Peter-Tobias Stoll (n 1123), 2.

[1163] Yearbook of the Institute of International Law, 1889–1892, vol. XI, 426–438. See, Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/601, <https://legal.un.org/ilc/documentation/english/a_cn4_601.pdf> accessed 5 November 2022.

[1164] Harvard Law School, Research in. International Law, part III, 'Competence of Courts in regard to Foreign States. See, William T R Fox, 'Competence of Courts in Regard to Non-Sovereign Acts of Foreign States' (1941) 35(4) American Journal of International Law 632.

[1165] The International Law Association adopted the 'Draft Articles for a Convention on State Immunity' in 1982. The ILA intended to provide 'a clarification and codification in an area of international law [of) growing importance to governments and to trading enterprises.' See, Gabe Shawn Varges, 'Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention' (1985) 26 Harvard International Law Journal 102.

[1166] See American Bar Association, 'Limitation of Sovereign Immunity' (December 1960). Section of International and Comparative Law Bulletin 1 <https://www.jstor.org/stable/pdf/25743257.pdf?refreqid=excelsior%3A612ba802172b8efd3944bf5005dc4c03&ab_segments=&origin=> accessed 4 October 2022.

In this connection, immunity has been the focus of several international treaties throughout the twentieth century. To begin with, in the aftermath of World War I, the Peace Treaties denied immunity to the defeated states when engaging in trade.[1167] The 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships (Brussels Convention),[1168] which also had immunity as a subject, became the precursor of several provisions on immunity in the area of the law of the sea.[1169]

Nevertheless, the most relevant contemporary international sources of State immunities are the European Convention on State Immunity (ECSI) and UN Convention on Jurisdictional Immunities (UNCSI), which deserve a standalone digression.

In 1972 the then Council of Europe's member States developed and concluded the ECSI, which, to date, remains ratified by only eight States.[1170] It bears noticing that the ECSI Contracting States agreed that the UNCSI would have eventually superseded the ECSI in their mutual relations.[1171] In light of the low rate of State adherence, the ECSI is not regarded as a codification of customary international law on State immunity.[1172] Vis-à-vis immunity from enforcement, it combines an obligation for States to comply with judgements rendered in member States against them with a rule prohibiting enforcement measures against them.

---

[1167] Art. 281 Versailles Peace Treaty [1919].

[1168] International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels, April 10th, 1926, and Additional Protocol, signed at Brussels, May 24, 1934.

[1169] Peter-Tobias Stoll (n 1123), 2.

[1170] European Convention on State Immunity, Basle, 16.V.1972, <https://rm.coe.int/16800730b1> accessed 10 December 2021. Moreover, an Additional Protocol was added which primarily established a European Tribunal in Matters of State Immunity. ibid 3. Such eight States are: Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom. See Giovanna Adinolfi, 'SWFs and State Immunity: Overcoming the Contradiction' in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015), 226.

[1171] Denunciation of ECSI once the UNCSI has entered into force 'appeared as the most straightforward option to achieve this result'. ibid.17.

[1172] Andrew Dickinson, Rae Lindsay and James P Loonam, *State Immunity: Selected materials and commentary/ Andrew Dickinson, Rae Lindsay, James P. Loonam* (Oxford University Press 2004), Explanatory Report on the European Convention on State Immunity, para 92.

Given the diversity of States' domestic approaches to questions of State immunity, the ILC developed the UNCSI, which, to date, remains the most ambitious attempt at uniforming the doctrine of State immunity at the international level.[1173] Specifically, in 1991, the ILC Draft Articles on Jurisdictional Immunities were published.[1174] After decades of negotiations, the UNCSI was finally published in 2004.[1175] Even though not in force and ratified by less than 40 States, the UNCSI can be seen as the most authoritative statement available in the current law of State immunity. The UNCSI has had significant influence, and several of its provisions have frequently been referred to by commentators[1176], as well as national and international courts being regarded as declaratory of customary law.[1177] Indeed, the ICJ has maintained that such treaties (UNCSI and ECSI) 'provisions and the adoption and implementation process shed light on the content of customary international law'.[1178]

Today, as discussed, it is universally recognised and accepted that States enjoy immunity under international law.[1179] The ICJ officially confirmed this in the 2012 *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) judgment.[1180] Specifically, the

[1173] Phoebe D. Winch (n 1159).

[1174] Peter-Tobias Stoll (n 1123), 3. See <https://legal.un.org/ilc/guide/4_1.shtml> accessed 4 October 2022.

[1175] The UNCSI has not yet entered into force as twenty-eight States have signed it, and only twenty-two States have ratified it. UN General Assembly, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, A/RES/59/38, <https://www.refworld.org/docid/4280737b4.html> accessed 10 December 2021.

[1176] Council of Europe, 'State Immunity under International Law and Current Challenges' (2017) <https://rm.coe.int/final-publication-state-immunity-under-international-law-and-current-c/16807724e9> accessed 22 May 2023, 10.

[1177] Not all provision of UNCSI are seen as customary law, see for instance Article 2(1)(b), *infra*.

[1178] *Jurisdictional Immunities*, para 128. See, also Benjamin K Nußberger, Victoria Otto, 'Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)' [2015] Max Planck Encyclopedia Public International Law 1.

[1179] Xiaodong Yang (n 50) 34. Sovereignty was initially recognised as a personal attribute of the monarch who embodied the State and exercised its sovereign powers. The monarch enjoyed equality amongst other sovereign rulers. Fox and Webb, *The Law of State Immunity (3rd Edition)* (n 1109) 133.

[1180] *Jurisdictional Immunities of The State* (*Germany v. Italy: Greece Intervening*) (hereinafter '*Jurisdictional Immunities*') Judgement ICJ Reports 2012 para 54 - 56. Brackets added by the author.

Court reminded the conclusions reached by the ILC in the 1980 thirty-second session Report that State immunity had been adopted as a general rule of customary international law solidly rooted in the current practice of States.[1181] The ICJ also recalled that such a conclusion was reached after

> *an extensive survey of State practice [by the ILC] and, in the opinion of the court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.*[1182]

Therefore, for the ICJ, rather than a principle (or an interest), immunity is a rule of customary international law whose scope of application can only be restricted by a customary[1183] exception.[1184] Precisely, in the 2000 *Arrest Warrant* case, the ICJ construed State immunity as a *procedural* rule,[1185] which 'a State enjoys in respect of itself (jurisdictional immunity) and its property (enforcement immunity) from the jurisdiction of the courts of another State […]'.[1186]

[1181] See, Yearbook of the International Law Commission, 1980, Vol. II (2), p. 147, para 26. 122.

[1182] id.

[1183] Or treaty exception, one would add.

[1184] See note 109, *infra,* for more scholarship on this subject, Jasper Finke (n 1109); see also Orakhelashvili (ed), *Peremptory Norms in International Law* (n 1184); Luca Pasquet, 'Some Considerations on State Immunity and Sovereign Debt' [2020] Afronomicslaw <https://www.afronomicslaw.org/2020/10/16/some-considerations-on-state-immunity-and-sovereign-debt> accessed 17 October 2022.

[1185] The ICJ maintained that immunity was 'essentially procedural in nature'. See, *Arrest Warrant* judgment (*Democratic Republic of the Congo v. Belgium*) (hereinafter '*Arrest Warrant*'), Judgment, I.C.J. Reports 2002 p. 25, para 60.

[1186] Phillip Allott (n 382). This was said in the context of personal immunities accorded by international law to foreign ministers. See, *Arrest Warrant* case.

Consequently, the rules of immunity 'do not bear upon the question whether or not the conduct in respect of which the proceedings are brought [is] lawful or unlawful'.[1187] Hence, following this line of reasoning, immunity is confined to determining whether the courts of one State may exercise jurisdiction (or enforcement) in respect of another State. Such an approach led the ICJ to the much-disputed conclusion in *Jurisdictional Immunities* that even an act constituting a grave breach of human rights or *jus cogens* could be qualified as a sovereign act covered by immunity.[1188] This conclusion has sparked a vivid academic debate.[1189] Moreover,

[1187] *Jurisdictional Immunities*, para 93.

[1188] See, Dissenting Opinion of Judge Yusuf where he stated that 'uncertainties on customary rules cannot be resolved by a formalistic exercise of surveying divergent judicial decisions. Customary international law is not a question of relative numbers. Consideration must be given to the circumstances and nature of each case and the factors underlying it. Resort may also be had to the general principles underlying human rights and humanitarian law. A balance must be sought between the function of immunity and the realization of fundamental human rights and humanitarian law'. See related/143/143-20120203-JUD-01-05-EN.pdf > accessed 24 October 2022.

[1189] For further readings on the academic debate related to the State immunity nature as a procedural bar and its implication for *jus cogens* violations see, *ex multis*, Katherine Reece Thomas and Joan Small, 'Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture?' (1999) 50(1) Netherlands International Law Review 1; Lee M Caplan, 'State Immunity, Human Rights, and Jus Cogens : A Critique of the Normative Hierarchy Theory' (2003) 97(4) American Journal of International Law 741; Andrea Bianchi, 'L'immunité des Etats et les violations graves des droits de l'homme : la fonction de l'interprète dans la détermination du droit international' (2004) 108 Revue Générale de Droit International Public 63; Ben Love, 'The International Court of justice: Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)' (2012) 51(3) Int leg mater 563; Markus Krajewski and Christopher Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' in A. von Bogdandy and R. Wolfrum (ed), Max Planck Yearbook of United Nations Law (vol 16. Brill N.V. 2012); McGregor L, 'State Immunity and Human Rights: Is There a Future after Germany v. Italy?' (2013) 11(1) Journal of International Criminal Justice 125; Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary (Oxford University Press 2013) 161–163. Pierre d'Argent and Pauline Lesaffre, 'Immunities and Jus Cogens Violations' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019); Matthew Happold, 'Immunity from Execution of Military and Cultural Property' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), The Cambridge Handbook of Immunities and International Law (Cambridge University Press 2019); Selman Özdan, 'State immunity or State impunity in Cases of Violations of Human Rights Recognised as Jus Cogens Norms' (2019) 23(9) The International Journal of Human Rights 1521; Atul Alexander, 'Jus Cogens and Immunity: Revisiting ILC Draft Article 7 on Immunity of State Officials from Foreign Criminal Jurisdiction' (2022) <http://opiniojuris.org/2022/07/19/jus-cogens-and-

it might be interesting to note how courts, like in South Korea and Brazil[1190], have recently ruled that foreign States 'did not enjoy jurisdictional immunity with respect to claims based on *jus cogens* violations of international law committed' in the forum State's territory.[1191] As digressing into such a debate would exceed the scope of our enquiry, it suffices to know that the discussion on the nature of State immunity and its relation with substantive norms of international character is still actively discussed, especially in criminal law and human rights fields.

Lastly, it is worth noticing that this standpoint adopted by the ICJ in *Jurisdictional Immunities*, led the Court in the case of *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* to state that the United States had violated customary international law on State immunity.[1192] This is because the United States permitted, in the domestic case of *Bank Marzaki v. Peterson*,[1193] the attachment of the assets of the Iranian central bank (Bank Marzaki) notwithstanding their sovereign purpose. Indeed, since 2012 the US State immunity legislation has provided for a so-called 'terrorism exception', which in principle allows the satisfaction of creditors even on immunised assets of a foreign State if the State is deemed a

immunity-revisiting-ilc-draft-article-7-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction/> accessed 4 October 2022.

[1190] South Korea, Seoul Central District Court, Joint Case No. 2016/505092, 34th Civil Division, Judgment (8 January 2021), available online at lbox.kr/detail/서울중앙지방법원/2016가합505092 accessed 25 May 2023 (South Korea, Seoul Central District Court, Judgment of 8 January 2021), Section 3.I.3)(7); Brazil, Federal Supreme Court (Supremo Tribunal Federal), Recurso Extraordinário com Agravo 954.858 Rio de Janeiro, Karla Christina Azeredo Venancio Da Costa e Outro(a/s) (petitioners), are 954858/rj, Judgment (23 August 2021), available online at portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf accessed 25 May 2023 (Brazil, Federal Supreme Court, Changri-lá, are 954858/rj), 30.

[1191] Vessela Terzieva, 'State Immunity and Victims' Rights to Access to Court, Reparation, and the Truth' (2022) 22(4) International Criminal Law Review 780.

[1192] ICJ, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* <https://www.icj-cij.org/en/case/164/judgments> accessed 26 November 2022.

[1193] US Supreme Court, *Bank Markazi, aka Central Bank of Iran v. Peterson et al*, 136 S. Ct. 1310 (2016), <https://www.supremecourt.gov/opinions/15pdf/14-770_9o6b.pdf> accessed 26 November 2022. See also, Harvard Law Review, 'Bank Marzaki v. Peterson', at <https://harvardlawreview.org/2016/11/bank-markazi-v-peterson/> accessed 26 November 2022.

terrorism sponsor. Iran was blacklisted by the United States as a country supporting terrorism. Nonetheless, the ICJ reiterated its dictum concerning the procedural nature of immunity. A State should not be deprived of its immunity 'because it is accused of serious human rights violations or the international law of armed conflicts'.[1194]

## C. STATE IMMUNITY FROM ENFORCEMENT AND ITS BENEFICIARIES

### 1. State Immunity from Enforcement under the ECSI and UNCSI

Coming to the international regime vis-à-vis immunity from enforcement, one has to look at the international conventions and customary law first.

The ECSI allows enforcement measures, yet only in the presence of an express waiver (Article 23).[1195] The ECSI establishes that the Contracting States shall give effect to judgments delivered against them under the provisions of the Convention.[1196] Then a combined reading of Articles 24 and 26 stipulates that 'with respect to judgments concerning industrial or commercial activities, enforcement measures remain possible against property 'used exclusively in connection with such an activity''.[1197] Therefore, the ECSI does not exclude enforcement but allows Contracting States to make declarations allowing for reciprocal enforcement measures to be taken under Article 24.[1198]

---

[1194] *Jurisdictional Immunities of the State*, para 91.

[1195] August Reinisch (n 1123), 805. See Articles 23 and 20 ECSI. As mentioned, the ECSI, however, is not regarded as a codification of customary law. Nonetheless, it is an expression of the will of at least eight European States regarding State immunity.

[1196] ibid.

[1197] And as between States which have made an optional declaration in accordance with Article 24 of the Convention. ibid. As Reinish recalls, the ECSI does not codify existing customary law on the subject. On the contrary, 'it represents a compromise between states adhering to a rule of absolute immunity from enforcement measures and those permitting such measures under certain conditions'. August Reinisch (n 1125), 805. See, Council of Europe, Explanatory Report on the European Convention on State Immunity (1972), available at http://conventions.coe.int/Treaty/EN/Reports/HTML/074.htm, at para 92.

[1198] See Dickinson, Lindsay and Loonam (n 1172), Explanatory Report on the European Convention on State Immunity, paras 92-96 and 100.

Regarding the UNCSI, Article 18 covers pre-judgment measures, while Article 19 regulates State immunity from post-judgment measures of constraint.[1199] The latter recites that no post-judgment measures of constraint, such as attachment, arrest or execution, against the property of a 'State', may be taken in connection with a proceeding before a court of another State unless and except to the extent that the State has consented or that the State has earmarked the property for the debtor's satisfaction.[1200]

Another exception under Article 19 subparagraph (c) is if

> *it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.*[1201]

It is important to remark that the term 'property' designates movable (tangible or intangible) or immovable property whether owned, possessed or controlled by the foreign State.[1202] According to Brown and O'Keefe, the UNCSI excludes 'any property in which a State has some lesser species of right or interest'.[1203] However, they also recall that the term 'property *in connection* with the entity' has to be intended as broader than ownership or possession.[1204] Yang maintains that such an 'ambiguous understanding' may intend a legally

[1199] Focusing on award enforcement proceedings, we are mainly interested with Article 19 UNCSI.

[1200] By international agreement; by an arbitration agreement or in a written contract; or by a declaration before the court or by a written communication after a dispute between the parties has arisen.

[1201] Article 19 UNCSI.

[1202] Jean-Marc Thouvenin and Victor Grandaubert, 'The Material Scope of State Immunity from Execution' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 251.

[1203] Chester Brown and Roger O'Keefe, 'Part IV: State Immunity from Measures of Constraint in Connection with Proceedings before a Court' in Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013) 315–316.

[1204] ibid 326. See also Thouvenin and Grandaubert (n 1202) 254.

protected interest.[1205] Thouvenin and Grandaubert state in this regard that 'to simply exclude property in which a State has an interest, in particular when it may be difficult to draw a line between ownership, possession or control and an interest, is not convincing today from the point of view of globalisation and the expanding financialisaton of the economy'.[1206]

Therefore, constraint measures may only be taken against the property that has a connection with the entity to which the proceeding was directed. Nonetheless, as Yang rightly notices, the word 'connection', which remains undefined under Article 19(c), may permit a broad application of the provision. Specifically, it allows 'the levying of execution upon the property of a State to satisfy a judgment against a State entity, or vice versa, provided some kind of connection can be shown'.[1207]

The meaning of the term 'entity' seems clarified by the Annex to the Convention. The term 'entity', as in subparagraph (c) Article 19, means 'the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality'.[1208] This definition of 'entity' seems in line with Article 2(1)(b), which, as will be discussed, provides for the general definition of 'State' under the Convention.

To understand whether SWFs may benefit from State immunity from enforcement, one must investigate whether they form part of the State structure under the law of State immunity.[1209] Indeed, as seen, State immunity emanates from the State's sovereign character and, therefore, only what forms part of that structure can benefit from the procedural immunity

[1205] Xiaodong Yang (n 50) 344.

[1206] Thouvenin and Grandaubert (n 1202) 251. See also United States, Supreme Court, *Bank Markazi v. Peterson*, 20 April 2016, 136 US 1310 (2016).

[1207] Xiaodong Yang (n 50) 402.

[1208] See Annex UNCSI, Article 25.

[1209] Coming to the issue of the relationship between State entities such as SWFs and SOEs and their sponsoring States for the purposes of the application of immunity from enforcement, it has to be preliminary said that there are no international binding rules on the subject. Anne-Catherine Hahn, 'State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds' [2012] Revue Suisse de Droit des Affaires et du Marché Financier 103, 108. See *National Iranian Oil Co. Revenues from Oil Sales Case*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Judgment of April 12, 1983, (64 BVerfGE 1, 65 I.L.R. 215 (1984) (F.R.G.).

bar in enforcement proceedings. The UNCSI, which provides for special protection to 'property of a State' under Articles 18 and 19, as mentioned, necessarily reverts to the notion of 'State' under Article 2(1)(b). The Same applies to the ECSI and domestic statutes on State immunity, such as the US FSIA or the UK SIA, as for courts' application of State immunity doctrine. In other words, without a preliminary understanding of what constitutes a 'State', there cannot be a *ratione personae* application of the State immunity defence.

## 2. Locating Sovereign Wealth Funds within the Notions of 'State' and 'Separate Entities' under the Law of State Immunity from Enforcement

As hinted, to understand whether the immunity defence under international law may cover a SWF, we must revert to the preliminary question of what constitutes a State under public international law. Indeed, only States and their property can, in principle, be protected under the law of State immunity from enforcement.

Starting from the ECSI, Article 27 provides a stark division between the terms 'Contracting State' and 'separate entity'.[1210] Indeed, it recites that

> *[f]or the purposes of the present Convention, the expression 'Contracting State' shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.*[1211]

The ECSI Explanatory Report expressly stipulates that following paragraph (1) Article 27, all the provisions of the Convention 'which lay down special rules for proceedings to which one of the parties is a State (Articles 16-19), those dealing with the obligation to comply with a judgment or a settlement (Articles 20-22), and those prohibiting execution in the territory of the State of the forum (Article 23)', do not apply to such separate entities.[1212]

[1210] Article 27 ECSI is a General Provision of the Convention, which therefore calls for a general application to all the provisions of the Convention.

[1211] This format has been used by some States as the U.K

[1212] Dickinson, Lindsay and Loonam (n 1172), Explanatory Report on the European Convention on State Immunity, para 107.

In paragraph 2, it is indeed specified that proceedings 'may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person'. Yet, 'the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*)'.

To define such entities, the ECSI went beyond the criterion of legal personality alone, 'for even a State authority may have legal personality without constituting an entity distinct from the State'.[1213] Thus, it was considered that a dual test comprising the distinct existence separate and apart from the executive organs of the State and capacity to sue or be sued, i.e., the ability to assume the role of either plaintiff or defendant in court.[1214]

Therefore, according to the ECSI, it is in principle excluded that a SWF with a separate legal personality or an SOE could be interpreted as 'Contracting State'. However, as stated above, courts may not initiate proceedings if an entity is exercising sovereign authority; therefore, such entities can potentially be covered by immunity.

Coming to the UNCSI, the Convention defines the concept of 'State'. According to Article 2(1)(b)(i), a 'State' includes the State itself and its various organs of government.[1215]

Under point (ii) the UNCSI also mentions 'constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority and are acting in that capacity'.

Point. (iii) lists agencies or instrumentalities of the State or other entities, 'to the extent that they are *entitled to perform* and *are actually performing acts in the exercise of sovereign authority* of the State.[1216]

[1213] id. paras 108-109.

[1214] ibid.

[1215] The ILC Commentary specifies that point (i) includes 'the State itself, acting in its own name and through its various organs of government, however designated, such as […] various ministries and departments of government, ministerial or sub-ministerial departments, offices or bureaux'. International Law Commission, 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries' (n 666), para 6.

[1216] Emphasis added.

Lastly, point (iv) covers 'representatives of the State acting in that capacity'.

Thus, according to the UNCSI, the notion of 'State' also includes State agencies and instrumentalities or other entities. In this last regard, contrary to what is required for an organ or the State itself (see point (i)), a necessary condition for the application of Article 2(b)(iii) is that the agency or instrumentality is *entitled to perform* and *is actually performing acts in the exercise of sovereign authority* of the State. Therefore, immunity can be enjoyed by State entities with a functional link with the foreign State and as long as they are entitled to perform and are performing acts of sovereign authority.[1217]

As Grant notices, Article 2(1)(b)(iii) is 'remarkably reticent' concerning the explanation of what constitutes an agency or an instrumentality of the State, becoming one of the most difficult sub-paragraphs of Article 2(1)(b).[1218]

By way of example, one wonders whether Article 2 UNCSI applies to central banks. In this connection, SWFs are often put under the management of central banks, which, being the 'economy first respondents' and carrying out vital functions for the life of sovereign States, are usually thought to enjoy broader sovereign immunity treatment.[1219] Central banks' legal form and actual functions vary globally and change over time. For example, central banks are investing more money in the stock market today, and some central banks control or manage their nation's SWFs.[1220] In this connection, as Wuerth notices, nowadays, the protection of central bank assets abroad 'is not limited to entities that take a particular corporate form or which bear the title of 'central bank'; instead, international law protects entities which perform

[1217] It is worth noting that the provision does not specify how the agency or instrumentality has to be established in order to be qualified as State.

[1218] Tom Grant, 'Article 2(1)(a) and (b)' in Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013), 50.

[1219] Harvard Law Review, 'Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis' (2010) 124(2) Harvard Law Review 550.

[1220] Examples include Botswana, Chile, China, Japan and Norway. See, Anne-Catherine Hahn (n 1209), 103; 106-107. See also Gaukrodger (n 50).

central bank functions and act as a State's monetary authority'.[1221] This is clearly reflected in the text of Article 2(b) UNCSI.

According to some scholarship, a central bank, which, if it is a separate juridical entity, can be considered an agency or an instrumentality, 'is seen as the State only to the extent that it is entitled to perform and actually acts in the exercise of the sovereign authority of the State'.[1222] By contrast, when a central bank, as a separate juridical entity, 'does not actually act in the exercise of sovereign authority, it would not be deemed to be the State and, therefore, could not be covered by immunity'.[1223] This is what has been referred to as a 'functional' reading of central banks' immunity from enforcement, which postulates that their assets are immune as long as they are framed in the context of a sovereign function. According to this reading, one may say that SWFs managed by central banks might enjoy immunity if such an activity can be carried out for sovereign purposes.

Article 21(1)(c) UNCSI lists the property of central banks or other monetary authorities of the State amongst the property of the State which should not be considered in use or intended to be used 'for other than non-governmental commercial purposes'.[1224] International legal literature and some domestic courts' practice[1225] have pointed out that this provision might confirm that the property of central banks is deemed immune by category.[1226] The reasoning

[1221] Ingrid Wuerth (n 48) 268.

[1222] Thouvenin and Grandaubert (n 1202), 253.

[1223] ibid. However, this statement must be taken with caution, as domestic courts may have slightly different views on this matter.

[1224] According to Article 21 UNCSI the following assets are deemed as used for sovereign purposes: (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; (b) property of a military character or used or intended for use in the performance of military functions; (c) property of the central bank or other monetary authority of the State; (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale'.

[1225] See *infra*, case law analysis on *Stati v. Kazhakstan*.

[1226] Fox and Webb, *The Law of State Immunity* (n 1112) 529.

supporting such a categorical application of central banks' immunity from enforcement also derives from the wording of Article 21 UNCSI, which suggests a categorical application of its subparagraph (c).

In fact, in all subparagraphs of the Article, except subparagraph (c), there are requirements on certain use of the property in order for it to enjoy State immunity.[1227] From the fact that the corresponding limitation is missing in subparagraph (c), one may infer that there is no requirement that the property of a central bank shall be used in a certain manner or for particular purposes for it to enjoy immunity.[1228] Moreover, looking at the structure of the UNCSI, one may also see how the exceptions set by Article 21 may indicate a derogation to the general functional rule underlying State immunity. This would be a categorical reading of central banks' immunity, as it would apply to their assets based on their belonging to a certain category of entity (namely central banks), rather than their use for a certain function.

We will see in the case analysis that whether the categorical or the functional approach is to apply is far from straightforward and may lead courts to divergent conclusions regarding central banks' assets and SWFs.

Another crucial question which arose in the context of the drafting of the UNCSI was whether Article 2(b) covers SOEs. It seems that during the preparatory works of the UNCSI, the United Kingdom was against this idea, maintaining that entities with separate juridical personality, other than central banks and monetary institutions, should have been left out of the scope of Article 2(1)(b) UNCSI.[1229] As the ILC states in the Draft Articles, the general rule is that State enterprises are presumed not to be entitled to perform governmental functions and, therefore, not granted State immunity.[1230] Nonetheless, the prevailing approach in drafting the

[1227] See Svea Court of Appeal, *Kazakhstan v. Stati*, 17 June 2020, 22, *infra*.

[1228] id.

[1229] International Law Commission, 'Third report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur' (11 April 1990). Extract from the Yearbook of the International Law Commission, Vol. II UN Doc A/CN.4/431 <https://legal.un.org/ilc/documentation/english/a_cn4_431.pdf>, 8 para 5.

[1230] Draft Articles on Jurisdictional Immunities of the State and their Property, Article 10 Commentary, para 3.

UNCSI was to include SOEs as long as they are 'entitled to perform and are performing acts in the exercise of the sovereign authority of the State'.[1231] The ILC indeed states that 'a State enterprise established for commercial purposes, not being a State as defined in [Article 2(1)(b), falls] outside the scope of the topic of jurisdictional immunities of States'.[1232]

Among the categories listed in Article 2(b) UNCSI, depending on its institutional design, a SWF may, in principle, qualify as a State organ under 2(b)(i) or a State agency or instrumentality under 2(b)(iii). Nonetheless, the distinction between the two categories is often blurred, as '[t]here is in practice no hard-and-fast line to be drawn between agencies or instrumentalities of a State and departments of government'.[1233]

In any event, the first regards SWFs structured as a pool of assets and administered by a ministry or a central bank. In this case, it may fall within the scope of Article 2(b)(i) UNCSI as it may qualify as part of the 'State' or as asset of a central bank rather than as instrumentality. Then, the use of such assets should in any event be analysed.

The second case relates to SWFs structured with a separate legal personality. Similarly to what was remarked in the previous Chapters vis-à-vis SWFs *ius standi* and State responsibility in investment arbitration, a SWF with a separate legal personality much like an SOE might be covered by State immunity, yet *only* if it is vested with, and it is effectively carrying out a sovereign activity under Article 2(b)(iiii).

Therefore, in this second case, the court before which the SWF pleads immunity will have to assess whether the entity has been entitled to perform sovereign acts (also based on the forum State's domestic law whenever present), and the requirement of their actual performance which may be evaluated based on the factual circumstances of the case. As seen so far, SWFs can be identified without much difficulty as entities 'entitled to perform acts in the exercise of sovereign authority'. Indeed, as explained in the first Chapter, governments and central banks

[1231] id. See, Thouvenin and Grandaubert (n 1202), 253.

[1232] Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed) (n 1189), 291 et seq. See, International Law Commission, 'Report of the International Law Commission on the work of its fortysecond session'' (1 May 1990). UN Doc A/45/10.

[1233] Tom Grant (n 1218) 50.

manage such funds in order to invest public sources, like the product of raw materials trading or foreign-exchange reserves surplus, to pursue macroeconomic or welfare goals.

By contrast, assessing whether SWFs are 'actually performing' acts of sovereign authority is more complex. The UNCSI indeed does not spell out whether courts must consider the nature, the purpose of the act, or both such elements.[1234] If one looks at the broader investment activity undertaken by SWFs, the 'actual performance' requirement appears to be met for several reasons. This in light, for instance, of the source of the invested assets, the chain of public controls that oversees SWFs' investments, and the legal framework in which their investments are framed.[1235] By contrast, if one focuses on the specific contracts entered into by a SWF, like purchasing a company's shares, then the assessment yields an opposite result.

In any event, compliance with this requirement would result in the possibility for SWFs to qualify *prima facie* as sufficiently connected to the 'State' for the UNCSI. Nonetheless, as highlighted above, it does not automatically mean that they enjoy immunity, as it remains to be analysed whether the specific activity that gave rise to the dispute falls within the scope of the commercial exception.[1236]

Furthermore, it is noteworthy that the Annex to the UNCSI establishes that Article 19 does not prejudge the question of 'piercing the corporate veil' of a State entity. That means that whenever questions relating to a situation where a State entity has deliberately mispresented its financial positions or subsequently reduced its assets to avoid satisfying a claim, or other related issues, a court can effectively disregard the corporate personality of the entity at hand. However, as Hahn explains, the broader issue of piercing the corporate veil between a State enterprise and the State has been 'deliberately left out' from the UNCSI negotiations.[1237]

[1234] By contrast, as we will see, the UNCSI identifies the nature test for the assessment of the commercial nature of an act.

[1235] Often the constitutional level or other primary sources of law.

[1236] However, given the debate surrounding this provision, it might be hard to clearly state whether it codifies customary international law.

[1237] Anne-Catherine Hahn (n 1209), 108.

Moreover, one has to highlight that the UNCSI does not differentiate between property of the States and that of State enterprises – if the latter qualifies as State under the Convention Article 2(b). Contrariwise, some States' domestic statutes do maintain a differentiation between the property of States and that of a separate entity. This is, for instance, as will be discussed below, the case of the US FSIA.

We conclude with the statement by Grant that Article 2(b) UNCSI undoubtedly includes, under specific circumstances, 'State enterprises', namely corporate entities with a separate legal personality from the State and established usually to pursue commercial purposes.[1238] Therefore, Article 2(1)(b)(iii) would embrace, given some specific circumstances, 'central banks, State utilities, […] sovereign wealth funds and the like – entities, enjoying a legal personality separate from the State, established by it for a specific purpose and retaining some connection with it.[1239]

*i. Different Approaches on the Qualification of 'State' and State Enterprises: Zoom in on Central Banks*

As anticipated, civil law jurisdictions do not have statutes on State immunity. Some have general laws on immunity, such as Belgium (with the adoption of what has been referred to as

[1238] Tom Grant (n 1218) 50. This author also states that the term 'other entities' in Article 2(1)(b)(iii) intends to cover private entities not established by the State but nonetheless 'endowed with governmental authority'. See also International Law Commission, 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries' (n 666), draft Article 2, para 16.

[1239] Tom Grant (n 1218) 50.

'Yukos law')[1240], Sweden[1241] and France[1242]. They mainly transpose international law on State immunity in the domestic system, such as specific provisions of the UNCSI.

Overall, in the context of pleas of immunity from enforcement by State entities, several courts of civil law jurisdictions have refused to disregard the separate legal personality of State entities at the enforcement stage.[1243] This applies, *mutatis mutandis*, also to common law jurisdictions, like the United Kingdom or the United States. In other instances, civil law courts also dealt with the immunity of central banks' assets. We discuss the approach of several civil law courts in the context of our case law analysis. However, it might be interesting to preliminarily note how approaches may change, especially vis-à-vis the immunity of central banks' assets.

Indeed, when it comes to immunity of State entities with separate legal personality, as mentioned, adopt a rather strict approach to State immunity from enforcement. By contrast, there might be more striking different approaches vis-à-vis State immunity of central banks' assets. As anticipated, some jurisdictions have a rather strictly functional approach to immunity from enforcement of central banks' assets. This means that without a clear and strict nexus to

[1240] Loi du 23 août 2015 insérant dans le Code judiciaire un Article 1412 *quinquies* régissant la saisie de biens appartenant à une puissance étrangère ou à une organisation supranationale ou internationale de droit public. See Marc K Sebastiaan Barten, 'State Immunity from Enforcement in The Netherlands: Will Creditors be Left Empty-Handed?' (25 April 2017) <http://arbitrationblog.kluwerarbitration.com/2017/04/25/state-immunity-from-enforcement-in-the-netherlands-will-creditors-be-left-empty-handed/> accessed 26 November 2022.

[1241] See Act (2009:1514) on Jurisdictional Immunity of States and Their Property (Lag (2009:1514) om Immunitet för stater och deras egendom). See *infra*.

[1242] Art. 59 of the Law No. 2016- 1691 on transparency, the fi ght against corruption and modernising economic activity, 8 December 2016. But also Spain, see Arts. 17– 20 of the Ley Orgánica 16/ 2015, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u ofi cina en España y las Conferencias y Reuniones internacionales celebradas en España (2015), BOE, 28 October 2015, Sec. I., p. 01299.

[1243] See, among others, *Sedelmayer v. Russian Federation* case, *infra*. See also the Swiss case *Kuwait v. X*, the Swiss Federal Tribunal rejected the immunity plea of the Kuwait Investment Authority regarding the attachment of its assets on the basis that KIA was a legally separate entity from Kuwait. See in this respect, Joseph M. Cardosi, 'Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution' (2013) 41(1) Pepperdine Law Review.

central bank activities, the assets attached cannot be considered covered by central bank immunity. This is the case in Belgium and Sweden, for instance.

Other jurisdictions, like the United Kingdom, have a 'categorical' reading of central bank' immunity, which has been regarded as a 'quasi-absolute' approach.[1244] Other jurisdictions might follow an intermediate approach between the strictly functional and categorical approach.[1245] This was for instance the case of France which however seems to have shifted toward a more categorical approach in the last years.[1246]

Indeed, Article L153-1 of the French Monetary and Financial Code adopted in 2005[1247] establishes that property of any kind, including foreign reserve assets, which central banks or foreign monetary authorities hold or manage on their behalf or on behalf of the foreign State or States that govern them, may not be seized. Importantly, pre-judgment attachment and seizures are not admissible for central bank assets.

On the other hand, a creditor possessing an enforceable title establishing a liquid and payable claim may apply to the attachment judge for authorisation to proceed with forced execution in one specific case.[1248] That is if the creditor can establish that the assets held or managed on its own account by the central bank or foreign monetary authority are part of resources allocated to a primary activity governed by private law.[1249]

---

[1244] See also Ingrid Wuerth (n 48), 272 *et seq*. See also, countries such as Argentina, China (with Hong Kong), Japan, Pakistan, Singapore and South Africa.

[1245] France have shifted its approach.

[1246] Since we discuss the cases of Belgium, Sweden and the United Kingdom in our case law analysis, here we will only briefly mention the case of France as it may have a bearing regarding the treatment of foreign central banks' assets.

[1247] In French, Code monétaire et financier.

[1248] Anaïs Mallien, Maria-Clara Van den Bossche, Olivier van der Haegen, 'Enforcement of Investment Treaty Awards against Sovereign States in a Landscape of Sovereign Immunity' in Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Second edition. Globe Law and Business 2021) 94.

[1249] Under the conditions provided for by Act No. 91-650 of 9 July 1991 reforming civil enforcement procedures.

In 2021, the French Supreme Court ruled that foreign central banks' accounts are un-attachable assets according to Article L-153-1 of the Monetary and Financial Code. This case is part of the so-called 'Commisimpex saga' (*Commisimpex v. Republic of Congo* case). Indeed, it is one of the many failed attempts of post-judgment enforcement measures sought by the mentioned Congolese company Commisimpex in the execution of two arbitral awards rendered against the Democratic Republic of Congo in 2000 and 2013.[1250]

The French Court of Cassation stated that the purpose behind Article L.153-1 was to protect the functioning of institutions that contribute to the definition and implementation of the State monetary policy and to prevent the blockade of foreign exchange reserves deposited in France. Therefore, the Court held that the limitation of the applicant's right to the effective execution of final judicial decisions resulting from the un-attachability of account in the Bank of African States was legitimate.

Interestingly, some commentators have remarked that the Supreme Court had used terms such as 'un-attachability', which may be seen as evocative of the concept of 'inviolability' of diplomatic property.[1251] Such two concepts produce similar effects, even though un-attachability, inviolability and immunity are three separate legal concepts such that a waiver of the latter is ineffective for the former two. Moreover, interestingly enough, the Court did not mention Article 21 UNCSI, which provides a more lenient regime of enforceability against central banks.

[1250] Sally El Sawah, '"Waiver of State Immunity over Central Bank Accounts! Say No More!", French Supreme Court Rules' (5 August 2021) <https://eapil.org/2021/08/05/waiver-of-state-immunity-over-central-bank-accounts-say-no-more-french-supreme-court-rules/> accessed 19 November 2021.

[1251] ibid. In the mentioned case, Commisimpex sought attachments against the Democratic Republic of Congo's account with the Bank of Central African States, which is not technically the central bank of Congo. However, the wording of Article L.153-1, which includes the term 'monetary authority', allows the protection of entities beyond foreign central banks. Indeed, the provision extends such protection to any other entity which performs central bank functions and acts as a State's monetary authority, as was the case of the Bank of Central African States.

This case is even more interesting in light of the 2016 amendment of the French Code of Civil Procedure through the so-called *loi Sapin II*[1252], which added specific provisions on immunity from enforcement, precisely Articles L111-1 to L111-1-3.[1253] These provisions are, as the ones adopted by Belgium, as we will see in our case study, strongly inspired by UNCSI Articles 18 and 19. Nonetheless, it has been submitted that the *loi Sapin II* has '*de facto* rendered any possible execution over foreign States' assets practically impossible' and that State immunity from execution in France has become (quasi) absolute.[1254] Interestingly such a revision of the law of State immunity from enforcement in France is intertwined with the Commisimpex saga, whereby, before landing before the French Supreme Court, in many instances, lower French courts gave way to perhaps too easy enforceability of investment awards against States.[1255] It bears noting that as of today, is the creditor who bears the burden of proof of showing that central banks' assets are used for commercial non-central banking functions.

Therefore, as per the French legal framework, a SWF established under the aegis of a central bank (or of another monetary authority) might benefit from a broader protection from execution compared to SWFs differently structured.[1256] Had a SWF a separate legal personality

[1252] Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033558528> accessed 18 November 2022.

[1253] In French, Code des procédures civiles d'exécution. Precisely, Article 59 and 60 of the loi Sapin II created Articles L111-1 to L111-1-3. Specifically, Article 59 aimed at codifying customary law on State immunity from execution, as reflected in UNCSI. Article 60, on the other hand, 'has enacted specific rules on execution proceedings against foreign States undertaken by so-called 'vulture funds' as had been the case with the famous *NML capital Ltd. v. Argentina* litigation', see Victor Grandaubert, 'France Legislates on State Immunity from Execution: How to kill two birds with one stone?' (23 January 2017) <https://www.ejiltalk.org/france-legislates-on-state-immunity-from-execution-how-to-kill-two-birds-with-one-stone/> accessed 19 November 2022.

[1254] Sally El Sawah (n 1250)

[1255]As a result, the at-the-time French government reacted to such a jurisprudential development by implementing the *loi Sapin II*, which aimed to create more legal certainty and avoid an excessively favourable approach toward State creditors. See Gilles Cuniberti, 'The Fluctuating Law of Diplomatic Immunity in France' (8 July 2020) <https://eapil.org/2020/07/08/the-fluctuating-law-of-diplomatic-immunity-in-france/> accessed 19 November 2022.

[1256] Pre-judgment attachment and seizures are not admissible for central bank assets.

from the State, without central bank management, French courts would probably give enforcement of an award rendered against the SWF sponsoring State.[1257]

Coming to common law jurisdictions, as said, they usually have domestic statutes on State immunity. We will discuss the UK SIA in the context of the case law analysis of *AIG v. Kazakhstan* dispute. A common law jurisdiction that we will not analyse in our case law is the United States, which may deserve a specific mention in light of the detailed and specific definition of 'State' and State instrumentalities it provides and an approach to central banks' immunity that might be diverging from the UNCSI's.[1258]

To begin with, under Article 1603 US FSIA, a 'foreign State would include 'a political subdivision of a foreign State or an agency or instrumentality of a foreign State as defined in subsection (b)'. Then, at letter (b), an 'agency or instrumentality of a foreign State' is described as any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign State or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

Thus, Section 1603(a) maintains that the notion of 'foreign State' encompasses the State's agencies and instrumentalities and that the commercial activity mentioned in section 1602 is to be determined having regard to its nature rather than its purpose.

Two main tests have been developed by the US courts to distinguish States from their agencies, political subdivisions, or instrumentalities. The first one is the 'legal characteristics' test, which holds that an entity is an agency or instrumentality if it is considered a separate entity under its domestic legislation. This criterion was extrapolated from the legislative report on the US FSIA, which specifies that the concept of 'separate legal person' under sub-

[1257] However, we must remind that the application of immunity to SWFs has to be assessed on a case-by-case basis by courts. Marco Argentini, 'The New Patrimonio Rilancio and the Italian approach to Sovereign Wealth Funds' [2021] Questions of International Law 51, 65-66. George K Foster, 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform' (2008) 25 Arizona Journal of International and Comparative Law 665, 683.

[1258] Also, the issue of the qualification of a State entity as State is a much debated issue under US case law.

paragraph (1) Article 1603 FSIA comprises 'a corporation, association, foundation or any other entity which, under the law of the foreign State where it was created, can sue or be sued in its own name'.

The second test, which Yang describes as 'the more reliable and now the established test', is the core function test. This second approach focuses on the entity's primary purpose and activities. It distinguishes between 'an entity that is an integral part of a foreign [S]tate's political structure and an entity whose structure and function is predominantly commercial'. An entity is a political subdivision if its 'core functions' are governmental, but it is an agency or instrumentality if its 'core functions' are commercial. If the core function is governmental activity, the entity is therefore equated to the State for the purposes of State immunity. Indeed, in the courts' eyes, if the core functions were governmental, the entity would not be considered separate from the State.[1259]

Coming to case law, in 1983, the US Supreme Court in *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (*Bancec*) spelt out the so-called 'Bancec presumption', that is, as a matter of general principle, government instrumentalities established distinct and independent from their sovereign should typically be treated as such.[1260]

US Courts subsequently crystallised five factors to assess whether an entity is an alter ego of the State and, therefore, when they can be treated as an emanation of foreign States for the satisfaction of sovereign debts.[1261] Such factors are known as the 'Bancec factors', which are: the level of economic control by the government, whether the entity's profits go to the government, the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; whether the government is the real beneficiary of the entity's conduct; and whether adherence to separate identities would entitle the foreign State to benefits in US

[1259] *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 US 611, 629 (1983). See, Cameron Miles (n 52), 38–39.

[1260] Bancec, 462 US 611, 626–627 (1983). The US Supreme Court pierced the corporate veil of Bancec, a State-owned Cuban entity, and identified the company with its State-owner. The Supreme Court held in this case that this is rendered possible 'where a corporate entity is so extensively controlled by its owner that a relationship of principal and agency is created' or where maintenance of separate corporate personality 'would work fraud or injustice'.[1260]

[1261] See, US Supreme Court, *Rubin et al v. Islamic Republic of Iran*, 138 S Ct 816, 823 (2018).

courts while avoiding its obligations. [1262] In turn, these factors aim to establish whether the State exerts extensive control over the entity.

More recently, the US Supreme Court applied the Bancec factors in the enforcement proceeding in the aftermath of the 2016 *Crystallex v. Venezuela* ICSID Award.[1263] In this case, Crystallex brought the proceedings against a Venezuelan State-owned oil company, Petróleos de Venezuela SA (Petróleos). In the District Court of Delaware, Crystallex sought and obtained a writ of attachment against shares owned by Petróleos in a Delaware corporation. Crystallex argued that, as Petróleos was an alter ego of the Venezuelan government, its shares in the Delaware company could be attached, precisely based on the 'extensive control' test of Bancec. The District Court sided with the plaintiff, maintaining that Venezuela exercised significant and repeated control over the Delaware company's day-to-day operations. The Court of Appeals confirmed the judgment of the District Court, applying the Bancec factors.

In terms of conditions of post-judgment enforcement measures, as mentioned, the FSIA differentiates between the property of foreign States[1264] and State agencies or instrumentalities.[1265] Specifically, according to Article 1610(a), unless the foreign State waives its immunity, the property of a foreign State located in the US can be subject to post-judgment execution if 'the property is or was used for the commercial activity upon which the claim is based'.

Therefore, the US FSIA requires a link between the activity that gave rise to the claim and the specific property to be executed.[1266]

---

[1262] See, Cameron Miles (n 52), 40.

[1263] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2 Award, 4 April 2016.

[1264] Or 'State proper' as Tejera calls it.

[1265] Victorino J. Tejera (n 1099).

[1266] However, it must be precised that this case regarded the application of State immunity from jurisdiction. In this regard, the mentioned *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016) (*Atlantica Holdings v. Samruk-Kazyna*) case may be of exemplification. Indeed, the Second Circuit held that the SWF was not entitled to claim sovereign immunity on the basis that its actions (the issuance of debt securities) had a 'direct effect' in the US, even though the issue was made outside the US.

Against this backdrop, a pool-of-asset SWF managed by an organ of a foreign State, like the ministry of economic affairs, might be considered a property of the State. Therefore, in principle, such a SWF might be attached only if its assets were located within the US and the judgment/award to be executed arose from a claim related to that asset/activity, which was used for commercial purposes.[1267] It bears noticing that the applicant bears the burden of proof.

From all this, we can infer that should an award be based on a claim related to an investment made by the pool-of-asset SWF managed by an organ of a foreign State the creditor would be entitled to request the seizure of only that specific financial asset. By contrast, the creditor will not be able to execute the judgment/award on other assets of the same SWF unrelated to its claim under the US FSIA.[1268] In other words, if the SWF were equated to its sponsoring State, a creditor who obtained an award against the sponsoring State would not be able to enforce such a decision on the assets of a State's pool-of-asset SWF by piercing its corporate veil.

Section 1610(b)(2) US FSIA stipulates that the property of a State agency or instrumentality can be attached, other than in case of a waiver of immunity, if 'the judgment relates to a claim for which the agency or instrumentality is not immune […], regardless of whether the property is or was involved in the act upon which the claim is based'. Differently from the property of foreign States, when the claim is directed against a State agency or instrumentality, no nexus is required between the commercial activities that originated the claim and the assets to be executed. It is essential also to note that the provision does not require that the assets are 'used for a commercial activity in the United States', but that the entity 'is engaged in a commercial activity in the United States'.[1269]

The different regulation between the property of the State and the property of the State's agencies or instrumentalities has given rise to some criticisms. Indeed, as pointed out by a commentator, '[t]his creates a differential treatment among creditors of SWFs that is unjustified and lack coherence'. Furthermore, it bears stressing that a SWF, which does not

[1267] It is thus implicit that the court had already qualified the investment as a commercial activity when it came to assess the enjoyment by the fund of the immunity from attachment, basing on the nature of the act.

[1268] Like, for instance in case of illicit conducts committed by the fund.

[1269] According to Section 1603(d), the nature test should apply in this case.

qualify as an 'agency or instrumentality', based on the criteria analysed above, cannot, in principle, enjoy immunity from execution.[1270]

Lastly, the legislation of immunity of central bank property contained in the FSIA may be applicable in the case of SWFs managed by central banks. In this regard, section 1611(b) recites that, notwithstanding the provisions of section 1610,

> *the property of a foreign State shall be immune from attachment and from execution, if (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.*[1271]

Therefore, provided that they are held by a central bank and used for central banking functions (i.e., for its own account), central bank assets enjoy immunity from enforcement in the US[1272] When SWFs assets are held by central banks, US courts may qualify SWFs as central banks' property according to section 1611(b)(1) of FSIA. This would in turn allow SWFs to benefit from immunity from enforcement.[1273] It goes without saying that such a supposition is conditioned upon the qualification of SWFs activities as 'central banking functions' by US courts.[1274]

---

[1270] Victorino J. Tejera (n 1099), 55.

[1271] Emphasis added. For a broader analysis of the immunity of central bank properties in the US, see Xiaodong Yang (n 50) 410 et seq.

[1272] See Caplan (n 1191); Paul L Lee, 'Central Banks and Sovereign Immunity' (2003) 41(2) Columbia Journal of Transnational Law, 377 where he enucleates four different interpretation of the concept of 'on its own account'.

[1273] The burden of proof regarding the demonstration that the funds are properties of the central bank 'for its own account' is most presumably borne by the government.

[1274] See also Victorino J. Tejera (n 1099), 70. The expression 'held for its own account' can also be read as to exclude from the scope of Section 1611(b)(1) central banks' properties used for commercial purposes. This interpretation is based on a passage in the US FSIA *travaux préparatoires* and has also been endorsed by several lower courts' decisions. See *Banque Compafina v. Banco De Guatemala* [1984] 583 F Supp 320 (US District

By contrast, if such property is used for non-central banking purposes, 'the attachment of the property involved should be governed by the restrictive theory of sovereign immunity as codified by the general rules of the FSIA'.[1275] In this regard, in 1993, the US District Court of New York specified that

> [*p*]*roperty used for commercial activity and property of a central bank held for its own account are not mutually exclusive categories. Rather, as the structure of the FSIA makes clear, property of a central bank held for its own account is a category of property used for commercial activity*.[1276]

It seems, therefore, that central banks' property enjoys immunity from execution as long as it is used for central banking functions, irrespective of their commercial nature.[1277]

Yet, as we will see in Section D of this Chapter, what qualifies as central banking function might not be as clear as it may sound.

## D. EXCEPTIONS TO STATE IMMUNITY FROM ENFORCEMENT

Three main exceptions to immunity from enforcement are recognised under international law. The first is the State's consent to the enforcement measure (waiver of immunity).[1278] The second is the State earmarking of a specific property to satisfy the underlying claim. The third is the so-called 'commercial exception', namely a lifting of immunity when the property against which enforcement is sought is used for other than governmental purposes.

---

Court for the Southern District of New York) 322; *Banco Central de Reserva del Peru v. Riggs National Bank of Washington, DC* [1994] 919 F Supp 13 (US District Court for the District of Columbia) 17; *Bank of Credit and Commerce Int'l Ltd v. State Bank of Pakistan* [1999] 46 F Supp 2d 231 (US District Court for the Southern District of New York) 239

[1275] Patrikis (n 51) 277.

[1276] *Weston Compagnie v. La Republica Del Ecuador* [1993] 823 F Supp 1106 (US District Court for the Southern District of New York) 1112.

[1277] Patrikis (n 51) 277. See also Brown and O'Keefe (n 192) 343.

[1278] The ambiguity concerning the status of SWFs complicates the legal position when it comes to determining whether jurisdictional immunities cover a SWF. When it comes to arbitration, the signing by the SWF of an arbitration agreement might be interpreted as a waiver of the SWF's immunities (if any). This would, to some extent, simplify the position.

Current State practice provides evidence of the growing acceptance of the restrictive doctrine worldwide. With many States shifting away from the absolute doctrine, the restrictive doctrine of State immunity has become a 'global trend'.[1279] Therefore, most countries recognise the so-called 'commercial', 'private law', or '*iure gestionis*' exception.

However, notwithstanding a general acceptance of the restrictive doctrine of State immunity, few States have resisted such an approach.[1280] To name one, the PRC historically espoused the absolute immunity doctrine under which, as mentioned, a foreign State is always immune from suit (and execution)[1281] whether the claim arose from sovereign or commercial activities.[1282] Indeed, one should not disregard that for over half a century[1283], the PRC has been one of the 'staunchest supporters of the principle of absolute immunity of State and its property from the jurisdiction of other States'.[1284]

Yet, overall, irrespective of the type of immunity we refer to, today, it is widely accepted that State immunity as a 'procedural defence' is limited only to sovereign activities, leaving

[1279] As seen, also the ICJ recognised domestic courts' importance in the context of the affirmation of the restrictive doctrine.

[1280] See also Brazil, for instance, where no specific legislation concerning State immunity has been passed and Brazilian courts traditionally considered the principle of State immunity as absolute. See, *Genny de Oliveira v. Embassy of the German Democratic Republic* (Appeal No. 9.696-3).

[1281] Carlo Focarelli (n 1155) 366–377. We focus on the PCR and Russia as we will discuss cases of enforcement which took place in such territories.

[1282] Yilin Ding, 'Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?' (2012) 26(2) Emory International Law Review 997. For instance, by waiving its absolute immunity by treaty in bilateral relations with some States such as Russia.

[1283] Since the establishment of the PRC in 1949.

[1284] Dahai Qi, 'State Immunity, China and Its Shifting Position' (2008) 7(2) Chinese Journal of International Law 307, 307. See also, Wenhua Shan and Peng Wang (n 1129). Interestingly, Orakhelashvili discusses the hypothesis of China been considered as a persistent objector vis-à-vis restrictive immunity doctrine. See, Orakhelashvili, 'State Practice, Treaty practice and State Immunity in International and English Law' (n 1145) 423. By way of example in the famous 2011 *FG Hemisphere v. Congo* case (ACV 5-7/2010, Court of Final Appeal), the Hong Kong Court of Final Appeal, which in the end upheld a plea of absolute immunity, and the PCR strongly supported the absolute immunity stance. Shen Wei, 'FG Hemisphere Associates v. Democratic Republic of the Congo' (2014) 108(4) American Journal of International Law 776.

out all that is deemed to be States' commercial activities.[1285] As Yang rightly emphasises, the concept of commercial activities serves a dual purpose, reflecting the distinction between immunity from jurisdiction and immunity from enforcement expressed by the ICJ in Jurisdictional Immunities, by international treaties and domestic legislations on State immunity.[1286] Namely, as mentioned, the commercial exception first identifies whether a State is immune from the jurisdiction of a foreign court; secondly, 'it provides the yardstick for deciding whether the property of a State is immune from enforcement measures'.[1287]

As States engage in business with and as private persons, it is understood they should be answerable in the courts of the country where their business is conducted. While the rationale is clear, as we will see in the following section, establishing a 'legal formulation'[1288] for such a commercial exception to the application of State immunity has historically proven the crux of this very doctrine.[1289]

1. The Commercial Exception

Starting from international instruments, it is important to notice that the ECSI has clearly adopted a restrictive approach to State immunity, which is reflected in the ECSI's preamble and reiterated in Article 7 – which even though pertaining to immunity from jurisdiction has a general value – stating that

> *[a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it [...] engages, in the same manner as a private*

[1285] Which therefore denotes situations where a State is not immune from the jurisdiction of a foreign domestic court and, in principle, the general criterion for identifying and establishing such situations. Xiaodong Yang (n 50) 75. A State might also incur in other exceptions, as under the US FSIA is the non-commercial torts exception, the expropriation exception, the waiver exception, and the terrorism exception.

[1286] Chester Brown and Roger O'Keefe (n 1203), 287.

[1287] Xiaodong Yang (n 50) 75.

[1288] Fox and Webb, *The Law of State Immunity* (n 1112) 399.

[1289] James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1984) 54(1) British Yearbook of International Law 75, 75.

*person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.*[1290]

The ECSI lists a series of exceptions to State immunity, primarily based on the *de iure imperii*/*iure gestionis* dichotomy.[1291] International and domestic legislations have incorporated this approach in different ways.[1292]

The ILC also followed this approach in drafting the UNCSI, positing immunity as a rule and limiting it through a list of exceptions. More precisely, Article 19(c) posits that enforcement can be granted against State assets if 'it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes'. Therefore, awards can only be enforced against assets used for commercial uses. Article 2(1)(c)(i) of the Convention[1293], defines commercial transaction as

(i) *any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.*

At the domestic level, however, the concrete application of the commercial exception 'is so diverse and the criterion by which it is determined so differently formulated as to prevent the articulation of the exception in terms acceptable to all'.[1294] At the same time, as Orakhelashivili rightly emphasised, unless the criteria separating sovereign from non-

[1290] id., Article 7.

[1291] Council of Europe (n 1176). Carlo Focarelli (n 1155) 366–377.

[1292] See the US FSIA discussed *infra*.

[1293] Which also applies Article 10 UNCSI vis-à-vis immunity from jurisdiction.

[1294] Fox and Webb, *The Law of State Immunity (3rd Edition)* (n 1109) 395.

sovereign acts are 'clear and robust, the restrictive doctrine cannot feasibly operate'.[1295] In other terms, the distinction between 'sovereign and non-sovereign acts has to be legal, normative and prescriptive, not purely factual or contextual'.[1296]

Overall, there are three main approaches to defining the commercial exception today.[1297] The first consists of a closed list of exceptions. This is the case, for instance, of the US FSIA or the UK SIA or, as we have seen, the ECSI. The second employs a general and abstract criterion. On the other hand, the third is a combination of the first two approaches. It provides a non-exhaustive list of exceptions combined with a residual category determined by an abstract criterion.[1298]

In this context, the classification of sovereign and non-sovereign activities becomes dependent on another preliminary question: whether such a classification is exclusively or partially based on the domestic law[1299] of the *lex fori* or international law.[1300] According to the ILC Commission and the ICJ,[1301] in the appreciation of State immunity scope, international law emphasises the *opinio iuris* of States and domestic courts' practices. While domestic legal frameworks and case law are not an alternative source to the international law rule of State immunity, they undoubtedly 'illuminate the respective State's understanding of the amount of

[1295] Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 110.

[1296] ibid.

[1297] Banifatemi (n 995) 126. See also Annamaria Viterbo, *Sovereign Debt Restructuring: The Role and Limits of Public International Law* (Giappichelli Editore 2020) 52.

[1298] Annamaria Viterbo (n 1297) 52.

[1299] Domestic law should however be in line with customary law of State immunity, otherwise it would result in a conflict like in the *Germany v. Italy* case.

[1300] See the approach of Ian Brownlie in the context of the 1991 Third Resolution of the Institute de Droit International on State Immunity whereby he proposed two lists on criteria of competence and incompetence rather than on *iure gestionis – iure imperii* division. See, Fox and Webb, *The Law of State Immunity* (n 1112) 403.

[1301] See, *Jurisdictional Immunities, supra*.

protection foreign states must be afforded with regard to exercising adjudicatory and enforcement jurisdiction.[1302]

For the most part, courts employ abstract criteria in determining the commerciality of an activity. Among these, the nature and purpose 'tests' are the most recurrent in both international and domestic courts' assessments.

As mentioned, countries such as Belgium and, as seen, France have enacted laws on State immunity from execution since 2015. It is noteworthy to mention that in these countries, State immunity would apply to property used for sovereign purposes,[1303] but also, as Thouvenin and Grandaubert stress, 'property deprived of any allocation, insofar as it is not a 'commercial' type of property, such as money in a bank account or tax or social claims owed to foreign States by companies'.[1304]

The two authors notice that such an approach might be seen as slightly more extensive than in those countries, which mostly have no legislation on State immunity, where a clear 'sovereign' allocation triggers immunity. Following this second approach, which can be seen applied in countries such as Italy, the Netherlands, Germany, Switzerland and Russia, State immunity applies exclusively to property used for a particular public purpose and leaves unprotected State property receiving no specific allocation.[1305]

### 2. The Nature and the Purpose Tests

The 'rule of thumb' in addressing the character of a State entity activity, be it in the context of the attribution of State responsibility or the evaluation of standing of a State entity, has been that the nature of the entity's activity, rather than its purpose, is decisive. This seems to apply also in the State immunity doctrine, and especially in the application of State immunity from

[1302] Jürgen Bröhmer, 'State Immunity and Sovereign Bonds' in Anne Peters, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015). Council of Europe (n 1176)

[1303] As distinguished from 'commercial' or 'private' purposes.

[1304] Thouvenin and Grandaubert (n 1202) 256.

[1305] ibid.

jurisdiction. Most cases available, especially in European countries, confirm this statement.[1306] Moreover, this approach seems as old as the first inception of the restrictive doctrine, and it is not by chance.[1307] Indeed, when immunity was seen as an absolute attribute of the State/monarch, the classification focus was only on the activities' purpose. This was so since, as Lauterpacht noticed, being the ultimate purpose of any State activities sovereign by definition, it follows that virtually any activity would have been covered by immunity, to the detriment of the private party contracting with the State.[1308] This criterion was proven over-inclusive of the State's economic activities.[1309]

Therefore, according to Fox Webb, the classification method developed into one of the 'private person test','[1310] which would identify a dual capacity of the State, a sovereign and a private capacity, the latter of which the State would exert whenever acting as a private person in the market.[1311] In the immunity doctrine, the private person test is traceable from the first cases acknowledging restrictive immunity.[1312] According to this view, the purchase of a battleship could be categorised as a sovereign act covered by immunity because it was not an act that a private could perform.[1313] Yet, the purchase of army boots would have fallen out of

[1306] See cases listed at page 30, footnotes 33 to 40, Stephan Wittich, 'The Definition of Commercial Acts' in Gerhard Hafner, Marcelo Kohen and Susan Breau (eds), *State Practice Regarding State Immunities/La Pratique des Etats concernant les Immunités des Etats* (Brill | Nijhoff 2006).

[1307] Fox and Webb maintain that the use of the nature test dates back to 1928 when, in a note, Switzerland proposed to consider the inherent nature of the act rather than its purpose concerning a restriction of State immunity. Fox and Webb, *The Law of State Immunity* (n 1112) 411, see footnote 61.

[1308] Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (n 1143) 234. See also, Christoph Schreuer, *State Immunity: Some Recent Developments* (Hersch Lauterpacht memorial lectures vol 8, Repr. of the ed. Grotius 1988, Grotius 1995), 15.

[1309] *Empire of Iran* case, 27. See fox 411, footnote 60.

[1310] Throughout history the test has been expressed in different fashions, such for instance 'in the manner as an ordinary private individual', 'in a private capacity', yet the underlying analogy remain the same: the one between the State and a private individual. Xiaodong Yang (n 50) 63. Also see the distinction operated by French Courts on *actes de puissance*, *actes de gestion* or *actes de commerce*.

[1311] See *Gamen Huvert v. Etat Russe*, Paris, Court of Appeal, 30 April 1912, (1919) RGDIP 493.

[1312] See *infra* and Xiaodong Yang (n 55) 60-63.

[1313] Fox and Webb, *The Law of State Immunity* (n 1112) 409.

immunity scope because it was one that a private could have performed as well.[1314] This reasoning was found soon to be over-simplistic and too reliant on the purpose of the actions.

The classification focus seemed to have consequently shifted to the capacity of the person performing the act, namely its relationship to the State, and the form by which the act is performed, i.e., whether the act is performed in an official or private capacity.[1315] This type of classification process involves both structural and functional considerations. Yet, how judges concretely consider such considerations depends on the interpretative approach one chooses to adopt. Precisely, in the context of jurisdictional immunities, it depends on whether one focuses on the nature or on the purposes of the activity performed by the actor at issue. In the context of immunity from enforcement, it depends on whether one considers the nature of the purposes of the employment of the seized assets.

In other words, the application of State immunity strongly depends on whether courts lean on evaluating the nature or the purpose of the activities/assets. In this regard, in the *Empire of Iran* case, the German Federal Court held that the nature of the activity was the decisive factor in determining whether a State act was sovereign or non-sovereign.[1316] What mattered was the nature of the transaction 'rather than its underlying motive and policy, whether the State acted in the exercise of its sovereign authority or a private capacity the way that any private person could act'.[1317] By the 1960s, other European courts had adopted such an approach.[1318] In the *Philippine Embassy* case, echoing Lauterpacht's words, the same German court acknowledged that the ultimate goal of States' activities is often a sovereign one. The distinguishing elements of *acta iure gestionis* are the precise nature of the act and its legal effects, regardless of the entity's public nature (even if central banks).[1319]

---

[1314] *Guggengeim v. State of Vietnam*, French Cour de Cassation, 19 December 1961 (62) 66 RGDIP 654.

[1315] Fox and Webb, *The Law of State Immunity* (n 1113) 409.

[1316] *Claim against the Empire of Iran Case*, Federal Republic of West Germany, supra. See also [2016] VI ZR 516/14, Germany; Bundesgerichtshof.

[1317] Orakhelashvili, 'State Practice, Treaty practice and State Immunity in International and English Law' (n 1145) 413.

[1318] Such as Austrian and Swiss for instance. See, Fox and Webb, *The Law of State Immunity* (n 1112) 411.

[1319] *Philippine Embassy*, Bundesverfassungsgericht, 13 Dec. 1977, 46 BVerfG 342; 65 ILR 146 at 164. See also August Reinisch (n 1123), 808. id.

Coming to international instruments, the ECSI does not define commercial exceptions. However, as mentioned, it provides a list of activities, from Articles 4 to 14, for which States do not enjoy immunity. In this sense, as Wittich noticed, many activities of a commercial character would fall within the scope of such provisions, especially Articles 4, 6 and 7.[1320]

As for the UNCSI, the commercial exception, as mentioned, is expressed in Article 2(2)(c) and employed in Article 10 for immunity from jurisdiction and in Article 19 for immunity from enforcement. The third paragraph of Article 2(c) states that for determining whether a contract or transaction is a 'commercial transaction', reference should be made *primarily* to the nature of the contract or transaction.[1321] Then it specifies that its purpose should be taken into account 'if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction'.[1322]

Therefore, the UNCSI prioritises the nature test to establish if a matter falls into the *de jure gestionis* or *de jure imperii* spheres according to both Article 2 and Article 10 and, in principle, Article 19, which speaks of commercial 'uses'. However, the criterion of commercial use goes to the purpose rather than the nature of the property's use.[1323] This may be seen in opposition to the prominence given to the nature of a transaction in the definition of a 'commercial transaction' specified in Article 2(1)(c) of the Convention (and applied in Article 10 UNCSI).[1324] Brown and O'Keefe maintain that this opposition is merely apparent. These authors explain that Article 19(c) should be interpreted against the backdrop of Article 2(1)(c), which forms part of the former's context. Thus, it is logical to construe the term 'non-commercial transaction' as defined in Article 2(1)(c). Property of a State is used for ''other than non-commercial purposes' within the meaning of Article 19(c) when – stating in the

[1320] Stephan Wittich, 'The Definition of Commercial Acts' (n 1306), 23.

[1321] Emphasis added.

[1322] id.

[1323] Chester Brown and Roger O'Keefe (n 1203) 323.

[1324] Indeed, Article 10 states that 'if a State engages in a commercial transaction with a foreign natural or juridical person […] the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction'. Paragraph 1 does not apply: '(a) in the case of a commercial transaction between States; or (b) if the parties to the commercial transaction have expressly agreed otherwise'.

positive – it is used for the purposes of a commercial transaction as understood by the Convention'.[1325]

At the same time, however, the Convention does not entirely discharge the purpose test. Indeed, Article 2(2) UNCSI also posits that the purpose can be relevant to determining the non-commercial character of the contract or transaction because of the parties' agreement or the practice of the *lex fori*.[1326] As a result, the UNCSI, in a way, acknowledges the stance taken in several jurisdictions, which do not cast out the use of the purpose test.

Indeed, while, as seen above, the nature test is widely used by courts and in domestic and international legal instruments, some jurisdictions also rely on other criteria, such as the purpose of the activity. In fact, not all jurisdictions seem to agree on 'banishing' the purpose test from the classification process of the character of State activities. Reference is made to jurisdictions such as Italy, France, Austria, and others that have followed this approach.[1327]

In this connection, one must immediately highlight that the purpose test is widely used in immunity from enforcement. Indeed, while immunity from jurisdiction focuses on the nature of the activity, the purpose of the asset or activity is usually taken into account by courts for immunity from enforcement. Indeed, in the seminal case of the *Philippine Embassy Bank Account*, the German Federal Court found that, as a rule of international law, no enforcement could be granted against the property of a foreign State without its consent if such properties were serving sovereign purposes.[1328] As Reinisch notes, the stance of the German Federal court confirms the existence of a fundamental distinction between property serving sovereign, on the one hand, and non-sovereign purposes, on the other hand.[1329]

---

[1325] Chester Brown and Roger O'Keefe (n 1203) 323.

[1326] Carlo Focarelli, International Law (Edward Elgar Publishing 2019) 366–377.

[1327] Stephan Wittich, 'Article 2(1)c and (2) and (3)' in Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013), 71.

[1328] *Philippine Embassy* Case, Bundesverfassungsgericht, 13 Dec. 1977, 46 BVerfG 342; 65 ILR 146 at 164. See also August Reinisch (n 1123), 808.

[1329] August Reinisch (n 1123), 808.

Some Nordic courts have used the purpose test in combination with the nature test. For instance, the District Court of Helsinki held in *Yrityspankki Skop Oy v. the Republic of Estonia*, a case concerning Estonia's financial guarantees given to privates, that both the nature and the purpose of the transaction had conclusive significance to exclude immunity.[1330]

The Swedish Supreme court has sometimes put the nature and the purpose test on the same footing. In *Västerås kommun (The Local Authority of the Municipality of Västerås) v. Icelandic Ministry of Education and Culture*, it established that determining the criteria for classifying State acts was a controversial issue and mentioned the use of both the nature and the purpose test. Nevertheless, from a pragmatic standpoint, it said that it would refer to the ensemble of circumstances of the particular case rather than focusing only on one aspect of the issue.[1331]

Other countries such as Italy have historically been a bastion of the purpose test, yet inconsistently at times.[1332] In some older cases, Italian tribunals went as far as disregarding the nature test. By way of example, in *Società immobiliare Corte Barchetto v. Morocco*, the Tribunal of Rome held that foreign States enjoyed immunity 'when, acting in their capacity as international law subjects or in the exercise of the powers of a public authority, [they] perform acts aimed at attaining public goals'.[1333] This approach was upheld by the Italian Court of Cassation, which specified that 'foreign States are immune from jurisdiction and execution in the performance of the functions by which they pursue their institutional public goals'.[1334]

---

[1330] *Yrityspankki Skop Oy v. Republic of Estonia District Court of Helsinki*, Case No., 95/1997, 21 January 1998. See, Stephan Wittich, 'The Definition of Commercial Acts' (n 1306) 33. See also Council of Europe - Directorate of Legal Affairs, 'Pilot Project of the Council of Europe on State Practice Regarding State Immunities - Analytical Report' (4 August 2005) <https://rm.coe.int/168004c7a8> accessed 20 October 2022.

[1331] Stephan Wittich, 'The Definition of Commercial Acts' (n 1306), 34.

[1332] ibid 35.

[1333] *Società immobiliare Corte Barchetto v. Morocco*, Tribunal of Rome, 29 April 1977, Italian Yearbook of International Law (1980-81), 222.

[1334] *Sindacato UIL-Scuola di Bari v. Istituto di Bari del Centro internazionale di studi agronomici mediterranei*, Supreme Court of Cassation, 4 June 1986, Rivista di diritto internazionale (1987), 182. See also I/26, *Mallavel v. Ministère des affaires étrangères français*, Pretore (lower court judge) of Rome, 29 April 1974, Italian Yearbook (1976), 322.

In Japan, the Supreme Court in *J/3, X et al. v. the United States of America* affirmed that it could not rule over issues related to the landing and take-offs of aeroplanes from the US Armed Force air base nearby Tokyo because these were sovereign acts. Indeed, it stated that 'judging from the purpose or the nature of these activities, it is clear that they are sovereign acts'.[1335]

In some cases, the nature of the act test is considered inapplicable where the activity is inextricably linked with sovereign purposes, e.g., warships, such as in the Dutch *United States of America v. Havenschap Delfzijl/Eemshaven Port Authority*.[1336]

Therefore, in addition to the attention given to the nature of the act, several courts have considered the purposes of specific conduct as an aspect to factor in assessment on State immunity. In this regard, Article 2(2) UNCSI recognises the recourse to the purpose only in case of an agreement or when the practice of the forum State so requires.

The main critique of the purpose test remains, as seen that it is too all-encompassing. As Schreuer stated, once one starts enquiring about the underlying motives of the State to a transaction, it 'will most probably end up with some political purpose somewhere' as regardless 'of how genuinely commercial an activity is, it can always be traced to some aspects of public welfare'.[1337] Therefore, according to this view, everything would fall into the purpose test scope. However, according to Schreuer, the fact that sometimes the purpose is considered as necessary as the nature of the act, or even more important than the latter, is not surprising since '[e]very human activity can only be described in a legally meaningful way by reference to some purpose'.[1338] Here, one could read an acknowledgement of the relevance of the purpose criterion and, at the same time, its rejection, for it is potentially too broad of a scope.

Coming to the common law jurisdictions' stance on the matter, Section 1610 US FSIA permits execution upon a foreign State's property only if such property *is used for* commercial

[1335] *J/3, X et al. v. the United States of America*, Supreme Court of Japan, 14 March 2002, Hanrei Jihou No. 1786, 2002, Japanese Annual of International Law 46 (2003), 161.

[1336] *United States of America v. Havenschap Delfzijl/Eemshaven* (Delfzijl/Eemshaven Port Authority), Supreme Court, 12 November 1999, NJ 2001, No. 567, Netherlands Yearbook of International Law (2001)

[1337] Schreuer, *State Immunity* (n 1308) 15.

[1338] ibid 95.

activity, which, as seen, is defined by section 1603(d). It might be interesting to note that, similarly to what we observed with regards to the UNCSI, Section 1610 US FSIA provides a potentially conflicting criterion for determining the commercial nature of an activity concerning immunity from enforcement compared to the one provided by Section 1603 with regard to immunity from jurisdiction. Indeed, the term 'used for' seems to suggest the consideration of the purpose of the use of the property, following the purpose rationale. Indeed, Section 1603 explicitly points to the nature test to classify sovereign and non-sovereign activities. Specifically, letter (d) section 1603 US FSIA states that

> [*a*] *'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose* […].

Therefore, an activity is deemed as commercial when on the ground of its inherent character, it can be seen as private in nature.[1339]

[1339] The famous *Argentina v. Weltover* case can serve as a perfect example. In such a case, the US Supreme Court applied the nature test as in section 1603 in addressing facts related to Argentinian sovereign debt instruments ('Bonods'). As Argentina lacked sufficient foreign exchange to retire the Bonods from the market, it unilaterally extended the time for payment and offered bondholders substitute instruments to reschedule the debts.[1339] On this ground, two Panamanian corporations and a Swiss bank brought a breach-of-contract action in the US Federal District Court, which Argentina motioned to dismiss. The dispute landed before the US Supreme Court which reaffirmed the District Court jurisdiction on the matter. It stated that the FSIA provided that the commercial character of an act ought to be determined by reference to its nature rather than its purpose. The Court stated that '*the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign State performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce*'. The Supreme Court found that the focus was on issuing the Bonds, which is private in nature, and was therefore held not to be covered by immunity. The sovereign reason to reschedule the payment was irrelevant to the analysis of the immunity application. Subsequent US case law followed this approach. Such as in the *Saudi Arabia v. Nelson*, where it was found that 'whether a State acts in the manner of a private party is a question of behaviour, not on motivation'. *Saudi Arabia v. Nelson*, US, 507 US 349, 360 (1993); 123 L.Ed.2d 47, 61; 100 ILR 544, 553. See *Argentina v. Weltover*, US, 504 US 607, 614 (1992); 119 L.Ed.2d 394, 405; 100 ILR 509, 515. However, see *Ralph Janvey v. Libyan Investment Authority*, No. 15-10548 (5th Cir. 2016), <https://law.justia.com/cases/federal/appellate-courts/ca5/15-10548/15-10548-2016-10-26.html> accessed 15 December 2022.

As a systemic issue, section 1610 could result in apparent friction with the provision of section 1603(d), according to which '[t]he commercial character of an activity shall be determined by reference to [its] nature […] rather than by reference to its purpose'.[1340] If the term 'used for' is regarded as an opening to the application of the purpose test, the sovereign aims of most SWFs could be considered in the evaluation of immunity from enforcement, therefore constituting an obstacle to award creditors in the attachment of the fund's assets.

Coming to the UK SIA, Section 13(2)(b) states that the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award.[1341] However, section 13(4) provides that subsection (2)(b) 'does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes'.[1342]

Interestingly, section 17(1) defines commercial purposes, which means purposes of transactions or activities as mentioned in section 3(3), in line with the definition used for immunity from jurisdiction.[1343] The UK SIA remains agnostic regarding the test to adopt in defining commercial activity. Indeed, section 3(3), similarly to the US FSIA, defines 'commercial transaction' as

> *(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional*

[1340] With specific regards to immunity from execution, see Victorino J. Tejera (n 1099), 53.

[1341] Or, in an action *in rem*, for its arrest, detention or sale.

[1342] The section continues with: 'but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if – (a)the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or (b)the process is for enforcing an arbitration award'. See UK SIA.

[1343] Therefore, any contract for the supply of goods or services; any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

*or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.*

Visibly the UK SIA does not expressly spell out which test should be adopted to determine the commercial nature of an activity. Notwithstanding this silence, the primacy of the nature test is well established under UK case law.[1344]

Lastly, it is worth noticing that a less formalistic approach is traceable, namely the 'context and circumstances' analysis.[1345] In *I Congreso del Partido*, Lord Wilberforce has famously advocated in favour of this approach, which may appear as a middle ground between nature and purpose tests.[1346] Indeed, he stated that to address whether a State should be granted immunity or not under the restrictive doctrine, the whole context in which the claim against the State is made has to be considered,

*with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the State has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.*[1347]

[1344] *I Congreso del Partido* [1981] 2 All ER 1064, 1072.25; *Trendtex Trading Corpo v Central Bank of Nigeria* [1977] 1 QB 529, 558. In *Alcom v. Colombia*, for instance, contracts for the supply of goods or services and loan contracts were properly characterised as commercial transactions even if entered into in the exercise of sovereign authority. See Lord Diplock in Alcom Ltd v Republic of Colombia [1984] 1 AC 580, 586 – 87.22 See, Hayk Kupelyants, *Sovereign Defaults Before Domestic Courts* (vol 1, Oxford University Press 2018), 283.

[1345] Stephan Wittich, 'The Definition of Commercial Acts' (n 1306) 38.

[1346] *I Congreso del Partido (HL)* [1983] I AC 268. See Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed) (n 1189) 69.

[1347] *I Congreso*, [1983] 1 AC 244, 267; 64 ILR 307, 318.

The English courts have followed Lord Wilberforce's contextual method in several cases.[1348] This approach considers other factors that can be seen as external to the act at issue, going beyond the nature of the act. In other words, it 'calls for balancing the different interests at stake'.[1349]

It is worth recalling the 'Comparative Dominant Theory' proposed by Bantekas, which aims at balancing the nature test against the purpose test.[1350] This author advises courts to address what test is most suitable or predominant on logical bases, given the concrete circumstances of the case, rather than automatically falling back to the nature test, even when the circumstances of the case would require assessing the purpose of the activities as well. In this sense, this proposed approach resembles the context test since it gives space to considerations other than just the nature of the activities.

In light of such a framework, it is appropriate to think that should the assets of a SWF be seized in the United Kingdom, a court's focus in the assessment of the availability of immunity from enforcement would in principle be on the nature of the fund's activities, rather than on their purposes. This, given the typical financial cross border activities, which a SWF is entrusted with, would, in principle, determine a finding that the activity in question is commercial in character. However, as we can appreciate from our case law study on the *AIG v. Kazhakstan* case, this evaluation is not always as straightforward as one may think, especially when a central bank is involved in the management of a SWF assets.

[1348] See, *inter alia*, *Littrell v. USA* (No. 2), England, (1992) 100 ILR 438, 447; 1993, [1994] 4 All ER 203, 212, 216; [1995] 1 WLR 82, 90, 94; 100 ILR 438, 458–459, 463; *Kuwait Airways v. Iraqi Airways*, England, 1993, [1995] 1 Lloyd's Rep 25, 35; 1995, [1995] 1 WLR 1147, 1157, 1173; 103 ILR 340, 385, 398, 416; *In re Banco Nacional*, England, [2001] 3 All ER 923, 932; [2001] 1 WLR 2039, 2049; 124 ILR 550, 559; *Kuwait Airways v. Iraqi Airways*, England, [2003] 1 Lloyd's Rep 448, 468–469, para 153; 126 ILR 758, 799.

[1349] Stephan Wittich, 'The Definition of Commercial Acts' (n 1306) 38.

[1350] Ernest K Bankas, *The State Immunity Controversy in International Law* (Springer Berlin ″ Heidelberg 2005), 367-368. See also Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Second edition, Springer 2022).

*i. Different Approaches on the Qualification of the Commercial Exception: Zoom in on Central Bank Activities*

As anticipated in Section C of this Chapter, the most striking diverging approaches with regard to immunity from enforcement are visible when courts have to frame the immunity of foreign central banks' assets. We have already discussed, and we will further address this in our case law analysis, how some countries have a quasi-absolute or strictly categorical approach to central banks immunity, such as the United Kingdom. A more restrictive approach, yet still quite protective, is provided by countries such as France the United States.

With reference to the latter jurisdiction, it has been already noticed how the scope of immunity for central banks' assets from enforcement largely depends upon the reading of the sentence 'held for its own account' under Section 1611(b) US FSIA. In *NML Capital, Ltd. v. Banco Central de La República Argentina* the US Court reasoned that 'held for its own account' encompassed property used for commercial activities, 'because State property not used for a commercial activity is already immune from execution, whether or not it is owned by a central bank'.[1351] In the appeal, the US Court of Appeals also specified that 'the plain language of the [USFSIA] suggests that Congress recognized that the property of a central bank, immune under Section 1611, might also be the property of that central bank's parent state'.[1352] As Tejera puts it, Section 1611(b)(1) USFSIA makes such property immune from execution, 'regardless of whether it is devoted to a commercial activity or not or whether the property in question is devoted to the activity that was the object of the dispute or not'.[1353]

[1351] *NML Capital, Ltd. v. Banco Central de La República Argentina*, 680 F.3d 254 (2d Cir. 2012) (affirming District's Court judgment on that FSIA's commercial exception applied against Argentina's bank account); *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011) (holding that the Argentine Republic has not waived the Central Bank's FSIA immunity). See also, *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120 (2d Cir.2009) (holding that the Administración Nacional de Seguridad Social's funds were immune from attachment); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir.2007) (denying attachment of the funds for repayment of Argentina's obligations to International Monetary Fund).

[1352] *NML Capital, Ltd v Banco Central de la República Argentina* [2011] 652 F3d 172 (US Court of Appeals, Second Circuit) 188, 194., id. 194.

[1353] Victorino J. Tejera (n 1099), 61. There are two exceptions: where there is an explicit 'waiver.' Also, the modern terrorism exception to immunity from execution under FSIA Section 1610(f)(1)(A) or Terrorism Risk Insurance Act ('TRIA') applies to central banks and monetary authorities. In this last instance, see the recent

Yet, Wuerth notices that the scope of the central banking functions test is somewhat unclear. Indeed, on the one hand, in *NML Capital* the Court rejected the application of the commercial activity test to central banks' assets. On the other hand, however, it did not explain how courts should determine what constitutes 'a 'paradigmatic' central banking function'[1354], which is also especially important 'as central banking practices change over time'.[1355]

Another interesting case where a court granted an extensive protection to central banks' assets is a 2013 judgment of the German Federal Court. Indeed, in this case the court clarified that central banks' assets 'serving sovereign purposes' are generally immune from execution under international law, and that in the German legal order it is the intended purpose of the assets placed in an account that is dispositive, and not the organisational form of the entity that owns them.[1356] Because the purpose of foreign reserves is to back the State's currency and to preserve the State's ability to act internationally, accounts used for foreign reserve management are immune from execution.[1357]

Nevertheless, the Court did not go as far as to clarifying if the sovereign purpose test protects 'all assets of the central bank which are held with the purpose of benefiting the sovereign, or only those assets designated as foreign reserves'. This is one of the most crucial issues courts have to deal with when addressing the immunity of central banks' assets. If 'sovereign purpose' is interpreted broadly, the protection to central banks' assets becomes quite high.

---

seizures of the assets of the central bank of Afghanistan. President Biden indeed froze Afghan central bank assets following the Taliban's takeover of the government in August 2021. See also the more recent the debate on the Russian central bank's assets. See Menno T Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?' (2023) 16 Netherlands International Law Review 175. However, both exceptions are beyond the scope of this research. See also Ernest T Patrikis, 'Foreign Central Bank Property: Immunity from Attachment in the United States' [1982] University of Illinois Law Review 265.

[1354] Ingrid Wuerth (n 48) 272.

[1355] ibid. Also, *NML Capital v. BCRA* was not a decision by the Supreme Court, which could interpret 'held for its own account' differently. The most likely alternative is a plain language test, which, if adopted, could provide near-absolute protection to central bank assets, like the protection provided under the UK SIA.

[1356] Ingrid Wuerth (n 48) 272.

[1357] See Decision of 4 July 2013 (n. 49), paras. 10–14, 17.

Indeed, after such judgment, it would seem that in Germany central bank activity with a 'sovereign purpose' likely includes activity that would be characterised as commercial based on its nature and 'the protection will be especially broad if such purpose includes investing money to benefit the State'.[1358] Indeed, at para 14, the Court reasoned that the underlying legal relationship between the foreign depositor and the credit institution was private, not sovereign, in nature.

Other countries we will tackle in our caselaw analysis, such as such as Belgium or Sweden, have a rather functional approach to central banks immunity, namely immunity only applies to assets used for central banking purposes.[1359] Canadian courts have, for example, denied immunity to Canadian Treasury Bills held by the Central Bank of Iraq, reasoning that the bills were 'used to finance the Central bank of Iraq's current account', which was a commercial activity, as was 'the investment of surplus funds in interest- bearing treasury bills'.[1360]

The aforementioned German decision and approaches such as the Canadian one (and the ones we will discuss in our caselaw analysis) create different levels of protection. With the German approach, central banks' assets protection is considerably higher than in countries that do not shield central banks' property used for a commercial activity, based on the nature of the activity rather than its purpose.

Therefore, we can preliminarily affirm that the actual difference between courts' competing approaches strongly depends on how commercial activity is framed. [1361] If as

[1358] Ingrid Wuerth (n 48) 273.

[1359] Wuerth also recalls how countries such as Australia, Canada and Israel, do not provide immunity from enforcement for central bank assets 'if those assets are used for a commercial activity, without regard to any government or sovereign purpose'. In these countries, central bank assets 'are treated like other State-owned property, which is not protected if used for a commercial activity'. ibid 278

[1360] *Canfi corp Overseas Projects Ltd. v. Asbestos Plastic Industries Public Enterprise*, Canada, Superior Court of Quebec (7 March 1995), 1995 CarswellQue 2187, J.E. 95– 963, EYB 1995– 75702.

[1361] See also the divergent findings of the US Supreme Court in *Weltover v. Argentina* and the Italian Court of Cassation in *Borri v. Argentina*, Request for a Ruling on Jurisdiction, Case No 11225, (2005) 88 Riv Dir Int 856, ILDC 296 (IT 2005), 27th May 2005, Italy; Supreme Court of Cassation. Indeed, these two cases involved substantially the same subject matter related to the Argentinian default. As seen, in the former case, the court's

Wuerth says 'commercial activity' is defined in terms of the 'nature' rather than the 'purpose' of the activity, as is frequently the case in the context of immunity from adjudication, then the commercial activity test protects fewer central bank assets than the German or US approaches'.[1362] This, as will be shown, bears an enormous relevance in the assessment of SWFs immunity by domestic courts.

In this regard, it may bear recalling how the ICJ in Certain Iranian Assets has recently categorised Bank Marzaki activities as sovereign on the basis of their purposes.[1363] The ICJ addressed the question of whether Bank Markazi was in fact a 'company' within the meaning of the Treaty of Amity between the United States and Iran, and whether the Bank was in fact protected by such Treaty. The Court noted in this regard that the only activities on which Iran relied to characterise Bank Markazi as a 'company' consisted in the purchase, between 2002 and 2007, of 22 security entitlements in dematerialised bonds issued on the US financial market and in the management of proceeds deriving from those entitlements.[1364]

In the opinion of the Court, these operations were not sufficient to establish that Bank Markazi was engaged, at the relevant time, in activities of a commercial character. Indeed, the

---

focus was on the act of issuing bonds, which being private in nature, was therefore held not to be covered by immunity. By contrast, in *Borri*, the Italian Court of Cassation took the view that the focus should have been on the legislative measures taken by the debtor State to address a public financial crisis that was deemed to be covered by State immunity Annamaria Viterbo (n 1297). See also, the Supreme Court ruling over Greek sovereign bonds restructuring (Case VI ZR 516/ 14, Judgment of 8 March 2016). in Johannes Ungerer, 'Sovereign Debt and Immunity: The Controversy of Subsequent Liability Limitation for State Bonds' in Régis Bismuth and others (eds), *Sovereign Immunity Under Pressure* (Springer International Publishing 2022). See also Sebastian Grund, 'Enforcing Sovereign Debt in Court: A Comparative Analysis of Litigation and Arbitration Following the Greek Debt Restructuring of 2012' [2018], 50. Tom Rhys Davies, 'German court finds Greek debt claims inadmissible' (22 March 2016) <https://globalrestructuringreview.com/article/german-court-finds-greek-debt-claims-inadmissible> accessed 17 December 2022.

[1362] Ingrid Wuerth (n 48) 277.

[1363] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment, 30 March 2023.

[1364] ICJ, *Certain Iranian Assets (Islamic Republic of Iranv. United States of America)*, Summary of the Judgment of 30 March 2023, available at <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-SUM-01-00-EN.pdf> accessed 17 June 2023, 2.

operations in question were carried out within the framework and for the purposes of Bank Markazi's principal activity, from which they were held as *inseparable*. The Court indeed stated that they were merely a way of exercising its sovereign function as a central bank, and not commercial activities performed by Bank Markazi 'alongside [its] sovereign functions'.[1365]

The Court derived from this that Bank Markazi could not be characterised as a 'company' within the meaning of the Treaty of Amity. Consequently, the ICJ upheld the jurisdictional objection raised by the United States with regard to Iran's claims relating to alleged violations of the Treaty of Amity grounded on the treatment accorded to Bank Markazi as a 'company'. As a result, the Court found that it had no jurisdiction to consider those claims in the first place.

## E. INVESTMENT ARBITRATION AND STATE IMMUNITY FROM ENFORCEMENT

As we proceed to address our case law study, we have to preliminary spend a few words on the investment arbitration framework for awards enforcement. In terms of international or regional treaties, only a few address the issue of judgment-award enforcement and, therefore, sovereign immunity from enforcement. Indeed, international treaties and conventions frequently do not regulate the enforcement phase, as this stage strictly occurs in domestic systems. This applies even to the ICSID Convention, which creates one of the more self-contained frameworks for international investment arbitration.[1366]

Indeed, Article 53(1) of the ICSID Convention provides that an ICSID award is binding on all parties to the proceeding, and each party must comply with it according to its terms.[1367] As per Article 54(1), if a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognised and enforced in the courts of any ICSID Member State as if it were a final judgment of that State's courts.[1368] However, according to Article 55 ICSID,

[1365] id.

[1366] Antonio R. Parra (n 1090).

[1367] Stanimir A. Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder (ed), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009). Julien Fouret (ed) (n 1087).

[1368] Article 53 ICSID: (1) 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant

even though Member States must recognise and enforce the award, each State's laws relating to sovereign immunity from execution continue to apply.[1369] The Executive Directors of the World Bank recognised in their report on the ICSID Convention that the doctrine of sovereign immunity may prevent the forced execution State of judgments obtained against foreign States or against the State in which execution is sought. Indeed, while Article 54 requires the Contracting States to equate an award rendered according to the Convention with a final judgment of its courts, it does not oblige them to go beyond this.[1370] In other terms, it does not require them to undertake forced execution of awards rendered under the Convention in cases in which final judgments could not be executed.

Nonetheless, we can count on one international convention regulating the enforcement of awards globally. Indeed, the most prominent international instrument concerning the enforcement of international awards (especially in commercial arbitration) is the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[1371] This Convention, which 159 States have ratified, seeks to create common standards for recognising and enforcing foreign and non-domestic arbitral awards.[1372] According to the text of the New York Convention, a decision by a signatory State's court to refuse enforcement to a claimant seeking enforcement of a foreign award has to be consistent with the listed grounds in Article V.

---

provisions of this Convention […]'. Article 54 ICSID: '(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State […]. See, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.

[1369] Article 55 ICSID 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'. See, id.

[1370] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 33.

[1371] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. XVI, June 10, 1958, 21 UST. 2517, 330 U.N.T.S. 3 (New York Convention), <https://www.newyorkconvention.org/english> accessed 11 August 2022.

[1372] Gary Born, 'The New York Convention: A Self-Executing Treaty' [2018] MJIL 115. See also Martin Domke, 'International Commercial Arbitration. The New York Convention. Compiled and edited by Giorgio Gaja' (1978) 72(4) American Journal of International Law 961.

These grounds are the incapacity of a party or invalidity of the arbitration agreement, the violation of due process, the arbitral tribunal exceeding its authority, the improper constitution of the arbitral tribunal or procedural irregularities, and when an award has not yet become binding or has been set aside or suspended. Usually, it seems domestic courts have narrowly construed the grounds for refusal under Article V, with the consequence that parties resisting enforcement on such grounds have been largely unsuccessful.[1373] However, according to Gaillard, in many of such enforcement cases, 'the effectiveness of arbitral awards – and thus the commitment of a State to resolve certain disputes through arbitration – [gives] way before State immunity from execution and respect for the division of the State's commercial activities into separate legal entities'.[1374]

Thus, in international arbitration, one could say that enforcement remains heavily reliant on domestic law systems and courts' implementation of international law and (the few) international conventions, such as the New York Convention. A similar objective is also pursued by the Inter-American Convention on International Commercial Arbitration (or 'Panama Convention'), which was signed by 18 Latin American States and the United States.[1375]

## F. AWARD ENFORCEMENT PROCEEDINGS AGAINST SOVEREIGN WEALTH FUNDS: THE KAZAKHSTAN'S SAGA

### 1. Introduction

After setting the stage on State immunity from enforcement, we proceed now with our case analysis of several award enforcement proceedings brought against SWFs. This, to appreciate

[1373] Emmanuel Gaillard, Benjamin Siino, 'Enforcement under the New York Convention', 3 January 2019, <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/Article/enforcement-under-the-new-york-convention> accessed 11 August 2022.

[1374] See Emmanuel Gaillard and Jennifer Younan (ed) (n 883) 189. See also Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories' (2022) 71(1) International and Comparative Law Quarterly 183.

[1375] Inter-American Convention on International Commercial Arbitration, 30 January 1975, in force 16 June 1976, 1438 UNTS 245 (Panama Convention), <https://www.oas.org/juridico/english/treaties/b-41.html> accessed 11 August 2022.

the application of the general framework to SWFs *in concreto*. We found two strains of enforcement proceedings, brought against two of Kazakhstan's SWFs. These enforcements cases, which stemmed from an investment arbitral dispute, are in chronological order, *AIG v. Kazakhstan* and *Stati v. Kazakhstan*.[1376]

This is an analysis of enforcement proceedings before domestic courts. The aim is to study the courts' approaches to the application of immunity from enforcement to the seized Kazakhstan's SWFs. The involved funds were the NFK (the National Fund of Kazakhstan), managed by the National Bank of Kazakhstan (NBK), Kazakhstan's central bank, and Samruk (Samruk-Kazyna), a joint stock company wholly owned and directed by the State of Kazakhstan. As we will see, notwithstanding the similarity of the cases' subject matter, domestic courts arrived at divergent findings concerning the very nature of such SWFs and their activities in the frame of their sponsoring State macroeconomic management. We can preliminarily conclude that these divergent approaches partially relate to such funds' different corporate and institutional settings and the interpretation of the commercial exception. Given the above, it logically follows to organise the analysis of such enforcement cases per *typology* of SWF involved. For every enforcement proceeding, we first describe all the arbitral disputes and the legal framework of the relevant jurisdictions in which the enforcements took place. Finally, we critically assess all the enforcement proceedings in the round to draw some conclusions on the 'international customary' stance on SWFs and State immunity from enforcement. With this aim, before addressing the enforcement disputes related to the two Kazakh SWFs, it is essential to spend a few words on the 'identity' of such SWFs.

[1376] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (7 October 2003); *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. 116/2010, Award, 19 December 2013. *AM Capital Partners, Inc & Anr v. Kazakhstan* ('*AIG'*).

## 2. Kazakhstan's SWFs: The National Fund and Samruk-Kazyna

As a preliminary remark, a 2017 OECD report on Kazakhstan's economic development found that SOEs, together with large private industrial and banking conglomerates, dominate the economy of Kazakhstan.[1377] Specifically, the OECD reported that

> [*t*]*he scale of Kazakhstan State involvement in the economy stands out among benchmark and OECD economies […]. All indicators of State control, apart from the governance of SOEs, are above average for OECD economies. The summary indicator for State control is above those for all OECD countries, except Turkey, and is slightly below the values for the neighbouring economies of Russia and China. This assessment reflects the heavy involvement of government in network sectors, the preference for coercive regulation rather than encouraging desired action through incentives and price controls, and the pervasiveness of State ownership across sectors*.[1378]

While Kazakhstan seems to lack a general ownership policy, the State has implemented some legislation targeting State ownership. Among those, the Law on State Property concerning State ownership and management of SOEs specifies the relevant State authorities' roles, powers and responsibilities.[1379] In addition, the OECD refers to the Law on Sovereign Wealth Fund that states the general aim of such funds is 'to increase the national wealth of the republic of Kazakhstan'.[1380]

The first Kazakh SWF, NFK, was established in 2000 to act as a stabilization fund to stabilise fiscal spending and lessen the impact of volatility in oil, gas, and mineral prices on the

[1377] OECD, 'Multi-dimensional Review of Kazakhstan: In-depth Analysis and Recommendations' (2017) <https://www.oecd-ilibrary.org/development/multi-dimensional-review-of-kazakhstan_9789264269200-en> accessed 1 December 2022.

[1378] ibid.

[1379] ibid.

[1380] ibid.

State of Kazakhstan.[1381] NFK currently performs two functions. A stabilization function and a saving function to address inter-generational equity from the oil windfall. Therefore, it could be said that such a fund is both a stabilisation fund and an inter-generational fund.[1382]

NFK is funded mainly by tax revenues from the oil sector, privatization proceeds, proceeds from the sale of agricultural land by the government, and investment income from the management of NFK. NFK direct expenses are targeted payments to the State budget, which serve the stabilizing purpose. Such targeted transfers are discretionary and can be directed at supporting particular budgetary goals. Kazakhstan's President decides how to distribute the targeted payments, mainly used to finance anti-crisis initiatives during economic downturns.

Transfers must pass through the State budget. Most oil income inflows are invested abroad as part of the savings function. Since 2016, NFK is not permitted to invest in domestic securities issued by the government, quasi-government, or private sector, despite a minor portion of its assets previously invested domestically into government development organisations bonds.[1383]

The Central Bank of Kazakhstan manages this fund. The Presidential Decrees no. 402 and 543, Kazakhstan's budget law and an agreement between Kazakhstan and the Central Bank (the 'National Fund Agreement'), govern the Central Bank's management over the fund. Under the National Fund Agreement, the Central Bank may either hold the funds in its own name or transfer funds and the responsibility for their investment management to third-party managers. Therefore, private asset managers connected to the Central Bank may decide on the part of the investment strategy of the SWF.

[1381] Asian Development Bank, 'COVID-19 Active Response and Expenditure Support Program: Report and Recommendation of the President' (June 2020) <https://www.adb.org/sites/default/files/linked-documents/54188-001-sd-05.pdf> accessed 29 November 2022.

[1382] ibid.

[1383] (10%). Recent changes to fund investment strategy have increased the emphasis on stocks and alternative investments.

Samruk, on the other hand, is differently structured, as it is a joint stockholding company established in 2008 by Presidential Decree.[1384] The fund was created through the merger of the 'Sustainable Development Fund Kazyna' and the 'Kazakhstan Holding Company for State Assets Management Samruk' and the additional transfer to the Fund of interests in certain entities owned by the Kazakh Government. The Government (the State of Kazakhstan), represented by the Ministry of Finance, is the sole shareholder of Samruk.

According to Samruk's Corporate Governance Code, the financial and operational performance of the fund shall be grounded on the economic independence principle. An agreement between Samruk and the State sets out the principles of their interaction, the roles of different relevant ministries, and how the State should exercise its role as the shareholder through the Board. According to a recent report from the OECD, the Kazakhstan government appoints the Board with six members.[1385] Two of them are government representatives, i.e., the Minister of National Economy and the Adviser to the President. Three directors are independent, and one is the Chair of the fund.

The Fund's activities are funded by authorised stock and income from dividends from national development institutions, companies, and other legal entities. Share interests are owned by the Fund on the right of property or trust management and other incomes not prohibited by the legislation of the Republic of Kazakhstan. The Fund has its own balance sheet and bank accounts.[1386]

As for the objectives of the Fund, its principal aim is to increase the national wealth of the Republic of Kazakhstan by increasing the long-term value (cost) of member organizations of the Fund's group and effective management of assets belonging to the group of the Fund.[1387]

[1384] And by the Resolution of the Government of the Republic of Kazakhstan.

[1385] OECD, 'State-Owned Holding Companies: A Background Note for the OECD Asia-Pacific Network Meeting on Corporate Governance of State-Owned Enterprises 8-9 December' (8 December 2022) <https://www.oecd.org/corporate/ca/state-owned-holding-companies-background-note.pdf> accessed 5 December 2022, 33.

[1386] See, corporate governance of Samruk at <https://sk.kz/about-fund/corporate-governance/?lang=en> accessed 1 December 2022.

[1387] OECD, 'State-Owned Holding Companies: A Background Note for the OECD Asia-Pacific Network Meeting on Corporate Governance of State-Owned Enterprises 8-9 December' (n 1385), 33.

In concrete terms, the fund facilitates modernization and diversification of the Kazakhstan economy, diversifies and stabilises the economy, and enhances companies' efficiency.[1388]

In this vein, Samruk controls almost all of Kazakhstan's strategic corporate assets amounting to 40% of its GDP in 2017. Five of its public companies (in the telecoms, railways, and energy sectors) are listed on the stock market.[1389]

## G. CASE STUDY N. 1: THE *AIG V. KAZAKHSTAN* CASE OR ENFORCEMENT AGAINST NFK IN THE UNITED KINGDOM

### 1. The Arbitral Proceeding

Between 1999 and 2000, a joint venture project involving AIG and a Kazakh company began the development of a residential housing complex in Kazakhstan.[1390] After the property had been purchased and construction contracts were signed, the Government of Kazakhstan announced the cancellation of the project ordering the transfer, without compensation, of the project property.[1391] Seizures of properties and expulsions of contractors from the sites followed suit.

The investor initiated an ICSID claim against Kazakhstan under Article VI(4) of the US-Kazakhstan BIT, alleging, *inter alia*, unlawful expropriation. The ICSID Tribunal agreed with the Claimant that these actions indeed amounted to expropriation, were arbitrary and in wilful disregard of the due process of law and 'were shocking to all sense of juridical propriety'.[1392] In light of it, the Tribunal awarded the claimant almost ten million USD plus continuing interest, which the Respondent State did not pay.

[1388] ibid.

[1389] ibid.

[1390] Hew R. Dundas, 'State Immunity and the Enforcement of Awards against State Parties: AIG Capital Partners v Republic of Kazakhstan' (2006) 72(1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 77.

[1391] ibid.

[1392] *AIG v. The Republic of Kazakhstan*, Award (7 October 2003).

After the State's non-compliance, AIG proceeded with enforcing the award in the United Kingdom, having located assets in this jurisdiction. Specifically, the claimants requested the seizure of cash and securities held in London by third parties (AAMGS) acting as custodian of the NBK.[1393] They obtained leave to register the award in the High Court in England.[1394] In this context, Kazhakstan pleaded immunity from enforcement with regards to NFK assets.

However, before entering into the details of the enforcement proceedings, a digression into the UK domestic framework on State immunity from enforcement is rendered necessary.

2. The UK Framework on State Immunity from Enforcement

Section 14 UK SIA defines 'State' as including (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government, 'but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued'.[1395]

Hence, contrary to other common law statutes like the US FSIA, the UK SIA does not include State agencies or instrumentalities in the definition of 'State'. In so doing, the UK statute creates what Yang refers to as a 'presumption of non-immunity' for State entities. In this connection, Paragraph 2 of the provision specifies that

> *[a] separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if — (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State*

[1393] AIG sought to enforce the award as a judgment by obtaining final third-party debt and charging orders against cash and securities held in London by AA pursuant to a Global Custody Agreement between AA and NBK.

[1394] *AIG Capital Partners Incorporated and CJSC Tema Real Estate Company Limited v Kazakhstan and National Bank of Kazakhstan* (*intervening*), Enforcement decision, [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, IIC 9 (2005), 20th October 2005, despatched 20th October 2005, United Kingdom; England and Wales; High Court [EWHC]; Queen's Bench Division [QBD]; Commercial Court.

[1395] Article 14 UK SIA.

*(or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune*.

UK courts usually perform a two steps analysis in addressing State immunity pleas from State entities. First, they enquire about the status of an entity vis-à-vis the State. In other words, courts assess whether the entity is separate from the State, possesses legal personality and enjoys financial and administrative independence.[1396] If the entity has no independent personality, it will have to be included in the definition of State and follow the same analytical reasoning the UK courts apply to State immunity of States. This means it will still have to pass the second step of the analysis, namely the commercial-sovereign characterisation of its activity. Only if the activity is regarded as sovereign immunity will be applied.[1397]

As for the structural analysis of the entity, according to Section 14(1) one criterion to assess whether an entity is separate from the State is that it must be distinct from the executive organs of the government of the State. Yang explains that this is a factual element which depends on foreign law, which confers the status upon the entity. It is a distinctiveness of an organisational character 'in the sense that the test is provided by the existence of the right of executive organs to give directions about the conduct of the entity's daily business'.[1398]

In several instances, English courts analysed State entities' status while addressing whether the assets of such entities were available to satisfy the debts of the State.[1399] British courts have historically adopted a somewhat restrictive approach to delimiting the State notion and its detachment from its SOEs.

---

[1396] Xiaodong Yang (n 50) 235.

[1397] See *Kuwait Airways v. Iraqi Airways*, England, 1992/1993/1995, [1995] 1 Lloyd's Rep 25; [1995] 1 WLR 1147; 103 ILR 340. See also, *Ministry v. Tsavliris*, England, [2008] 2 Lloyd's Rep. 90, 102–104, paras. 67, 70–74 and *Propend v. Sing*, England, (1997) 111 ILR 611, 667, 669.

[1398] Francis A. Mann, 'Immunity of Sovereign States' (1938) 2(1) The Modern Law Review 57, cited by Xiaodong Yang (n 50) 236.

[1399] See e.g., *Kensington International Ltd v Republic of Congo* [2003] EWHC 2331 (Comm) para 32. See Cameron Miles (n 52), 40.

In this regard, in *Trendtex*, the English Court noted that some entities 'of sufficient proximity to the state' could benefit from State immunity.[1400] In this case, the Court had to address the relationship between the Central Bank of Nigeria and the Nigerian State to answer whether the Bank could bear the State's debt. Nevertheless, after considering the Central Bank's functions and relationship with the state, the Court held that it was not an 'alter ego or department' of the latter.[1401] This notwithstanding the governmental functions, the extensive supervision and veto powers by the Federal Executive Council, and eleven government decrees amending the bank's founding statute, which hindered its independence from the state. For the Court, the fact that the central banking business was essentially governmental was not enough to consider the bank a State's alter ego.[1402]

Coming to SOEs, in *Congreso I*, Lord Wilberforce noticed the existence of State-owned corporations, by remarking that[1403]

> *State-controlled enterprises, with legal personality, ability to trade and enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial: but it is an accepted distinction in the law of England and other states*.[1404]

Later in his opinion, Lord Wilberforce stated that '[t]he status of these organisations is familiar in our courts, and it has never been held that the relevant State is in law answerable for their actions', and rejected the argument that such entities' actions could be attributed to their owners.[1405]

---

[1400] ibid 35. *Trendtex* [1977] QB 529, 573G-574F *supra*.

[1401] ibid.

[1402] *Trendtex supra.*

[1403] Cameron Miles (n 52), 37.

[1404] *Playa Larga (Owners of Cargo lately laden on board) v I° Congreso del Partido* [1983] 1 AC 244, 258F- G.

[1405] *I° Congreso del Partido* [1983] 1 AC 244, 271E.

Another prominent case in English jurisprudence is undoubtedly the *Gécamines* case.[1406] In this case, Hemisphere, a Delaware corporation, had purchased two arbitral awards levied against the DRC from Energoinvest DD, a Yugoslavian hydroelectric company.[1407] The Delaware company attempted to enforce those awards in England against Gécamines. Gécamines, a DRC-owned mining company, was a department of the Congolese State and hence was deemed by the creditor an alter ego of the State whose assets could be seized for debt satisfaction.

Ultimately, the dispute landed before the Privy Council, which referred to the more nuanced principles governing immunity in current international and national law compared to previous cases like *Trendtex* and *Congreso I*. The Court referred to the ECSI, the UKSIA, and the attribution methods provided by the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts.[1408]

Nonetheless, the Privy Council heavily drew from the US Supreme Court in *Bancéc*. Specifically, it held that absent evidence of extensive control, a presumption of separateness between an SOE with separate legal personality and its sponsoring State has to be upheld and that the SOE 'and the State forming it should not have to bear each other's liabilities'.[1409] Indeed, according to the Privy Council, it would take 'quite extreme circumstances to displace this presumption'.[1410] Such a presumption could be displaced if

> *the entity has, despite its separate juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the*

[1406] *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, see Chapter II and Chapter III.

[1407] Rahima Patel, 'Quite Extreme Circumstances: Privy Council Determines the $100m Question in La Générale des Carrières et des Mines ('Gécamines') v F.G. Hemisphere LLC ('Hemisphere')' (31 July 2012) <http://arbitrationblog.kluwerarbitration.com/2012/07/31/quite-extreme-circumstances-privy-council-determines-the-100m-question-in-la-generale-des-carrieres-et-des-mines-gecamines-v-f-g-hemisphere-llc-hemisphere/> accessed 9 December 2022.

[1408] Cameron Miles (n 52), 38.

[1409] *Gécamines* [2013] 1 All ER 409 para 29.

[1410] id.

*relevant constitutional arrangements, as applied in practice, as well as of the state's control over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the State are so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa. The assets which are (subject to waiver and to the commercial use exception in s 13(4) of the [SIA]) protected by State immunity should be the same as those against which the states' liabilities can be enforced.*[1411]

Given the above, the Privy Council held that Gécamines was not an organ or department of the Congolese State. For the Council, the corporation was a legitimate and functional corporate entity with its own assets, budget, accountings, borrowings, debts, taxes, and other responsibilities.

The Gécamines test was upheld in other cases such as *Taurus Petroleum Ltd v. State Oil Marketing Co of the Ministry of Oil of Iraq*.[1412] There, the State Oil Marketing Company of the Ministry of Oil for the Republic of Iraq (SOMO), clearly an organ of the Iraqi State under its domestic law, was still found not to be part of such a State and, therefore, not immune under the UK SIA.[1413] This was held notwithstanding that it was an organ established by statute and had a monopoly on the export and import of hydrocarbons from Iraq. Despite this evidence, it was found that SOMO was not immune under Section 14(1) of the SIA, 'on the basis that the mere fact of its separate personality engaged the 'strong presumption' in Gécamines and that the evidence supplied could not overcome this'.[1414]

This approach seems to have been maintained vis-à-vis SOEs with separate legal personality. The recent case *Botas Petroleum Pipeline Corporation v. Tepe Insaat Sanayii AS*

[1411] id.

[1412] *Taurus Petroleum Limited (Appellant) v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* (Respondent) [2017] UKSC 64.

[1413] Derek P. Auchie, 'Taurus Petroleum LTD v. State Oil Marketing Co. of the Ministry of Oil, Republic of Iraq' (2018) 1(1) Journal of Enforcement of Arbitration Awards 1.

[1414] Cameron Miles (n 52), 44.

case.[1415] This case stemmed from an ICC arbitration between Tepe Insaat Sanayii AS (Tepe), a Turkish construction company, and Boru Hatlari Ile Petrol Tasima AS (Botas), a Turkish SOE.[1416] Tepe successfully brought arbitration proceedings against Botas, which terminated the contracts, obtaining two ICC awards. Tepe subsequently sought to enforce the Awards against Botas's shares in two subsidiaries in the UK (Jersey). Botas was a separate entity within the meaning of section 14 SIA, so it was held unable to claim State immunity. The Privy Council rejected that Botas' assets were the property of the Turkish State under Section 13(2)(b) SIA and hence immune from enforcement.

Interestingly, Botas argued that the concept of 'property' under the UK SIA should be broadly interpreted to include not only those assets in which a State enjoys a proprietary or legal interest but also 'those over which it exercises significant control in terms of their use and disposition'. The Privy Council rejected this interpretation, holding that, for enforcement purposes, the nature of ownership of the 'property of a State' meant only a proprietary or legal interest. Specifically, it stated that

> [*i*]*n the context of enforcement, possession or control are irrelevant, except in so far as they are aspects of some identifiable proprietary or legal interest against which execution could lie. Section 13(2)(b) addresses 'the property of a State' in the straightforward sense of a proprietary interest having value against which execution can lie. Section 13(2)(b) was not drafted, and there is no call to read it, to preclude execution in the ordinary course against assets belonging to a separate entity on the ground of non-proprietary involvement by the State in the form of mere possession or control*.[1417]

From this decision, one could infer that assets over which an SOE or a SWF (with a separate legal entity) has a legal or proprietary interest, rather than the State, may not be

[1415] *Botas Petroleum Pipeline Corporation v. Tepe Insaat Sanayii* AS [2018] UKPC 31 ('*Botas*').

[1416] Charlie Thompson, 'Botas v Tepe: State Immunity in the Context of Arbitration Enforcement' (29 November 2018) <http://arbitrationblog.practicallaw.com/botas-v-tepe-state-immunity-in-the-context-of-arbitration-enforcement/> accessed 9 December 2022.

[1417] *Botas*, para 22.

protected by immunity from enforcement, even where day-to-day control over the assets is with the State.[1418]

### 3. The Enforcement Proceeding against NFK or Immunity of SWFs Managed by Central Banks in the United Kingdom

As mentioned, Kazakhstan claimed State immunity on its own account and the NBK's. AIG had already obtained interim orders and contended that the cash and securities were assets of the State that could and should be the subject of final orders. NBK intervened in the proceedings and applied to discharge both orders on the ground that the cash and securities held by the third party were 'property' of NBK and were immune from enforcement.

In this case, cash and securities belonging to NFK were held under a global custody agreement made by Kazakhstan's central bank. Therefore, while the assets remained the property of NFK, the central bank was actually responsible for their management. The High Court of England held these assets as central bank 'property'. This because, under the UK SIA, the term central bank 'property' means any assets in which the central bank has 'some kind of 'property interest' irrespective of the capacity in which the central bank holds it and whether or not the State of the central bank has another interest in the property.[1419]

Therefore, given the assets were central bank property, the Court denied execution of the ICSID Award against NBK's bank accounts, which were considered to be property of a central bank and, therefore, covered by section 14 UK SIA.

This finding falls in line with the UK caselaw in this respect. Indeed, enforcement against foreign central banks of foreign States in the UK is rather tricky. This is because of the special treatment accorded to Central Banks under the SIA. Indeed, section 14(4) provides that the property of a State's central bank 'or other monetary authority shall not be regarded for subsection (4) of section 13 above as in use or intended for use for commercial purposes'. Therefore, as Wuerth notices, the UK SIA applies immunity 'whether or not the central bank

[1418] See, Allen & Overy, 'Assets Owned by a State-Owned Enterprise not Immune from Enforcement' (29 November 2018) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/assets-owned-by-a-state-owned-enterprise-not-immune-from-enforcement> accessed 9 December 2022.

[1419] Ingrid Wuerth (n 48) 280. See also, Hew R. Dundas (n 1390).

property is used for a commercial activity without any examination of purpose for which the property is used'.[1420] Therefore, the UK SIA maintains a categorical approach to immunity from enforcement of assets of a central bank, meaning that such assets are protected regardless of the activity for which they are used *because* they are the central bank's assets.

In the case, the UK Court rejected that NBK assets, being central bank assets, were not immune because the sponsoring State was the actual beneficial owner. The Court recognised that AAMGS held the cash and securities (of which the Claimant requested the seizure) by order of NBK, which had the contractual right to payment of the debt that was constituted by the accounts. For these reasons, the court identified such accounts as falling within the scope of section 14(4) of the SIA, thus enjoying complete immunity from execution. Indeed, the Court held that 'moneys in a bank account of a central bank with another bank are immune from execution irrespective of the source of the funds in the account or the use of the account or the purpose for which the account is maintained'.[1421]

Moreover, given NBK held such accounts as part of the NFK – one of the mentioned Kazakhstan's SWFs – the Court also considered whether they could have been qualified as 'property of a State' as per Sections 13(2)(b) and 13(4) SIA. It highlighted that the NFK 'was […] created to assist in the management of the economy and government revenues of the [State], both in the short and long term'. Furthermore, it specified that '[m]anagement of a State's economy and revenue must constitute a sovereign activity'.[1422]

The Court also referred to a letter received by the Kazakh ambassador to the UK, confirming the sovereign and non-commercial purposes of the assets held, through a custodian, by the fund. For all these reasons, the Court concluded that regardless of whether one had to consider the assets under enforcement procedure as 'property of a central bank' or as a

[1420] Ingrid Wuerth, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department' (2011) 51(4) Journal of International Law, 270 <SSRN: https://ssrn.com/abstract=1811604> accessed 29 September 2022.

[1421] See, Ingrid Wuerth (n 48) 279. See also *NML Capital v. BCRA* (n. 45), 192–3, rejecting the argument that central bank property is not 'held for its own account' when it is held for the profit or benefit of the State.

[1422] United Kingdom, High Court of Justice, *AIG Capital Partners Inc. and another v. Republic of Kazakhstan*, Case No. 2004/536, 20 October 2005, [2005] EWHC 2239 (Comm) (*AIG Capital v. Kazakhstan*), para 92.

'property of a State', they enjoyed immunity from execution. On the one hand, central banks' property enjoys full immunity from execution under the SIA. On the other hand, the stabilization and savings purposes of the National Fund of Kazakhstan have been regarded as non-commercial.

In the UK court view, central bank investments served a sovereign purpose because 'they were intended to secure 'high profitability levels', and were undertaken as 'part of the overall exercise of sovereign authority', as the 'aim […] was and is to enhance the national fund''.[1423]

Therefore, the UK courts maintain a rather restrictive approach toward SOEs and SWFs structured with a separate legal personality. Yet, when a central bank manages a SWF, the English courts' approach seems to be categorically protective of monetary authorities' assets, and the *AIG v. Kazakhstan* dispute provides an illustrative case in this respect.[1424]

## H. CASE STUDY N. 2: THE STATI V. KAZAKHSTAN CASE OR ENFORCEMENTS AGAINST NFK AND SAMRUK-KAZYNA IN SWEDEN, BELGIUM AND THE NETHERLANDS

### 1. The Arbitration Proceeding and the Post Arbitration Phase

The *Stati v. Kazakhstan* case originated in 2010 when two Moldovan investors, Anatolie and Gabriel Stati, and their companies, Ascom SA and Terra Raf Trans Trading Ltd (collectively 'Stati'), initiated an ECT-based arbitration against the State of Kazakhstan before the SCC.[1425] Specifically, the investors alleged to have been subject to, among other things, seizure of assets, arbitrary investigations and prosecutions, leading to a loss of valuable contracts for two oil

[1423] Ingrid Wuerth (n 48) 273. See, *AIG v. Kazakhstan* para 92.

[1424] United Kingdom, High Court of Justice, *AIC Ltd. v. Federal Government of Nigeria*, Case Nos. S/ 03/ 0056 and S/ 03/ 005, 13 June 2003, [2003] EWHC 1357 (QB), 129 ILR 571. For a summary of the arbitration case see Luke Eric Peterson, 'Kazakhstan Seeks to Annul $125 Million ICSID Award in Telecoms Dispute; We Review Earlier Kazakh Arbitrations' (12 November 2008) <https://www.iareporter.com/articles/kazakhstan-seeks-to-annul-125-million-icsid-award-in-telecoms-dispute-we-review-earlier-kazakh-arbitrations/> accessed 9 December 2022.

[1425] See Chapter II, Section E., Paragraph 3.

fields located in Kazakhstan. The claimants accused Kazakhstan of treating them 'unfairly and inequitably' and having breached Article 10(1) of the ECT.[1426]

In an Award rendered on 19 December 2013, the Tribunal found Kazakhstan liable for implementing a 'string of measures of coordinated harassment' to the detriment of the claimants' investments related to the oil fields and other contracts.[1427] In so doing, the Tribunal confirmed that Kazakhstan violated the Fair and Equitable Treatment provision of the ECT, and as a result, it awarded the claimants 506 million USD plus interest.[1428]

All the same, Kazakhstan refused to pay the award and, in 2014, attempted to have the latter set aside before the Svea Court of Appeal in Sweden.[1429] The Swedish Court of Appeal dismissed such an application, and the claimants started enforcement proceedings in several jurisdictions to recover the amount due by Kazakhstan. The recalcitrant State, however, resisted the award enforcement in several countries claiming, *inter alia*, that the award was tainted by fraud.[1430] Specifically, Kazakhstan alleged that Stati committed fraud during the arbitration by claiming fictitious costs for constructing a liquefied petroleum gas plant.[1431]

Thus, over the past years, national courts in various jurisdictions, including Sweden, the United States, the United Kingdom, Italy, Belgium, the Netherlands and Luxembourg, have

[1426] See, Energy Charter Treaty, Article 10 <https://www.energychartertreaty.org/provisions/part-iii-investment-promotion-and-protection/Article-10-promotion-protection-and-treatment-of-investments/101/#:~:text=Each%20Contracting%20Party%20shall%2C%20in,make%20Investments%20in%20its%20Area.> accessed 29 November 2022.

[1427] Precisely, Borankol and Tolkyn Fields and Munaibay Oil, to the Contract 302 Properties, and to the LPG Plant. See, *Stati v. Kazakhstan Ascom*, Award, 19 December 2013, para 1086.

[1428] Luke Eric Peterson, 'Moldovans Secure $500+ Million Arbitral Award in Claim against Kazakhstan under Energy Charter Treaty' [2014] <https://www.iareporter.com/articles/moldovans-secure-500-million-arbitral-award-in-claim-against-kazakhstan-under-energy-charter-treaty/> accessed 29 May 2023.

[1429] See Kazakhstan's Motion for Leave to Submit Additional Grounds in Support of Opposition to Petition to Confirm Arbitral Award, 18 March 2014 <https://www.italaw.com/sites/default/files/case-documents/italaw10276.pdf> (28 November 2022). See, Judgment of the Svea Court of Appeal on Kazakhstan's Set Aside Application (English), 9 December 2016 <https://www.italaw.com/sites/default/files/case-documents/italaw8791.PDF> (28 November 2022).

[1430] Which, as we will see was ultimately proven to be the case according to different domestic courts.

[1431] We will not discuss in the depth the fraud issue as it exceeds the scope of our research.

been engaged in these follow-on proceedings and have reached divergent findings with Stati's attempts to enforce the SCC award. In this connection, the English, Luxembourg and Belgian courts had recognised the soundness of Kazakhstan's fraud claims.

Specifically, the High Court in London ruled in 2017 that there was a sufficient *prima facie* case of fraud. However, Stati were permitted to discontinue enforcement in that jurisdiction before the matter could go to trial.

In February 2021, the Luxembourg Supreme Court overturned the Luxembourgish Court of Appeal's enforcement ruling that the latter court had violated due process when it refused to admit evidence of the State's fraud allegations. The lower court stayed further efforts by Stati to enforce the award pending the resolution of a criminal investigation of the investors in that jurisdiction.

As for Belgium, in the following sections, we will see that the Supreme Court has aligned with the Luxembourgish (and other courts) findings on fraudulent activities by Stati.

By contrast, the Swedish courts upheld the ECT award at the arbitration seat in Sweden. Notwithstanding the fraud allegations, the award was recognised in the US, the Netherlands and Italy.

Against this backdrop, we will limit ourselves to the analysis of the enforcement proceedings whereby the claimants seized Kazakhstan's SWFs, NFK and Samruk, and where immunity from execution had been raised as a defence by the respondent and addressed by domestic courts. This happened in several jurisdictions. Amongst these, based on the immunity questions raised by the parties and the related courts' assessments, we selected enforcement proceedings brought in three different jurisdictions[1432]: Belgium, the Netherlands and Sweden. In all such jurisdictions, the award creditors seized SWFs from Kazakhstan as assets of the State. Our case law study of the Stati case is structured based on the two SWFs involved and their different structures. First, we address the proceedings brought against NFK, a fund devoid of legal personality and managed by a central bank. These proceedings were instituted in Sweden and Belgium. Secondly, we address proceedings brought against Samruk, a fund structured as a separate legal entity from the State, in The Netherlands. Lastly, we attempt at drawing some remarks on such cases.

[1432] Which we have also preliminarily discussed in the previous sections.

## I. ENFORCEMENT PROCEEDINGS AGAINST NFK: IMMUNITY OF SWFS MANAGED BY CENTRAL BANKS

### *ii. Enforcement in Sweden*

#### a. Sweden Domestic Framework on State Immunity form Enforcement

After ratifying the UNCSI in 2009, Sweden has incorporated it into its domestic legal framework.[1433]

Swedish courts have assessed whether entities such as trade offices, tourist organizations and State-owned companies were to be regarded as State entities employing different criteria. In doing so, Swedish courts heavily relied on customary law to define the concept of 'State' vis-à-vis State immunity from jurisdiction and enforcement.[1434]

This assessment has been based, among other things, 'on the extent to which the relevant operations are regulated by law in the foreign State, if the operations [were] financed with public funds or if they [were] profit-oriented and to what extent the foreign State influence[d] and control[led] the concerned entity's actions'.[1435] However, there seems to be no common State practice regarding the characterization of an entity, whether it depends primarily on its status, its right to exercise State power or the character of its actions.[1436]

[1433] See Act (2009:1514) on Jurisdictional Immunity of States and Their Property (Lag (2009:1514) om Immunitet för stater och deras egendom). Nevertheless, the Swedish Act, as the UNCSI, is not yet in force. See, Kristoffer Lof, Asa Waller, Lisa-Hyder, Mannheimer Swartling, 'Quick Answers on State Immunity – Sweden' [2020] Kluwer Law International <https://www.mannheimerswartling.se/app/uploads/2021/07/Quick-Answers-on-State-Immunity-–-Sweden-Kristoffer-Lof-Asa-Waller-Lisa-Hyder.pdf> accessed 20 November 2022, 1. Other States have act similarly to Sweden, such as Spain and Japan.

[1434] ibid.

[1435] ibid, 2. See the *travaux préparatoires* to the Act (2009:1514) on Jurisdictional Immunities of States and Their Property, SOU 2008:2, 111.

[1436] See Governmental Bill 2008/2009:204, 38. ibid, 2.

Focusing on such State court practice, it has to be mentioned that Sweden has been the seat of several renowned award enforcement proceedings.[1437]

One such case is *Sedelmayer v. Russia*. In 1998, the SCC rendered a 2.3 million USD award in favour of Mr Sedelmayer for unlawful expropriation of its assets. The investor then tried to enforce the SCC award against the Russian Federation. In turn, Russia tried unsuccessfully to challenge the award in Swedish courts. After this, the dispute evolved into a ten-year-long legal battle before the Swedish courts. Mr Sedelmayer sought to execute the court order awarding costs against Russian-owned property and Russia and resisted enforcement in Sweden as in other seats of enforcement (like in Germany and the US).[1438]

In the context of this legal battle, Mr Sedelmeyer sought to attach a real estate with several apartments of property of the Russian Federation. Although it was partly used as a residence for diplomats and servants of the Russian Federation, for the most part, they were used for private purposes. The Supreme Court of Sweden, which upheld the Svea Court of Appeal's decision, held that the estate was not used for a significant part for the Russian Federation's sovereign assignments.[1439]

Specifically, Mr Sedelmeyer demonstrated that only 17 out of 48 real estate apartments were used for diplomatic purposes. The others were used for purposes of a 'non-commercial nature'. However, these same purposes were also of a 'non-official nature'.[1440] On this premise, the Court held that immunity could be lifted on those apartments.

In reaching its conclusion, the Supreme Court relied heavily on the UNCSI and the commercial exception to immunity from enforcement therein provided by Article 19.

---

[1437] Another important Sweden based case is represented by the enforcement of the *TMR Energy Limited v. The State Property Fund of Ukraine*, SCC Case No. 062/2000, Final Arbitral Award, 22 January 2001. See, Order of the Federal Court of Ottawa 2003 FC 1517 <https://jusmundi.com/en/document/decision/en-tmr-energy-limited-v-the-state-property-fund-of-ukraine-order-of-the-federal-court-of-ottawa-2003-fc-1517-tuesday-23rd-december-2003#decision_19307> accessed 20 November 2022.

[1438] Joseph M. Cardosi (n 1243), 141.

[1439] Kristoffer Lof, Asa Waller, Lisa-Hyder, Mannheimer Swartling (n 1433), 6.

[1440] *Sedelmayer* para 22. See Esra Yıldız Üstün (n 1086) 31.

Interestingly enough, the court interpreted this provision as meaning that where the property is partially used for official purposes but mainly for 'other purposes represented by the foreign state, [or] purposes that are a prerequisite to or consequence of a State run operation that is commercial or otherwise non-official in nature', the question becomes whether the different purposes 'together make up the specific nature that is required to safeguard the property'.[1441]

Consequently, the court departed from the commercial/non-commercial dichotomy concluding that state-owned property used for non-official uses may not be immune from attachment.

Last but not least, Sweden's approach toward SWFs and foreign central banks' immunity is illustrated by the *Stati v. Kazhakstan* enforcement case. As discussed below, for a Swedish Court, the fact that a foreign central bank manages a SWF might not be enough to apply State immunity from enforcement to the latter.[1442]

b. The Award Enforcement Proceedings in Sweden

After rejecting the motion to set aside the ECT Award rendered against the State of Kazakhstan, the Swedish courts enforced the Stati Award. In 2017, Stati initiated enforcement proceedings in Sweden against the property of Kazakhstan. Between 2017 and 2018, the Swedish Enforcement Agency attached and seized assets in the form of shares in listed Swedish corporations worth approximately 90 million USD and forming part of the NFK portfolio. The fund, as seen, is a SWF owned by the Kazakh Finance Ministry but placed under management by the central bank of Kazakhstan, NBK.

Kazakhstan and NBK challenged the seizure before the Nacka District Court, arguing that the funds belonged to NBK, which is separate from the State and enjoyed the immunity of central banks under international law. Specifically, the two appellants argued that if the Nacka District Court were to conclude that the property belonged to Kazakhstan, the assets would nonetheless be held within NFK. The Fund, according to Kazakhstan, had a distinct non-commercial purpose and belonged to the Central Bank in the sense of the UNCSI, meaning

[1441] Joseph M. Cardosi (n 1243), 141, see also from 142-147. See, Esra Yıldız Üstün (n 1086) 31.

[1442] *Stati v. Kazhakstan.*

that the property was protected against measures of constraint based on State immunity of central banks under the principles codified in Articles 19 and 21(1)(c) of the Convention. The State and the NFK argued that Article 21 (1)(c) explicitly states that property which belongs to a country's central bank shall not be deemed property which the State uses or intends to use for other than non-commercial purposes. As a result, the property of the SWF was to be considered immune to measures of constraint. According to the two applicants, whether the property was used for other than monetary purposes was irrelevant since no specific qualifier had been set forth in the UNCSI and, therefore, by customary international law.

The Swedish District Court upheld the Enforcement Agency's decision rejecting Kazakhstan and NBK plea for immunity. Specifically, the Nacka District Court explained that Kazakhstan's Central Bank had transferred some of the funds of the NFK to the external asset manager Bank Mellon. This was done within the scope of an agreement, namely the Global Custody Agreement (the GCA). The agreement provided that Bank Mellon would execute investments, e.g., acquiring securities in a specific jurisdiction, as per the decisions of the Asset Managers. Bank Mellon was the holder of the relevant accounts with Skandinaviska Enskilda Banken (SEB) and used the accounts to manage securities, in this case, acquired on behalf of another party. Moreover, the Court specified that several decisions on assets seized in SEB were made based on applications in which Kazakhstan, via the Ministry of Finance, was identified as the beneficial owner of the property. The District Court noted that the evidence

> *forcefully implie[d] that Kazakhstan, through its Ministry of Finance, [was] the actual owner of the property, not least due to the fact that Kazakhstan's Minister of Finance ha[d] granted [Bank Mellon] a power of attorney to exercise on behalf of Kazakhstan all rights which a shareholder normally has, such as exercising its voting rights and applying for reimbursement of paid withholding tax as per the applicable tax treaty. It is not likely that the power of attorney was granted for any other reason than that Kazakhstan is the owner of the property*.[1443]

Therefore, the Nacka District Court sided with the Enforcement Agency, concluding that the State owned the seized assets. In arriving at this conclusion, the Nacka District Court

[1443] At 7.

recalled a previous decision by the Swedish Supreme Court in 2011.[1444] In this judgment, the Supreme Court stated that the UNCSI expresses the principle that 'enforcement may be ordered against at least certain property belonging to a state, namely property used for other than government non-commercial purposes'.[1445]

The Nacka District Court held that in the case mentioned above, it was implied that immunity requires that the property has not been used (or intended to be used) for non-commercial purposes and that the purpose of the property be *of a specific qualified nature*. In this regard, the Nacka District Court noticed that the fund's assets had not been reported in the Central Bank's accounting.

Other factors were taken into account, such as (i) the structure of the procedure applying to decisions on dispositions of the funds within the fund; (ii) that the Central Bank had received commissions for its management of the fund; (iii) that Kazakhstan through its Ministry of Finance had granted Bank Mellon with a power of attorney to exercise all rights which a shareholder typically has; (iv) and that Kazakhstan on numerous occasions had claimed reimbursement of paid withholding tax.

The Court stated that it could not find enough circumstances which conclusively supported the opposite argument that the assets were used for central banking functions. The District Court concluded that the applicants had not established that 'the purpose of the holding of the property [was] of such *qualified nature* by belonging to the Central Bank under the [UNCSI] or otherwise'.[1446] In this way, the Nacka District Court arrived at such a conclusion rather swiftly and without actually analysing the fund's assets purpose per se. To the Court, crucial evidence that the assets did not belong to the central bank in the sense of Article 21(1)(c) UNCSI was the fact that their purpose was not of a *specific qualified nature*.

The Nacka District Court found that for the assets in question to benefit from sovereign immunity, it was not enough for the property to be held for a non-commercial purpose. Instead, the holding must be 'qualified', i.e., linked to the State's official functions. The Nacka District Court found that as the property was not accounted for in the National Bank's accounting and

[1444] Högsta domstolen, 2011-07-01, at 475.

[1445] At 9.

[1446] At 9. Emphasis added.

that Kazakhstan, on numerous occasions, had claimed reimbursement of paid withholding tax, the National Bank could not be regarded as the property owner. Accordingly, the Nacka District Court rejected the appeal because the property attached by the Swedish Enforcement Agency was not protected by State immunity.

Therefore, for this Court, the fact that the assets were held for purposes other than commercial was not enough. They should have been held for purposes clearly and specifically linked to the central bank's functions. The burden of proof to show such a link rested on the applicants, namely the Kazhakstan State and its SWF.

Kazhakstan and NBK appealed the District Court judgment before the Svea Court of Appeal. In June 2020, the Svea Court of Appeal reversed the District Court judgment.[1447] Indeed, it lifted the attachment of the Kazhaki Central Bank's assets in the National Fund, ruling that they were covered by sovereign immunity. Taking guidance from the UNCSI, the Court of Appeal held that the immunity of central bank property under Article 21(1)(c) covered all assets handled by a central bank and was 'categorical' in the sense that immunity did not depend on the use made of the assets in question.

In reaching such a conclusion, the Appeal Court first extensively explained the international legal framework on State immunity from enforcement and its reception within Swedish domestic law. In so doing, it recalled how the UNCSI, specifically, in this case, Articles 19 and 21(1)(c), reflected the widely accepted stance of many states on the customary status of immunity from enforcement.[1448] The Court then discussed how the dispute could be solved, considering the UNCSI provisions.

The Court first established that the NBK could be considered a central bank for Article 21(c) in light of its structure and independence from the State and the legal framework of Kazakhstan.

[1447] Case No Ö 3828-20, 'Ascom', Decision of 18 November 2021.

[1448] August A Jake Lowther, 'Cloaked by the Sovereign Veil: Recent Swedish Decision Applies Sovereign Immunity "Categorically"' (10 September 2020) <http://arbitrationblog.kluwerarbitration.com/2020/09/10/cloaked-by-the-sovereign-veil-recent-swedish-decision-applies-sovereign-immunity-categorically/> accessed 2 December 2022.

Then it confirmed that NFK could be considered as 'property' of the central bank in the sense intended by Article 21(1)(c) UNCSI. The Court cited Article 2 of Presidential Decree no. 402 and Article 21 of the Kazakhstani Budget Code, which stipulates that the National Bank manages the assets of the National Fund. Furthermore, according to Articles 1 and 2 of the National Fund Agreement, the National Bank is entitled to possess, use and dispose of the funds in the Fund.[1449] In addition, the Court found other evidence of such a relationship in the 2017 National Bank's annual report and the Global Custody Agreement between the National Bank and Bank Mellon. All these sources revealed that the ownership of the specific assets held by Bank Mellon was to be registered in the National Bank's name in Bank Mellon's register.[1450]

Ultimately, the Svea Court addressed whether the exception in Article 21(1)(c) UNCSI should have been applied categorically or functionally. The Court of Appeal noted that the provision in Article 21(1)(c) does not State that the immunity is limited to the property intended for use in any specific manner. For the Court, the wording of the provision, the UNCSI structure, its *travaux préparatoires*, the Swedish Government Bill incorporating the convention and the Supreme Court judgment in the NJA 2011 case[1451] suggested a categorical application of Article 21(1)(c). The Court also acknowledged the opposing stance supported by part of the State practice and the legal literature favouring a functional reading of the provision. In this regard, the Court stated that

> [*t*]*he opposite view, which has been set forth in certain legal literature on international law and which has support in certain State practice, does not deprive the aforementioned reasons of their strength. Against this background, the Court of Appeal finds that the provision shall be applied categorically. This means that*

[1449] At 20.

[1450] The Court stated that *'[i]t is undisputed that the National Bank has transferred part of the assets in the National Fund to the third party Bank of New York Mellon (BNYM) as global custodian, that this bank has retained SEB as sub-custodian and that SEB has opened securities accounts and bank accounts in Sweden on BNYM's behalf'.* See at 21.

[1451] At 475.

*property that belongs to a central bank or other monetary authority of the State enjoys immunity already on the basis of the nature of the property*.[1452]

Stati appealed this judgment before the Supreme Court of Sweden. Interestingly, the latter took a very different approach from the Svea Court. Indeed, on 18 November 2021, the Swedish Supreme Court overturned the Court of Appeal's decision, ruling that the shares held by NFK could not enjoy immunity from enforcement.[1453]

The Supreme Court recognised that 'central bank property should be granted special protection', given that the 'central bank runs operations within the monetary policy field in a broader sense'.[1454] It also emphasised that '[t]he vital importance of the monetary policy for the State's central functions in principle justifies absolute immunity as regards property which is used within this activity'.[1455]

Nevertheless, the Court explained that granting absolute immunity to the central bank would be unjustified. Indeed, for the Court, '[t]here is a lack of clear support in international [customary] law for the application of absolute immunity, even as regards property which the bank has at its disposal without there being any connection with the bank's monetary policy assignments'.[1456] The Swedish Supreme Court seemed to be focused on filling such a gap in international customary law.[1457]

The Court turned then to the application of the restrictive doctrine of sovereign immunity to central banks, which (according to the Court) requires that central banks' property enjoy immunity provided there is a 'clear connection' with the statutory powers of the central bank

[1452] At 25.

[1453] Ginta A Maria Fogdestam-Agius, 'Swedish Supreme Court Weighs in on Immunity of Sovereign Wealth Fund Assets under Central Bank Management' (7 March 2022) <http://arbitrationblog.kluwerarbitration.com/2022/03/07/swedish-supreme-court-weighs-in-on-immunity-of-sovereign-wealth-fund-assets-under-central-bank-management> accessed 2 December 2022.

[1454] *Ascom* [2021] Högsta domstolen Ö 3828-20, para 23.

[1455] ibid.

[1456] ibid. para 24.

[1457] *Ascom* (n 233), para 24.

itself.[1458] In this regard, the judges also maintained that '[o]nly the circumstances that the State will in the future have the option of utilising the value of the property for State activities or that the value will benefit future generations cannot be considered to be sufficient'.[1459] By contrast, the Supreme Court took the view that the immunity of sovereign assets must 'be determined based on what can be immediately ascertained as to the intended use of the specific seized property, disregarding how assets through State procedures may be re-allocated for other purposes in the future'.[1460]

The Court then assessed whether the purposes of such assets held by the National Bank as part of the Kazakhstani SWF were to be considered sovereign or commercial. In doing so, the Court turned on its analysis of the arrangements within the NFK and, in particular, the distinction between the fund's different portfolios and the multi-step procedure through which the State could withdraw money from the fund for various purposes, such as financing State actions or public services.

It pointed out that specific securities that are part of a SWF do not have a decisive impact on assessing whether they are covered by immunity from attachment.[1461] The seized shares and the associated claims were in the savings portfolio. As ascertained above, for the Court, the portfolio management did not differ from any other active, long-term management of shares and similar securities on the international capital market. [1462] There was a commercial element to the property holding.[1463] The question was then whether the seized assets still had a sufficiently concrete and clear connection to indicate a qualified act of a sovereign purpose to be covered by immunity from enforcement (despite the commercial element). The Court concluded that

[1458] ibid.

[1459] ibid. para 28.

[1460] Maria Fogdestam-Agius (n 1453).

[1461] ibid, para 33.

[1462] ibid, para 44.

[1463] ibid.

*there [was] no clear connection between the seized property and a qualified act by right of [sovereign] purpose. In this context, it should be noted that long-term State saving for future – as yet unspecified – needs cannot in themselves be considered to constitute an act [of a sovereign purpose]*.[1464]

The Court continued by saying that the SWF, of which the savings portfolio constitutes a part, is also intended to 'safeguard macroeconomic stability'. The long-term savings in the savings portfolio would create conditions to enable budget stabilisation and similar measures for a longer-term perspective.[1465] Nonetheless, the Supreme Court characterised the connection between the seized property and this stabilisation objective as 'weak'. Indeed, the judges stated that fulfilment of the objective requires not only that the shares produce interest but also that such a value is transferred from the savings portfolio to the stabilisation portfolio. Subsequently, that value should also be transferred to the State budget and, only then, be put to use for the macroeconomic stability objective.[1466]

As a result, in the Court's eyes, NFK's objective to accumulate long-term State saving for future needs could not be considered to constitute an act with sovereign purpose.[1467] Not being adequately qualified, such an objective was not enough for the Court to be considered an expression of Kazakhstan's sovereign power or similar official activity.[1468]

*iii. Enforcement in Belgium*

a. Belgium Domestic Framework on State Immunity from Enforcement

In accordance with international law, Belgian law establishes that a foreign State's assets located in Belgium territory, including bank accounts held or managed by that foreign State, are immune from enforcement. According to Article 1412 *quinquies*, section 2 of the Belgian Judicial Code, there are three specific exceptions to the immunity from enforcement against

[1464] ibid. para 45.

[1465] ibid. para 46.

[1466] id.

[1467] id.

[1468] id.

assets belonging to a foreign state.[1469] The first is when the State has explicitly waived its immunity and consented to enforcement against its assets.[1470] The second exception relates to the foreign State earmarking these assets for the enforcement of the claim that forms the basis of the application for enforcement. The third is the commercial exception; the assets are specifically used or allocated to economic or commercial activity and are located in Belgium.

While Article 19 UNCSI informs this provision, the latter also dramatically differs from it because it imposes on the creditor to obtain prior judicial authorisation of enforcement.

Indeed, the creditor seeking to attach a foreign state's assets must obtain prior authorisation from an execution judge, who will then determine whether one of the above-mentioned conditions for lifting immunity applies. Thus, Belgian law establishes a judicial preventive control mechanism on immunity from enforcement requests, which may impede enforcement against State assets in Belgium.[1471]

Article 1412 *quater* of the Belgian Judicial Code establishes a broad immunity regime for central banks' assets. The Article recites that 'any assets of any kind, including foreign exchange reserves, held or managed by foreign central banks or international monetary authorities in Belgium for their account or the account of third parties cannot be attached'. This provision allows exceptions to the general rule, though.

The first caveat, somehow the most peculiar, provides that immunity can be lifted 'subject to the application of mandatory supranational and international provisions'.[1472] However, no international provision, as seen, explicitly restricts immunity from enforcement of central banks unless we are talking about the customary rule regarding the commercial exception.

Article 1412 *quater* also provides that a creditor may apply to the enforcement court for the above authorisation to enforce against the assets of a foreign central bank in Belgium if: (i)

[1469] Belgian Judicial Code update on September 1st, 2007.

[1470] The Belgian Constitutional Court determined in 2017 that the requirement that the consent also be 'specific' (as the law still reads) only applies with regard to diplomatic assets.

[1471] Anaïs Mallien, Maria-Clara Van den Bossche, Olivier van der Haegen (n 1248) 91.

[1472] ibid 92.

it has an enforceable title against the said central bank and (ii) the assets are 'intended exclusively for a private law based economic or commercial activity'.[1473] Beyond the said provisions, State immunity is governed by customary international law as interpreted and applied by Belgian courts.

Thus, as per Belgian law, a SWF established under the aegis of a central bank may *prima facie* benefit from the extensive protection of the central bank. Yet, the concrete possibility for the creditor to attach SWF assets if used for a private law/economic based commercial activity remains. By contrast, if a SWF has a separate legal personality from the State, it may escape enforcement from State debts. In this regard, the Brussels Court of Appeal has confirmed the attachment measure sought by Stati against 500 million USD worth of assets owned by Kazakhstan through NFK and held with the Brussels subsidiary of the Bank of New York Mellon (Bank Mellon). Specifically, the Court rejected Kazakhstan's argument that the attached assets were subject to State immunity. In that regard, it found that the assets were invested to maximise long-term returns and intended to be used for commercial purposes. As a result, the assets did not fall within the scope of the protection of State immunity.[1474]

*a. The Award Enforcement Proceedings in Belgium*

In Belgium, Stati obtained a favourable enforcement order in 2017 against the assets of NFK held in an account in Bank Mellon. In October 2017, the District Court in Brussels ordered Bank Mellon to freeze 542 million USD in assets of Kazakhstan's Fund.[1475] As a result, Kazakhstan petitioned to have the seizure order annulled.

On 29 June 2021, the Brussels Court of Appeal gave enforcement to the award and dismissed Kazakhstan's plea of State immunity from enforcement.[1476] The Court rejected the

[1473] ibid. Translation by the cited authors.

[1474] Van Bael & Bellis, 'Brussels Court of Appeal Upholds Attachment Order against Kazakhstan' (3 August 2021) <https://www.vbb.com/insights/trade-and-customs/brussels-court-of-appeal-upholds-attachment-order-against-kazakhstan> accessed 19 November 2021.

[1475] The assets were held in the London office.

[1476] Court of Appeal, Brussels, 17th District-Civil Matters, 2021/5536, 29 June 2021, English translation available at <https://jusmundi.com/en/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-judgment-of-the-brussels-court-of-appeal-tuesday-29th-june-2021#decision_17019> accessed 1 December 2022.

appeal by the Republic of Kazakhstan and NBK against an attachment of Belgium-based funds in Bank Mellon.

With its application, Kazakhstan alleged that the funds were the Central Bank's property, not the State itself. They were, therefore, covered by the immunity of the central bank. However, this argument was swiftly dismissed by the Belgian Court, being dependent on the 'legal simulation' Stati had accused Kazakhstan of.

Usually, creditors are required to show that the State, among other things, exercises control over its company and its day-to-day operations, is the real beneficiary of the company's profits, and is responsible for its debts. Indeed, the Brussels Court of Appeal considered whether Kazakhstan had engaged in 'simulation,' or a breach of legal personality, by creating a mechanism akin to a corporate veil purposely designed to isolate the State from liability to its creditors. This issue arose because NBK, not the State, deposited the assets in question to the Bank Mellon account. Kazakhstan also sought to declare its National Bank as an independent corporate entity per Kazakh law.

The Court ruled that there was enough evidence to prove the existence of legal 'simulation', meaning that the actual owner of the assets was Kazakhstan and not the National Bank. This is because, among other things, Kazakhstan was the founder of the National Fund and the National Bank, it controlled them, and the National Bank — together with Kazakhstan — tried to remove the assets from the Bank Mellon's accounts.

Therefore, the Court rejected Kazakhstan's arguments by finding that while only Kazakhstan was Stati's debtor and not the NFK, the latter was indeed owned by the debtor State.[1477]

The Belgian Court also analysed the issue of whether the funds of the SWF held in Bank Mellon were intended for sovereign or commercial use. The Court started by recalling that it had to assess the issue based on all the concrete circumstances of the case.[1478] Based on the exception in Article 1412 *quinquies* of the Belgian Judicial Civil Code, the principle of

[1477] See, <https://www.vail-dr.com/arbitral-enforcement-takeaways-from-kazakh-asset-ruling/> accessed 3 December 2022.

[1478] Court of Appeal, Brussels, 17th District-Civil Matters, 2021/5536, 29 June 2021, para 255.

immunity from execution does not apply when the following three conditions are cumulatively fulfilled. Firstly, the assets are used or intended to be used by the foreign power for other than non-commercial, governmental purposes. Secondly, the assets are located in Belgian territory. Finally, the assets are related to the entity against which an enforceable title or authentic or private documents are addressed.[1479]

According to the Court, the assets seized by Stati were located in Belgium. Indeed, the assets on cash and securities accounts relating to the NFK that were the subject of the attachment were located in a London branch of Bank Mellon which, however, did not have a separate legal personality.[1480] Therefore, the Court assumed that the garnishment had been carried out at Bank Mellon's registered office in Belgium.

Interestingly, while the Belgian court acknowledged the content symmetry between Article 19(c) UNCSI and the exemption provisions of Article 1412 *quinquies* of the Judicial Code, it also stated that

> *given the fact that Article 19(c) of the UN Convention has not yet entered into force, on the one hand, and that this provision corresponds in content to Article 1412 quinquies, §2, 3° of the Judicial Code, on the other hand, the latter provision will be taken as the basis for the further assessment of the dispute regarding immunity in respect of the goods of the [NFK] Savings Fund.*[1481]

Therefore, the Court, in a way, did not directly rely on customary international law as the UNCSI codifies it but preferred to address domestic law directly. Yet, as stated by the Court, Article 1412 *quinquies* of the Belgian Judicial Code heavily draws from Article 19 UNCSI.

Kazakhstan argued that Stati failed to prove the (intended) use for other than non-commercial purposes of the seized goods. Kazakhstan substantiated this stance by referring to the judgment of the Dutch Supreme Court of 18 December 2020[1482], whereby immunity was granted to the SWF at hand.

---

[1479] id. para 256.

[1480] id. para 257.

[1481] id. para 248.

[1482] Which is analysed in the section below dedicated to the enforcement proceedings in The Netherlands.

The Belgian court started its reasoning by evaluating the commercial exception to immunity stating that Belgium adhered to the restrictive doctrine.[1483] According to the Belgian judges, the focus should have been 'on the purpose or destination of the seized goods'.[1484] The Court stated that the

> *starting point for the assessment is the concrete, actual, current purpose of the funds. This is the most reasonable and practicable criterion for distinguishing between assets with a public, 'sovereign' or 'other than non-commercial purpose' in order for this condition to be meaningfully understood and applied*.[1485]

The Court then also added that in the long run, 'a State will always pursue sovereign purposes of public utility'. Therefore, only the specific application of the purpose criterion, taking into account the context, 'which is completely different from other application cases as cited by Kazakhstan', can solve the issue.[1486]

In this connection, Kazakhstan referred to both the judgments by the Svea Court of Appeal of 17 June 2020 and the Dutch Supreme Court of 18 December 2020.[1487] However, the Belgian Court stated that the judgments from other courts did not 'impose itself on this Court in a binding manner, no useful contribution to the settlement of this dispute can be derived from it'.[1488] Moreover, the Court also referred to the Svea Court judgment, stating that it had 'been subject to justified criticism'.[1489] Interestingly the Court cited a previous submission filed by Stati in which an *ex parte* expert found that

[1483] The current tendency is that the immunity principle is being interpreted less absolutely, taking into account Article 6 of the ECHR, in which the right to enforcement is contained.

[1484] Court of Appeal, Brussels, 17th District-Civil Matters, 2021/5536, 29 June 2021, para 259.

[1485] id. para 260.

[1486] id. para 262.

[1487] We discuss this judgment in the section dedicated to the enforcement proceedings against Samruk in The Netherlands.

[1488] id. para 264.

[1489] Section 10.31 and note 787 in the last Stati conclusions cited by the Court.

> [t]*he SVEA Court of Appeal reasoned with very little analysis that 'central bank property held under a national fund 'is not' fundamentally different from the regular operations of a central bank'. […] the purposes and functions of Sovereign wealth funds differ from those of central banks, and that protecting Sovereign wealth funds through central bank immunity is an unresolved issue*.[1490]

The expert citation above also mentioned the *AIG v. Kazakhstan*, referred to by the SVEA Court of Appeal in its judgment. In this regard, the expert citation in Stati's submission stated that the *AIG* case concluded that under the UK SIA, all central banks' property is categorically protected, regardless of the capacity or the purpose for which the property is held. Therefore, the English Court of Appeal in *AIG* adopted a 'comprehensive' or categorical approach to central bank asset immunity. In other terms,

> [t]*he AIG-Court of Appeal decision did not depend on whether the assets were used for a commercial purpose or in the exercise of sovereign authority or within the scope of traditional central banking functions. To argue that any use of assets designed to maximize investment returns is sovereign and non-commercial because the sovereign's budget 'increases' is much like saying that all central banks' property is categorically protected because every investment strategy is designed to maximise returns. The AIG opinion grants categorical immunity to central bank assets under the UIF Sovereign Immunity Act. The opinion is, therefore, of little help in determining how to apply a functional approach under customary international law and the UN Convention*.[1491]

Moreover, the Belgian Court expressly stated that there is no uniformity at the international and national level concerning the concrete interpretation of central banks' immunity.[1492] Nonetheless, since the attachment was imposed on NFK and not a central bank, the Court held that examining whether the immunity of central banks applied in the case was redundant.

---

[1490] Court of Appeal, Brussels, 17th District-Civil Matters, 2021/5536, 29 June 2021, para 264.

[1491] id. para 264.

[1492] This was substantiated by the Statis with the exhibit of a Presidential Decree No. 385 of 8 December 2010.

In conclusion, the Brussels Court rejected Kazakhstan's claim of sovereign immunity of NFK assets. It indeed held that such assets were invested for a purpose other than of a non-commercial nature.

Specifically, it stated that the savings fund of NFK was to be distinguished from its stabilisation portfolio.[1493] Indeed, the NFK saving fund's ultimate purpose was to increase the long-term profitability of the assets. Specifically, the main objective of the savings fund was to accumulate and maintain funds through the sale of non-renewable energy for future generations to guarantee long-term returns with appropriate risk. This goal was held as commercial, being the fund set up to earn money by investing it, in the Court's terms.[1494]

Thus, the saving fund was deemed to make 'pure investments' since the assets were invested solely to maximize long-term returns. Therefore, given their established commercial purpose, they were not covered by immunity from enforcement.[1495]

Nevertheless, the Kazakh State parties again alleged that the investors engaged in fraud during the arbitration, claiming that the investors took out a loan from a group of venture investors to increase the damages suffered and to mislead the tribunal. In refusing to lift the attachment against the Kazakh assets, the Belgian Court explained that the English court decision in favour of Kazakhstan did not preclude the Belgian court from upholding the attachment of Kazakh assets.

Ultimately, in November 2021, the Brussels Court of Appeal annulled the order for attachment of NFK assets in Bank Mellon, having found that the award against Kazakhstan had been obtained through 'fraudulent acts and deception' by the Moldovan creditors Anatolie and Gabriel Stati.[1496] Stati have filed an appeal before the Belgian Court of Cassation, which is now pending.

---

[1493] Exhibit n. 10 of the Statis' conclusions cited by the Court.

[1494] Court of Appeal, Brussels, 17th District-Civil Matters, 2021/5536, 29 June 2021, para 266.

[1495] Claire Milhench, 'Kazakhstan's frozen billions sound alarm for sovereign funds' [2018] Reuters <https://www.reuters.com/article/us-global-swf-kazakhstan-analysis-idUSKCN1G40MI> accessed 29 May 2023.

[1496] Jack Ballantyne, 'Belgian Court Finds Stati Award Obtained by Fraud' [2021] Global Arbitration Review <https://globalarbitrationreview.com/article/belgian-court-finds-stati-award-obtained-

## 2. Award Enforcement against Samruk-Kazyna: Immunity of SWFs Structured as SOEs

### *i. Enforcement in The Netherlands*

#### a. The Netherlands Domestic Framework on State Immunity from Enforcement

Like other civil law countries, The Netherlands is party to the ECSI and a signatory of the UNCSI and the New York Convention, and it has not developed any general laws on immunity.[1497]

The doctrine of State immunity under Dutch law has been primarily shaped by case law and international conventions. The legal basis for the sovereign immunity defence is laid down in a single provision of the Holding General Decrees from Legislation of the Kingdom of 1829, which incorporates customary international law standards into the Dutch legal system of enforcement measures. Article 13(a) provides that 'the jurisdiction of the judge and the execution of judicial decisions […] are limited by the exceptions recognised in customary international law'.[1498]

Article 436 of the Code of Civil Procedure establishes that 'attachments may not be levied on goods intended for public purposes'.[1499]

In line with the ICJ ruling in *Jurisdictional Immunities*, Dutch case law has developed along the lines of Article 19 UNCSI, most of which – although not yet in force and not yet ratified by The Netherlands – is considered customary international law.[1500]

---

fraud#:~:text=A%20Belgian%20court%20has%20ruled,Stati%20obtained%20it%20through%20fraud> accessed 29 May 2023. See judgment in English at <https://jusmundi.com/en/document/pdf/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-i-judgment-of-the-brussels-court-of-appeal-tuesday-16th-november-2021> accessed 28 November 2022. See, <https://www.gov.kz/memleket/entities/adilet/press/news/details/286262?lang=en> accessed 28 November.

[1497] Annet van Hooft, 'Netherlands' in Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Second edition. Globe Law and Business 2021), 518-519.

[1498] ibid.

[1499] ibid. See also Article 38(a) of the Bailiff Act.

[1500] Sebastiaan Barten (n 1240).

Interestingly, following the 'Yukos Law' in Belgium, in September 2016, the Dutch Supreme Court ruled that assets of foreign States located in the Netherlands cannot be subject to attachment and enforcement unless those assets are used for non-governmental purposes.[1501] The creditor seeking attachment bears the burden of proof in this respect.[1502] Therefore, the Dutch Supreme Court confirmed this general presumption of sovereign immunity from enforcement of judgments and arbitral awards against a State's assets.[1503]

While immunity from enforcement is in no way absolute in the Netherlands, Dutch case law shows a somewhat restrictive approach to granting attachment against State assets managed by a central bank.

b. The Award Enforcement Proceeding in The Netherlands

In 2017, Stati filed an *ex parte* application before the Court of Amsterdam seeking authorization to make pre-judgment asset freezes against Kazakhstan, the NFK and Samruk.[1504] Specifically, Stati requested leave to levy attachment on, amongst other things, the shares of Samruk in the Dutch-incorporated company KMG Kashagan B.V. (KMGK), a Kazakh company[1505] involved in the development, management and operation of oil fields situated in the Caspian Sea.[1506]

[1501] Supreme Court of the Netherlands, *Morningstar International Corporation v Republic of Gabon, Staat der Nederlanden*, ECLI:NL:HR:2016:2236, 30 September 2016. See also the *Loi Sapin II* in France.

[1502] Sebastiaan Barten (n 1240).

[1503] Supreme Court of the Netherlands, *Morningstar International Corporation v Republic of Gabon, Staat der Nederlanden*, ECLI:NL:HR:2016:2354, 14 October 2016.

[1504] See, <https://kzarbitration.com/wp-content/uploads/2021/08/Exhibit-041.-Eng.-District-Court-of-Amsterdam-Statis-Ex-Parte-Application-for-Leave-to-Levy-Pre-Judgement-Garnishment-Pursuant-to-Article-700-31-August-2017.pdf> accessed 3 December 2022.

[1505] Samruk-Kazyna and National Company KazMunayGas JSC, another Kazakhi State enterprise, were the two shareholders, each with 50% shares.

[1506] Supreme Court of The Netherlands, *The Republic of Kazakhstan v. Stati et al.*, Judgment n. 19/03142 and 19/03144, 18 December 2020, para 3.2.2 (English translation available at <https://kzarbitration.com/wp-content/uploads/2021/08/Exhibit-108.-Eng.-Supreme-Court-of-the-Netherlands-Final-judgement-on-the-Samruk-proceedings-18-December-2020.pdf> (4 December 2022).

Stati's attachment application contended that Samruk was part of the Kazakhstan State and that its assets could be attached to satisfy the State debts. In this regard, Kazakhstan and Samruk partly invoked immunity from execution. This argument was raised as a defence in case Samruk were to be equated with the Kazakhstan State. The Preliminary Court, however, did not equate Samruk to Kazakhstan. Indeed, the fund's legal independent personality was not contested.

Nevertheless, the Preliminary Court granted the attachment as it concluded that Samruk, as a separate legal entity, and found it had abused its reliance on its legal independence vis-à-vis Stati. Specifically, the Preliminary Court inferred that Kazakhstan had founded Samruk with (at least partly) the purpose of shielding its assets from Kazakhstan's creditors. In other words, the Court held that Samruk was invoking its legal independence vis-à-vis Kazakhstan to pursue its own agenda, which differed from Kazakhstan's, and to shield assets from Stati. However, according to the Court, Samruk lacked factual and economic independence in its relationship with Kazakhstan, regardless of its independent legal personality.

The Preliminary Court based these conclusions on several arguments raised by Stati, the accuracy of which Samruk and Kazakhstan had not sufficiently rebutted. Specifically, Stati showed, *inter alia*, that: (i) Kazakhstan was the founder and sole shareholder of Samruk; (ii) Kazakhstan was prohibited by law from ever disposing of the shares; (iii) the State of Kazakhstan controlled Samruk; (iv) Samruk's primary objective was to increase the national welfare of the Republic of Kazakhstan; (v) Samruk's strategy required the approval of Kazakhstan; (vi) the chairman of Samruk's board was at all times the prime minister of Kazakhstan; (vii) the members of Samruk's board are obliged to implement the decisions of Kazakhstan; (viii) the board of Samruk could not take decisions that conflict with decisions of Kazakhstan as the sole shareholder; (ix) Kazakhstan could dismiss the members of the board at its discretion and at any time.

Kazakhstan and Samruk appealed the Preliminary Court judgment. Yet, the Amsterdam Court of Appeal confirmed the Preliminary Court's reasoning and findings and swiftly dismissed the claim of immunity pleaded by Samruk. In so doing, it specified that the SWF would not have enjoyed immunity if it had pleaded its independent personality from the State and had pleaded to be covered by State immunity, being its organ. On this second point, the Court specified that even if Samruk were organic part of the State of Kazakhstan, immunity would still have not been granted to Samruk. Precisely, the Court stated that

*assets of foreign states are not susceptible to attachment and execution unless and insofar as it has been established that they have a use that is not incompatible with this, in which case it is always the creditor who has to provide information on the basis of which it can be determined that the assets are used by the foreign State or are intended for, in short, other than public uses*.[1507]

The Court added that in case Samruk and Kazakhstan could invoke immunity from execution, Stati would have 'to make it plausible that not the final (ultimate), but the immediate use of the assets – here: the shares of Samruk in KMGK – is other than a public use'.[1508] In any event, the Court held that Stati had proved this sufficiently plausible. Therefore, according to the Court, the attached assets' 'immediate purpose' was a commercial one.[1509]

Samruk and Kazakhstan appealed the above decision[1510] of Samruk before the Netherlands Supreme Court at The Hague.[1511]

On 18 December 2020, the Dutch Supreme Court set aside the Amsterdam Court of Appeal judgment ruling that if Stati were even able to seize Samruk's assets at all, Samruk could have invoked State immunity from execution. This is in light of the ultimate objective of Samruk, namely increasing the national welfare of Kazakhstan, in the pursuance of which the proceeds of KMGK's shares would have been used.[1512]

---

[1507] <https://kzarbitration.com/wp-content/uploads/2021/08/Exhibit-072.-Eng.-Amsterdam-Court-of-Appeal-Ruling-denying-Samruks-appeal-regarding-lifting-of-pre-judgment-attachment-07-May-2019.pdf>, accessed 3 December 2022, para 3.7. See also Supreme Court 30 September 2016, *NJ 2017/190*.

[1508] id.

[1509] id.

[1510] In which permission had been given to attach the shares.

[1511] See <https://kzarbitration.com/wp-content/uploads/2021/08/Exhibit-074.-Eng.-Supreme-Court-of-the-Netherlands-RoKs-and-Samruks-application-Appeal-against-the-judgment-passed-by-the-Court-of-Appeal-of-Amsterdam-07-May-2019.pdf> accessed 3 December 2022.

[1512] See <https://kzarbitration.com/wp-content/uploads/2021/08/Exhibit-108.-Eng.-Supreme-Court-of-the-Netherlands-Final-judgement-on-the-Samruk-proceedings-18-December-2020.pdf> accessed 3 December 2022.

Specifically, the Supreme Court found that a presumption of immunity applied, which could only have been rebutted had Stati established that Kazakhstan was not using (or intending to use) the property in question, namely the proceeds from Samruk's shares in KMGK, for public purposes.

Precisely the Supreme Court stated that

> *it is in accordance with the meaning of the immunity from execution – aimed at respecting the sovereignty of foreign states – to take as a starting point the principle that property belonging to foreign states is not eligible for attachment and execution unless and to the extent that it has been established that their intended use is not incompatible with attachment and execution*.[1513]

According to the Court, this was in line with Article 19(c) of the UNCSI, 'which can be deemed on this point to be a rule of customary international law'.[1514] In light of the above, the Court stressed that foreign States are not required to submit information from which it follows 'that the intended use of their property opposes attachment and execution'.[1515] In other words, is the creditor the bearer of the burden of proof having to establish that the foreign State is using or intends to use the property other than for sovereign purposes.[1516]

Interestingly, the Supreme Court also took an opposite stance to the Court of Appeal vis-à-vis the requirement of the 'qualified use' or 'direct sovereign use'. Indeed, the former held that such a requirement was not in line with what was required by customary international law on State immunity. Therefore, for the Supreme Court, the Court of Appeal had incorrectly interpreted international law when asking for such a requirement. The Supreme Court explained that such a requirement run against the international law presumption of immunity from enforcement. Indeed, foreign states' property is, as a general rule, exempt from execution unless it has been established that the property in question is used or intended for use by the

[1513] Supreme Court, 3.2.3.

[1514] id.

[1515] id.

[1516] See also Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236 (MSI/ Gabon and State), paras. 3.5.2-3.5.3.

foreign State other than for public purposes. From this, the Court inferred that immunity from execution could not be 'reversed' in being applied to only property 'of which the direct use is for public purposes'.[1517]

Moreover, the Supreme Court expressly stated that the Court of Appeal's assumption that the use of Samruk's shares in KMGK was commercial was not sufficiently substantiated.[1518] Indeed the Supreme Court found that it was

> *unclear without further reasons why it may be presumed as established that the shares in KMGK held by Samruk are used other than for public purposes. After all, in principle the circumstance that the return on the shares in KMGK is intended to enhance Kazakhstan's national prosperity indicates in principle that they are intended for public purposes.*[1519]

Given these considerations, the Supreme Court referred the judgment back to the Court of Appeal, which rendered a final decision on 14 June 2022. Following the Supreme Court reasoning, the Court of Appeal held that Samruk's shares in KMGK enjoyed immunity of enforcement and lifted the pre-judgment attachment levied by Stati in September 2017.

To arrive at such a conclusion, the Court of Appeal first stated that, following the Supreme Court referral, it had to ascertain whether the shares in KMGK could qualify as 'property of the State' within the meaning of international law and, therefore, Article 2 UNCSI. It answered in the affirmative as the State exerted control over shares, and therefore the fund qualified as 'property' of Kazakhstan within the meaning of Article 19(c) UNCSI. More specifically, the Court based this finding on the fact that Kazakhstan was the sole shareholder of Samruk, and the disposal of the KMGK shares held by Samruk was reserved for Kazakhstan as the sole shareholder. In a more general sense, under the powers of the sole shareholder, it was clear to the Court that Kazakhstan, through the statutory powers of the (sole) shareholder and in particular through its power to appoint and dismiss the members of the Board of Directors, exercised 'ultimate control' over Samruk.

---

[1517] Para 3.2.4. Emphasis added.

[1518] Para 3.2.5.

[1519] id.

At this point, the Court held irrelevant that an agreement was concluded between Kazakhstan and Samruk according to which Samruk had operational independence and that Kazakhstan would manage the fund only by exercising shareholder powers and representing government members on the Board of Directors. Indeed, that agreement did not affect the 'ultimate control' Kazakhstan could exercise over Samruk precisely under Kazakhstan's legal and statutory powers as the sole shareholder. The Court noted that not only did Kazakhstan, the fund's sole shareholder, exercise ultimate control over Samruk, but legal safeguards had also been put in place to ensure that Kazakhstan remained so.

Given the above, the Appeal Court did not need to address the parties' debate about whether Kazakhstan and Samruk should be equated or whether Samruk was permitted to invoke its independent legal personality. For the Court, all that mattered was whether those shares were subject to immunity from execution.

The Court of Appeal then specified that Stati had not provided sufficient information to establish that the shares of Samruk in KMGK were intended for purposes other than sovereign purposes. The Court stated that it was undisputed that the shares of Samruk were held to increase the national welfare of the Republic of Kazakhstan and that Samruk could not dispose of them without Kazakhstan's consent. The Court acknowledged that Samruk's purpose is to contribute to Kazakhstan's economic development and increase national prosperity through optimal management of the State holdings it holds, which consequently may have the positive spillover of benefiting Kazhakstan as a shareholder. To the Court, this was a further confirmation that the purpose of the State holdings held by Samruk, including the seized KMKG shares, was sovereign. Therefore, the Court of Appeal held that the shares were covered by immunity from execution.

### 3. Remarks on Enforcement Proceedings in *AIG v. Kazakhstan* and *Stati v. Kazakhstan*

The above analysis of the enforcement proceeding of the *AIG v. Kazakhstan* and *Stati v. Kazakhstan* is illustrative of both the points of convergence and departures in domestic courts' assessments of SWFs immunity from enforcement.

To begin with, State immunity is a procedural defence, as we have seen in the previous sections, and the question of whether a SWF can assert immunity is contingent upon international customary law and the law of the jurisdiction in which proceedings are being

brought. This connects to whether the jurisdiction applies a restrictive doctrine in the first place and whether it has a specific legislation on State immunity.

As a general remark, one point of convergence is how the applicability of State immunity from enforcement to SWFs is dependent upon two main factors in every enforcement proceeding analysed.

First, courts assess the structural relationship between a SWF and the State. This analysis aims at establishing whether the fund may be regarded as part or as an instrumentality of the State. In this assessment, domestic courts interpret several aspects: a SWF asset management structure, its remoteness or closeness to the State, and the sovereign prerogatives of a fund's managerial institution and its related specific immunity regimes, such as in the case of central banks.[1520] At this stage, a court may be in the position to establish if the fund could *prima facie* enjoy immunity.

Second, following from the above, the character of the activities exerted by the SWFs is addressed. This second step has a central role in every court's analysis. Here, courts evaluates the character and/or purposes of the use of the assets seized in the enforcement proceedings.

However, the appraisal and relevance of each element depend on the court's approach. In other terms, to a certain extent, the importance given to each element may vary and so the end result of the very analysis. Indeed, on the one hand the case law analysis shown that several courts tend to focus on similar notions and aspects in the evaluation of State immunity from enforcement. On the other hand, it also highlighted how same actors and similar factual patterns may be evaluated in completely divergent ways by courts *exactly* because of the difference in elements it decides to focus on.

Specifically, we note how some courts have, on one side, swiftly addressed the structural relationship between State-SWF-central banks (see, for instance, the Belgian Courts) and, at the same time, focused mainly on the character of the immediate purpose of the seized assets. By contrast, other courts have privileged the importance of the structural link between SWF and State/central bank. Meanwhile, they seem to have given relevance to the purpose of the

[1520] In this latter case, the specific treatment of central bank immunity may 'interfere' with the immunity regime applicable to the SWF.

assets seized, be it in the context of the central bank immunity or not (see, by way of illustration, the proceedings against Samruk).

More precisely, starting from enforcement proceedings against a SWF devoid of separate personality and managed by a central bank, namely NFK, we can see how the Supreme Court of Sweden and the Brussels Court of Appeal denied immunity to the NBK and, therefore, its application to NFK. Indeed, the Belgian Court and the Swedish Supreme Court were not persuaded that SWFs under central bank management could enjoy immunity as central bank property and that increasing the national prosperity of the State constitutes a sovereign purpose in itself.[1521]

The Swedish Supreme Court and the Brussels reached the same conclusion. Sovereign immunity from enforcement applies to assets of a SWF managed by a central bank only if a clear connection to the central bank's monetary policy work or some other clear connection to a qualified sovereign purpose is established.[1522] They all found that the securities at issue had no apparent connection to the central bank's monetary policy work. The fact that the securities were included in the SWF savings portfolio and not in its stabilisation funds was decisive. Indeed, the savings portfolio was actively managed on a long-term basis with high risk to create a high return on investment. Thus, the savings portfolio management was more similar to regular private asset management than an instrument in the central bank's monetary and currency functions.

We can see the High Court of England (in the context of the *AIG* case) and the SVEA Court of Appeal on the other side of the spectrum. The UK court adopted a fully-fledged categorical understanding of enforcement immunity of central banks' assets. Thus, it applied immunity to NKF. This, as commented, falls in line with the UK SIA provisions. More importantly, the Court focused on the analysis of NFK's purpose which was to assist State

[1521] Maria Fogdestam-Agius (n 1453).

[1522] Magnusson Law, 'The Swedish Supreme Court: Certain Property Owned by a Central Bank is not Protected from Enforcement According to International Principles of State Immunity' <https://www.magnussonlaw.com/news/the-swedish-supreme-court-certain-property-owned-by-central-bank-is-not-protected-from-enforcement-according-to-international-principles-of-state-immunity/#:~:text=The%20Supreme%20Court%20concluded%20that,by%20state%20immunity%20from%20enforcement.> accessed 29 May 2023.

economy and government revenues both in the short and long term. In turn, this aim was regarded as a sovereign activity.

The SVEA Court, on the other hand, opted for a more nuanced approach yet still a more protective approach of central banks assets than the Belgian and Swedish courts.[1523] Indeed, it started by acknowledging a presumption of immunity of the assets owned/managed by the central bank as a matter of international law. It emphasised how immunity from execution is not limited to properties which will be used for an *immediate* public purpose.

*Mutatis mutandis*, this approach was adopted also by the Dutch Supreme Court vis-à-vis the enforcement against Samruk, which however is structurally different form NFK, being a separate legal entity not strictly managed by the central bank. Notwithstanding, the Supreme Court expressly noted that the Court of Appeal applied an incorrect interpretation of the law because it grounded its ruling on an 'immediate' sovereign purpose requirement. However, the fact that the proceeds of the shares held by the SWF were ultimately aimed at increasing Kazakhstan's national welfare indicated that, in principle, they had a sovereign purpose.

Therefore, when it comes to SWFs, and we would add, especially – yet not exclusively – those managed by central banks, it is difficult to preliminarily establish whether it would be granted immunity from enforcement. Indeed, a court may decide to focus on the nature of the activity or the immediate purpose of the assets or else on their overarching aims. It could lean onto a strictly functional reading of the commercial exception to central banks' activity or else, adopting a more categorical understanding of it.

In this last regard, we wonder if a strictly functional commercial exception exists in international law under the UNCSI. If so, it would hold true that it might risk 'overwhelming the rule' because a central bank's investment or asset account will always look commercial when employing standard commercial/financial vehicles.[1524] Distinguishing a central bank's conduct or investment activity as an investor from that of any private investor is practically and

[1523] This approach is also shared by other jurisdictions like, as we have seen in the previous sections, Germany, France or outside Europe, the US.

[1524] Thomas C. Baxter Jr, 'Recent Developments in Key Legal Issues of International Reserves Investments' (Federal Reserve Bank of New York, New York, 19 November 2010) <https://www.newyorkfed.org/newsevents/speeches/2010/bax101119> accessed 8 December 2022.

theoretically a dead end. The SVEA Court of Appeal, in this regard, used a poignant example by stating that

> [i]*f, for example, a central bank in competition with other market actors would offer banking services to consumers, it would be difficult to argue that property of the commercial segment of the banking operations would enjoy immunity. It cannot be excluded that there may be other situations where a categorical application of Article 21.1 (c) would lead to unreasonable outcomes. There should consequently exist a limited scope to apply Article 21.1 (c) in conjunction with Article 2.1 (b) (iii) with respect to central bank property. This could mean that the relevant property would not enjoy immunity if the sovereignty criterion is not met*.[1525]

The SVEA Court submitted that such an application should, however, be 'limited to cases where it is obvious that the relevant property is held in such manner as is fundamentally different from the regular operations of a central bank and a categorical application would lead to an unreasonable outcome'.[1526]

Nevertheless, and we refer to the judgments of the Swedish Supreme Court as also the Belgian Court of Appeal, can this be said with regard to a property of a central bank held within the framework of a national fund such as NFK or Samruk? Can managing the State economy through foreign investments transiting in saving funds be deemed intrinsically commercial? Is foreign exchange intervention 'commercial'? If the answers to these questions are in the affirmative, it clearly is only because one chooses to exclusively look at the nature of these activities/assets. Yet again, one may rebut that it they are still sovereign in their inherent determination. However, this resembles a circular reasoning from which is difficult to develop an alternative method to the nature/purpose dichotomic approach.

---

[1525] *Ascom Group S.A., Anatolie Stati, Gabriel Stati, and Terra Raf Trans Traiding Ltd.v. Republic Of Kazakhstan*, Decision of the Svea Court of Appeal, SCC Case No. 116/2010, 17 June 2020, para 25. Translation in English available at <https://jusmundi.com/en/document/decision/en-ascom-group-s-a-anatolie-stati-gabriel-stati-and-terra-raf-trans-traiding-ltd-v-republic-of-kazakhstan-decision-of-the-svea-court-of-appeal-wednesday-17th-june-2020#decision_11729> accessed 1 December 2022.

[1526] id.

Patrikis provides other examples like the issuance and sale of bonds. [1527] The issuance of promissory notes is a commercial activity. However, a governmental action preventing payment of such notes in response to an economic crisis may be seen as an exercise of a governmental function. By contrast, selling certificates of deposit by a government-owned commercial bank is a commercial activity.

In his studies on central banks' immunity, Patrikis asked how courts would have dealt with the division between sovereign and commercial functions. As a result of our case law analysis, we agree with his guess that the nature/purpose distinction would not be 'terribly clear to the courts'.[1528] In this connection, we conclude that it is hard to say whether the functional or the more categorical approach is crystallised vis-à-vis central banks' assets immunity. This is why we submit that it is perhaps premature to pick one as indicative of an evolution of customary international law on sovereign immunity of SWFs and central bank properties.[1529]

By contrast, what is clear at this stage was also acknowledged by the courts above: we are far from having a clear customary legal framework regarding central banks' immunity and, consequently, many of the SWFs which invest abroad.

### J. INTERIM CONCLUSIONS

At least two factors affect the availability of the immunity defence by SWFs. One is whether SWFs are regarded as part of the State or separate entities by such courts. The other is the purpose of the assets/activity they engage in.

In this context, the separate corporate form of State entities is traditionally seen as a strong indicator of the entity's independence from the State by courts of civil and common law

[1527] Ernest Patrikis, 'Sovereign Immunity and Central Bank Immunity in the United States' in International Monetary Fund (ed), *Current Legal Issues Affecting Central Banks, Volume I* (INTERNATIONAL MONETARY FUND 1992), 163.

[1528] Ernest Patrikis (n 1527)163.

[1529] See, Maria Fogdestam-Agius and Ginta Ahrel, 'Swedish Supreme Court Weighs in on Immunity of Sovereign Wealth Fund Assets Under Central Bank Management' (*Kluwer Arbitration Blog*, 7 March 2022) <http://arbitrationblog.kluwerarbitration.com/2022/03/07/swedish-supreme-court-weighs-in-on-immunity-of-sovereign-wealth-fund-assets-under-central-bank-management/>.

traditions. Indeed, courts have rarely, and only in specific circumstances, pierced the corporate veil of a SWF (or an SOE) to execute an award or a judgment against its sponsoring State. If the entity is separate, in principle, the debts of the State should not be borne by the former. [1530] At the same time, the entity being separate from the State apparatus, should not enjoy immunity if a judgment or an award is rendered against it.

Hence, as a matter of general policy, the structural and legal distinction between a SWF and its sponsoring State may entail that enforcement against a SWF could mirror 'enforcement against a private investor'.[1531] The above line of reasoning falls squarely in line with the Santiago Principles, which provide that 'courts recognise the separate legal existence of SWFs and that their assets will not be treated as assets of the [S]tate'.[1532] Thus, the availability of immunity to State entities 'turns on the identification or connection with the State: only the State itself, or an organ or individual identified or connected with the State, can be entitled to immunity'.[1533] The more an entity is distant from the State, the less probability it will have to be covered by immunity. In other terms, 'immunity becomes more derivative in nature, the further away one move from the State proper'.[1534] As rightly pointed out, however, the extent to which State agencies should enjoy immunity remains, and it will remain, a recurrent problem in the law of State immunity.[1535] Indeed, some scholarship maintains that the position is not fixed since 'there are no internationally binding rules on the question as to when the corporate veil existing between a State entity and a State may be lifted'.[1536]

By contrast, the courts' approach may change if the SWF is a pool of assets, especially if managed by a central bank. In this last case, the fund may benefit from central banks' broader immunity. This aspect of State immunity is particularly relevant to our enquiry as SWFs managed by central banks. In this connection, looking at the domestic dimension, State

[1530] Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs (n 29) 32.

[1531] ibid.

[1532] Anne-Catherine Hahn (n 1209), 110.

[1533] Xiaodong Yang (n 50) 230.

[1534] ibid.

[1535] Hazel Fox (n 1094), 237.

[1536] Anne-Catherine Hahn (n 1209), 108.

regulation of central banks' immunity can be seen as a spectrum or, as Wuerth calls it, a 'continuum', which is challenging to identify.[1537]

In addition, a trend recognises greater protection of central bank assets. Indeed, several States have enacted legislation according to central banks increased protection from enforcement.[1538] Wuerth says, 'sometimes in an explicit effort to attract investment by foreign central banks as there is also a trend towards reciprocity.[1539] However, as seen in our case law analysis, the judiciary of some States may have a more restrictive approach toward immunity from the enforcement of central banks.[1540] This connects to the commercial exception appraisal by courts.

Indeed, besides their structure, the purposes of a SWF asset also significantly impact a court's reasoning on the application of the immunity defence. Courts may only apply State immunity from enforcement if the fund at issue is deemed to be carrying out a sovereign activity. As seen, courts have been holding that enforcement and execution may only be levied upon assets of the State, which, however, must be intended for non-sovereign purposes.[1541] This reasoning could be summarised in the following: if the sovereign enters the marketplace, in whatever way that is, it must carry on.[1542]

---

[1537] One could say that States seeking to attract or maintain investments from foreign central banks, including China, Hong Kong, France, Germany, Japan, Singapore, The Netherlands, the United Kingdom and the United States, 'fall on the protective end of that continuum'. Ingrid Wuerth (n 48) 266.

[1538] See Argentina, Belgium, China, France, Japan and Russia.

[1539] Ingrid Wuerth (n 48) 266.

[1540] Harvard Law Review (n 1219). This Article warns against the perils of the erosion of State immunity allocated to central banks through the judicial interpretation of courts of the commerciality of central banks activity.

[1541] Dmitri Zdobnõh (n 1114), 166. This view has been reflected in many other European court decisions, such as, *inter alia*, in Germany, The Netherlands (*Cabolent v. NIOC*, The Hague Court of Appeal, 28 Nov. 1968, 1 NYIL (1970) 225), Italy (*Condor and Filvem v. Ministry of Justice*, Case No. 329, 15 July 1992 (101 ILR 394), at 402. See *Libya v. Rossbeton SRL*, Case No. 2502, 25 May 1989, 87 ILR 63, at 66), Belgium (*Leica AG v. Central Bank of Iraq et Etat irakien*, Cour d'appel, Brussels, 15 Feb. 2000 [2001] JT) and Switzerland (*République Arabe d'Egypte v. Cinetel*, Tribunal fédéral suisse, 20 July 1979, 65 ILR 425, at 430).

[1542] Orakhelashvili, 'State Practice, Treaty practice and State Immunity in International and English Law' (n 1145) 448.

Here emerges, once again, the recurrent issue of whether to focus on the nature of the use/activity of the seized assets, or on their purposes. In this regard, we noticed how some courts have focused on the 'immediate' purpose of the assets vis-à-vis central banks.

Far from being a nuance in the law of State immunity, incorporating the purpose criterion in a court's reasoning can yield very different results vis-à-vis the same subject matters compared to the employment of the sole nature test. Indeed, suppose one only focuses on the nature of an activity. In that case, SWFs' typical activities, i.e., the subscription of corporate bonds or shares (for instance, through the participation in capital increase operations), can be hardly qualified as sovereign-in-nature acts. Private parties might indeed undertake these investments as well. This in turn also applies to SWFs managed by central banks, which may benefit from greater protection in terms of immunity from execution in some jurisdictions.

The nature test is undoubtedly the most used determinative criterion for the commercial exception's application, vis-à-vis immunity from jurisdiction and, to some extent, also in immunity from enforcement. Nonetheless, it bears noticing how this is not a settled issue in immunity from enforcement. Indeed, several courts applied the purpose test, taking into account the whole context against which the claim was made against the State.[1543] The latter, in particular, has been applied either in conjunction with the nature test, as a subordinate or principal determinative criterion. Moreover, some criticisms have been raised in the international legal literature concerning the use of such an axiomatic approach that sees the nature of the act used as the sole criterion.

As shown in the *AIG v. Kazakhstan* and *Stati v. Kazakhstan* case studies, the application of immunity to State entities indeed strongly depends on how a court would frame the activities carried out by a SWF.

In such cases, the Swedish Supreme Court and the Belgian Court of Appeal found that the objective, such as macroeconomic stabilization, was not decisive to deem SWF assets used for sovereign purposes. Only the connection to the immediate use of the seized shares would have been a strong enough link. By contrast, The Netherlands Supreme Court expressly noted that such an interpretation was flawed because based on the immediate sovereign purpose requirement. However, the fact that the proceeds of the shares held by the SWF were ultimately

[1543] Stephan Wittich, 'The Definition of Commercial Acts' (n 1306) 39.

aimed at increasing Kazakhstan's national welfare indicated that, in principle, they had a sovereign purpose.

It is hard to generalise SWFs objectives and functions as a unitary category. Their aims vary from stabilizing the macroeconomic effects of sudden increases in export earnings, managing pension assets or a tranche of foreign exchange reserves, to restructuring sovereign wealth. However, suppose one were to apply the above findings to other SWFs assets. In that case, the aim and functioning of all saving funds could, in principle, be held as 'not sovereign enough' and, therefore, structurally lacking a qualified nexus with a central bank's monetary objective. An objectively sovereign purpose of a SWF managed by a central bank, such as macroeconomic stabilization, could then be disregarded because the connection to the immediate use of the seized shares is not strong enough. However, as other courts inferred, one could say that creating a financial surplus to increase the national welfare, macroeconomic stabilisation prospectively, and future generation well-being is *per se* a sovereign purpose.

Ultimately, following the Swedish and Belgian Courts' reasonings, the commerciality or sovereignty character of State assets resides in the temporal element a court chooses to focus on: their immediate use or their overarching goal.

Given that international law does not seem to impose an additional criterion of 'immediacy' of the sovereign purpose, one may legitimately wonder whether such courts aimed at establishing a stricter requirement in the State practice on immunity from the enforcement. At the same time, one could also wonder whether the Swedish Court might have overly emphasised the corporate arrangement of a saving fund, perhaps to avoid rendering Sweden a moot arbitration seat where enforcement against State assets is perceived as discouraged.

In summary, our objective was to illustrate how the application of immunity to SWFs varies significantly depending on the unique structures of these funds and the approaches taken by courts in characterising SWFs activities. Specifically, we examined whether SWFs are perceived as extensions of the State, engaging in sovereign functions, or whether they may be seen as serving different purposes. Ultimately, our inquiry revolved around whether domestic courts have established a consensus on granting immunity from enforcement to SWFs.

We believe that the treatment of SWFs under international law as also under domestic law might show general trends. However, it might be too soon to talk about customs or

crystallisation of practices. Indeed, as mentioned in our case law analysis, it is risky to over-generalise the outcomes of our research. This is even more so as international law 'is not a static discipline' and it might evolve with the changing socio economic background in which applies.[1544]

[1544] Pierre-Hugues Verdier and Erik Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (2015) 59 International Studies Quarterly 209. See also Attila Massimiliano Tanzi (n 1129). Some may even say sovereign immunity doctrines stand as proof of it. Christian Tomuschat, '7 The Case of Germany v. Italy before the ICJ' in Anne Peters, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015), 87. Yet after *Germany v. Italy*, some may say otherwise.

## GENERAL CONCLUSIONS

This thesis started with a riddle, questioning the Readers about the common denominator among major Western companies, revealing that they all share a shareholder, namely a SWF, funded by a State capitalist government. The relevance of these actors in the contemporary investment landscape has been explained in the course of this work, addressing geopolitical implications and the legal identification *problématique* related to their dual nature of sovereign actors structured as private financial vehicles. It became evident that the activities of such investors engendered intricate legal issues, particularly concerning the conceptualisation of the government-owned or -controlled entities, as SWFs defy and redefine the conventional boundaries of public and private power.

Against this backdrop, the inquiry delved into IIL and arbitration identification practices concerning SWFs, particularly those funded by State capitalist countries. It sought to understand how legal practitioners in international investment law and investment arbitration, namely arbitrators and domestic judges, perceive SWFs. The evolving relationship between State sovereignty, economic control, and the goals of international investment law and ISDS is a central theme and how is international economic law predisposed towards State capitalist institutions is currently under debate.[1545] With the rising of State capitalist paradigms and, therefore, of State capitalist SWFs and SOEs, the tension between State sovereignty and control over economic decisions, on the one hand, and the inner goal of IIL and ISDS to favour cross-border investments on the other 'sets the frame for several questions of great legal intricacy'.[1546] By way of example, can sovereigns, in the guise of State capitalist institutions, be both investors and regulators,[1547] act as claimants and respondents in ISDS and benefit from State immunity in award enforcement proceedings when seized as assets of the States? Can they be all the above at the same time? As stated in the General Introduction, this work enquired whether these

[1545] Delimatsis, Dimitropoulos and Gourgourinis (n 11).

[1546] Leonardo Borlini and Stefano Silingardi (n 76), 27.

[1547] Should sovereign entities be allowed a vote on company matters like any other shareholder or be moved by motivations other than profit-maximisation? ibid, 27.

sovereign investors are to be seen as servants of the States or as masters of capital in the context of the international investment legal branch.[1548]

However, answering to these questions is not straightforward, especially within the realm of IIL and ISDS. Moreover, discussing SWFs as a homogenous group might not be methodologically accurate as they differ in legal structure, governance, the extent of autonomy from the State, purposes and explicit aims or missions.[1549] All these factors are highly relevant in determining their sovereign or commercial character, and whether they are to be seen as ordinary investors or as instrumentalities of the State, eligible to benefit from immunity from enforcement.[1550]

Given this, our analysis identified, and therefore focused on, two main structural types of funds: funds structured as pool of assets and managed by State organs, precisely central banks, and SWFs structured as SOEs.

While endeavouring to ascertain the categorisation of SWFs in the context of IIL and ISDS, a preliminary inquiry arose: how does one practically discern their 'true nature'? This necessitated an exploration into the analytical tools employed in international investment disputes by arbitrators and enforcement judges to demarcate the boundary between sovereign and private spheres. With this objective in mind, the study has scrutinised investment disputes where State entities were involved as claimants or respondents and cases involving domestic award enforcement where SWFs were targeted as State assets. This scrutiny has highlighted the bifurcation inherent to arbitrators' and judges' assessments regarding sovereign investors.

The first prong of this assessment regards the structural analysis of the relationship between the entity and the State. This structural analysis is manifested both in investment tribunals' evaluation of sovereign investors' standing as claimants and attribution matters related to the same entities as State instrumentalities, as well as in domestic courts' assessment over the invocation of State immunity by SWFs in award enforcement proceedings. The analytical stance adopted by arbitrators and courts appears to be largely aligned. Separate entities are *prima facie* addressed as private entities, and a discernible presumption of

[1548] Sperber (n 24).

[1549] Andrew Cannon and Hannah Ambrose (n 1096).

[1550] ibid.

separation between these entities and the sponsoring States prevails. Majority State ownership is seen as a mere red flag of potential control, and the specific level of control required to establish an agency relationship between entity and State is usually remarkably high. Therefore, the corporate veil is typically upheld, except when specific evidentiary contexts establish lack of independence or fraudulent intent on the part of the State. In the case of SWFs structured without separate legal personality, managed by State organs, as in certain instances, outcomes may diverge.

As for award enforcement proceedings, domestic courts' approach may vary both when addressing different types of SWFs, and between the same types of SWFs. This is visible from our case law analysis of *Stati v. Kazakhstan*, whereby Samruk (notwithstanding its separate legal personality) and NFK have been considered covered by State immunity from enforcement in some jurisdictions while not in others.

Ultimately, the proximity of a SWF to its sponsoring State, its structural form (whether a pool of assets without legal personality or managed by a public institution), and the primary objectives of its assets collectively influence a court's inclination to grant or deny immunity. Nevertheless, the divergence in domestic courts' interpretations precludes sweeping conclusions. The prospect of SWFs successfully invoking 'private investor' status in investment arbitration while concurrently claiming sovereign immunity in award enforcement when targeted as State assets remains plausible, albeit contingent upon case-specific considerations. Evidently, SWFs do not constitute a monolithic investor category, necessitating a case-by-case approach.

Nevertheless, the ultimate result hinges on the second prong of the assessment – namely, the characterisation of the sovereign entity's activities/functions in the given case. In this investigation, what is regarded as governmental or sovereign is inherently so, having special consideration for the typicality of its sovereign character and nature. The same can be said, *mutatis mutandis*, with respect to what qualifies as commercial activity. Tribunals and courts tend to focus on the private/public division in the market, on the typicality or 'nature' of an activity rather than on the overarching purposes. The governmental/private distinction operated in investment disputes by tribunals echoes the *iure gestionis*/*iure imperii* distinction inherent to the law of State immunity.

Within the context of award enforcement proceedings and immunity pleas, courts have demonstrated how the complete evaluation of a SWF activity changes based on the focus on either its State sovereign objectives or the specific nature of the investment of its assets. The predominant approach to the theories of State immunity is the restrictive doctrine which recognises that 'immunity is given for acts performed in the exercise of sovereign power but withdrawn in respect of acts of a commercial or private law nature'.[1551] While the commercial or *jure gestionis* exception is recognised by all countries subscribing to the restrictive doctrine of State immunity, its application is still far from homogenous and 'the criterion by which it is determined [is] so differently formulated as to prevent the articulation of the exception in terms acceptable to all'.[1552]

From these premises, certain conclusions may be drawn. Overall, congruence extends to the assessments of investment tribunals and courts. Instruments rooted in public international law, addressing State ownership, recur and resonate. This recurrence has exposed certain critical aspects.

First and foremost, a recurring interpretation of the relationship between State entities and the State – as they assume the role of instrumentalities of respondent States and claimants in ISDS – finds its grounding in the application of the same tools, particularly the attribution rules delineated in the ARSIWA. Yet, these Articles are not only employed to attribute international wrongful acts to States, their original intent, but also to assess the status of disputing parties. Nonetheless, the extent to which this practice should go uncontested may be subject to doubt. This is because the thresholds set forth by these Articles is demanding, designed to attribute conduct to States.

Moreover, a similar pattern is discernible in the consistent interpretation of the concept of governmental activity. The distinction between the sovereign and the commercial is nebulous, particularly when dealing with entities like SWFs. The notion of governmental and commercial activities may shift with the changing socio-economic and global political landscape in which they are applied. It is imperative to acknowledge that, in the economic field,

[1551] Hazel Fox and Philippa Webb (n 50) 23. See Xiaodong Yang (n 50). Alexander Orakhelashvili (n 1295).

[1552] Hazel Fox and Philippa Webb (n 50) 399.

differences in the extent of public sectors among States, as well as the policies and regulations governing such sectors, are substantial.[1553] However, the analysis, in our context, has not indicated a discernible evolution in the interpretation of these concepts; instead, a rigid approach has been observed, especially in investment arbitration.

The conceptual separation between the public and the private, the sovereign and the commercial, is a construct employed by regulators and legal operators to navigate and administer the economic reality. This distinction is, hence, an analytical construct. Nevertheless, this does not divorce the decision of where to draw the boundary between these spheres from the logics of politics, power, and interests. The assertion that law and politics as social phenomena are two emanations of the same entity holds true, suggesting that their separate existence is only a consequence of a dualistic or pluralistic human perspective on the world.[1554] In this thesis it is submitted that this also applies to public international law analytical instruments and practices founded on the public/private dichotomy. This is so because, in essence, while being a legal field composed of rules and institutions, public international law is also a tradition and a political project.[1555]

Within this context, the presence of normative assumptions underpinning these analytical frameworks in international economic law becomes evident. As hinted, a perceived disentanglement from political powers is often attributed to certain international public law instruments. Specifically, a claim of neutrality to some international public law instruments, such as the ARSIWA can be identified. As Chimni states, such a claim of neutrality of these secondary rules 'obscures the organic historical relationship between primary and secondary rules, which were shaped in the colonial era'.[1556] This may lead to an oversight of the thick and

[1553] '[T]here are considerable differences between States with respect to the extent of their public sector, the governmental policies with respect to such public sector and generally the regulation of public sector activities'. Kovács (n 513) 135.

[1554] Miro Cerar, 'The Relationship Between Law and Politics' (2009) 15(1) Annual Survey of International & Comparative Law 19.

[1555] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) Modern Law Review 1,1.

[1556] Bhupinder S. Chimni, 'The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective' (n 374) 1213.

structured links between States and corporations by the normative implant used by IIL operators.[1557]

The analytical tools and approaches available to arbitrators and judges for categorising State entities largely hinge on a Western-oriented dichotomy of public versus private, underscoring the commercial essence of investments over their objectives and contextual backdrop.

We believe the public/private separation could only ever operate effectively within the limitation of the regulatory boundaries of a single nation State. Yet, historically, this has not been the case, and the globalised-Western perception of the public/private divide has prevailed, at least in the legal frameworks of international public and economic law. However, the global geoeconomic power structure has changed since. The globalised, ever so State capitalist economy has blended into a global private and financialised sphere. This while the Western public sector has remained primarily national and quite fractured.[1558]

The public/private divide becomes problematic when the theoretical assumption upon which is grounded is misaligned with empirical economic and geopolitical realities to which applies. Society has developed from a position where the 'compromise' embodied by such analytical construct might have been reasonably regarded as accurate to a position where it might be out of touch with the economic and geopolitical reality. To use other words, there might be a disjuncture between the conceptual and symbolic meaning of the public/private divide and its empirical, practical value.[1559] Based on these observations, one could dare to say that the public/private divide assumption might not match the contemporary realities of our political reality.[1560]

[1557] ibid.

[1558] Constantijn van Aartsen, 'The End of the Public-Private Divide' (14 September 2016) <https://www.maastrichtuniversity.nl/blog/2016/09/end-public-private-divide> accessed 11 November 2021.

[1559] A. C Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law'' (1997) 4(2) Review of International Political Economy 261.

[1560] Constantijn van Aartsen (n 1558).

This is exactly what it is believed is the core of the issue in the apprehension of SWFs in general and, more specifically, in the context of investment disputes. SWFs and State capitalist investors at large raise questions with a broad-spectrum reach, conceptually intertwining with the legal debates on the public/private divide.[1561] Sovereign investors are indeed posited in a continuum between such two competing dimensions, with some of those performing activities that are more public than private and others carrying out more private than public functions. They often times operate in the grey area between the black and white distinction of private/public, sovereign/commercial. Yet, in our analysis, no 'dusk' or third choice was ever given in the dichotomic approaches used by investment legal operators.

Our perspective suggests that the traditional demarcation of power into the spheres of public and private inadequately serves as the bedrock for constructing a legal framework tailored to SWFs.[1562] The aspirations of SWFs are complex to generalise, encompassing objectives ranging from macroeconomic stabilisation to the management of pension assets, foreign exchange reserves, or the restructuring of sovereign wealth. Characterising SWFs based on their objectives underscores their inherent sovereign attributes, overlooking the private channels they typically use. Conversely, should one focus on the immediacy of their operations and consequently, their private organisational structures and corporate instruments, their pursuit of commercial gain takes precedence.

We contend that there exists no definitive answer as to whether SWFs should be deemed sovereign or private entities. They are inherently capable of embodying both facets effectively. Nevertheless, we posit that any stance adopted by a court or investment tribunal is intrinsically rooted in a political and economic perspective, one that probably postulates a segregation of private and public realms into distinct domains. However, this dichotomy between the public and private, often viewed as a gravitational force shaping societal constructs, is in actuality an illusory construct, obscuring the fact that society lacks a discrete division into public and private components.[1563] These two dimensions are inherently intertwined, irrespective of theoretical

[1561] See, *inter alia*, Duncan Kennedy (n 1561); Morton J. Horwitz (n 1561); Margaret Thornton (ed) (n 1084); Susan B. Boyd (n 1561); Christine Chinkin (n 844); Julie A. Maupin (n 1561); Burkhard Hess, *The private-public divide in international dispute resolution* (Pocketbooks of The Hague Academy of International Law, Brill/Nijhoff 2018); Constantijn van Aartsen (n 1558).

[1562] Carrie Shu Shang and Shen Wei (n 22).

[1563] Constantijn van Aartsen (n 1558).

exercises in abstraction. This becomes even more pronounced in the context of non-liberal capitalist nations.

SWFs and State capitalist investors rise to prominence as pivotal agents that disrupt the established paradigms of sovereignty and commerciality within host nations and within the legal proceedings conducted before courts and tribunals. Against this backdrop, the primary objective that guided the inception of this study, and remains steadfast in its conclusions, was to undertake a comprehensive evaluation of how SWFs and SOEs are perceived by investment arbitrators and judges during the enforcement phase. Beyond the specific categorisations, what emerged with considerable clarity is the inherent challenges posed to Western public international law frameworks and narratives when capturing the essence of the State's role within the economy, particularly in non-Western contexts. In light of this, the present thesis consciously refrains from asserting normative claims regarding the preferred 'new' legal standards for forthcoming disputes involving SWFs. This is so as our contention does not revolve around a critique of the tools employed per se in discerning their character. Rather, what we propose is a re-evaluation of the foundational premises guiding their interpretation, aligning them with the contours of the contemporary geoeconomic landscape. Fundamental concepts like State ownership, control, governmental and commercial character, and objectives, all warrant reconsideration and adaptation based on similar critical discourses seen in other realms of law, and more importantly, on the empirical realities of contemporary State capitalism.

This deliberate approach also emanates from an acknowledgment that rigid interpretative methodologies often fall short in encapsulating the dynamic and evolving nature of global politics and geoeconomics. As a result, it is our contention that the evaluation of intricate transnational economic disputes demands a contextually driven, case-specific analysis. Thus, we advocate for circumspection when unreservedly endorsing dichotomous methodologies, recognising that their application may not constitute the most fitting lens for comprehending the socio-political reality in which State capitalist SWFs operate, let alone unravelling their 'true nature'.

**TABLE 1 - LARGEST FUNDS BY DATE OF ESTABLISHMENT**

| Fund | Country | Year of Establishment |
|---|---|---|
| Kuwait Investment Authority (KIA) | Kuwait | 1953 |
| Abu Dhabi Investment Authority (ADIA) | UAE-Abu Dhabi | 1967 |
| Public Investment Fund (PIF) | Saudi Arabia | 1971 |
| Tamasek | Singapore | 1974 |
| Government of Singapore Investment Corporation (GIC) | Singapore | 1981 |
| Hong Kong Monetary Authority Investment Portfolio (HKMAEF) | China-Hong Kong | 1993 |
| Norway Government Pension Fund Global (NBIM) | Norway | 1997 |
| SAFE IC | China | 1997 |
| National Council for Social Security Fund (NSSF) | China | 2000 |
| Mubadala | UAE-Abu Dhabi | 2002 |
| Qatar Investment Authority (QIA) | Qatar | 2005 |
| Korea Investment Corporation (KIC) | Korea | 2005 |

| | | |
|---|---|---|
| Investment Corporation of Dubai (ICD) | UAE-Dubai | 2006 |
| China Investment Corporation (CIC) | China | 2007 |
| National Welfare Fund (NWF) | Russia | 2008 |

* *

*

**TABLE 2 - SWFS CHARACTERISTICS AND DIFFERENCES FROM OTHER INSTITUTIONS**

| SWFs Are | SWFs Are Not | Conflicting Cases |
|---|---|---|
| State-owned | Private investors | Some SWFs manage both public and private money simultaneously (Australia, QIC) |
| Investment Funds | Operating companies | Some SWFs like Tamasek, CIC, are incorporated companies – some others are funds managed by central banks (SAMA, SAFE, HKMA) |
| International Portfolio | Domestic Funds | They may also invest domestically (Chilean PRF, CDP) |
| Have not Explicit Pension Liabilities | Public Pension Funds | Australian FF and New Zealand Superannuation Fund serve as buffer for future liabilities while not facing pension regular payments |
| Determined by the Source of Funding | /// | /// |
| Above risk-free investors | Stabilization Funds | Stabilization Funds have historically evolved into SWFs as they have improved in capabilities and |

| | | |
|---|---|---|
| | | investment strategies (*see Chapter 1*) |
| Long-Term Investors | Money market Instruments | CIC |
| Have Defined Purposes | /// | These purposes may change and overlap |

*Source: Table based on Capape and Guerrero Blanco work, op. cit. 10*

* *

*

**TABLE 3 - SWFS TYPES AND LEGAL STRUCTURES**

| Fund Type | Institutional Location | Legal Status | Cases |
|---|---|---|---|
| Separate Institution | Independent Entities | Separate Legal Entities | Australia Future Fund, CIC, GIC, QIA, KIA |
| Delegated Operational Authority | Central Banks/ Ministries of Finance | Pools of Assets devoid of legal personality | Chile PRF, Norway GPFG |
| Segregated Investment portfolio or tranche of assets | Central Banks | Pools of Assets devoid of legal personality and sometimes even of *de facto* existence from liquidity reserves | China SAFE, Saudi SAMA, Hong Kong HKMA |

* *
*

## ANNEX I - SWFS DEFINITIONS

| Year | Author | SWF Definition |
|---|---|---|
| 2005 | Andrew Rozanov | 'by-product[s] of national budget surpluses, accumulated over the years due to favourable macroeconomic, trade and fiscal positions, coupled with long-term budget planning and spending restraint'. SWFs are the outcome of 'situations where government and central bank are so comfortable with the level of reserves that they are prepared to transfer a sizable chunk to other, non-traditional purposes'. |
| 2007 | IMF-global financial stability report | 'SWFs can generally be defined as special investment funds created or owned by<br><br>governments to hold foreign assets for long-term purposes'. |
| 2007 | IMF-balance of payments manual | 'Some governments create special purpose government funds, usually called sovereign wealth funds (SWFs). Created and owned by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The funds 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'. |
| 2007 | Stephen Jen | 'To me, a SWF needs to have five ingredients: 1. Sovereign; 2. High foreign currency exposure; 3. No explicit liabilities; 4. High-risk tolerance; 5. Long investment horizon. There are close cousins of SWFs. |

| | | |
|---|---|---|
| | | Official reserves are related to SWFs, as are sovereign pension funds (SPFs). These three categories of public funds have different characteristics, but are not necessarily mutually exclusive. Rather than providing a more precise definition of SWFs, I believe that it would be more accurate to describe what these funds are in a diagram. Official foreign reserves are, by definition, 100% in foreign currencies. They have no liabilities explicitly attached to them, though, indirectly, they are financed by domestic government bonds used to finance the foreign exchange interventions in the first place. In my definition, SWFs don't need to be 100% in foreign currencies, but should be mostly in foreign currency terms. For example, Singapore's Temasek Holdings, Malaysia's Khazanah Nasional BHD and Canada's Fond des generations (Quebec) are not 100% held in foreign currency assets, but we still consider them SWFs, as they have high exposure to foreign currencies'. |
| 2007 | Steffen Kern | 'Sovereign wealth funds – or State investment funds – are financial vehicles owned by States which hold, manage or administer public funds and invest them in a wider range of assets of various kinds. Their funds are mainly derived from excess liquidity in the public sector stemming from government fiscal surpluses or from official reserves at central banks. SWFs can be categorised into two types of funds according to their primary purpose. On the one hand, so-called stabilisation funds aim to even out the budgetary and fiscal policies of a country by separating them from short-term budgetary or reserve developments which may be caused by price changes in the underlying markets, i.e. in oil or minerals, but also in foreign exchange conditions. On the other hand, savings or intergenerational funds create a store of |

| | | |
|---|---|---|
| | | wealth for future generations by using the assets they are allocated to spread the returns on a country's natural resources across generations in an equitable manner.<br><br>Even though similar in their purpose and investment behaviour to other forms of funds – such as pension funds, investment funds and trusts, hedge or private-equity funds – SWFs essentially differ from the former as they are not privately owned, raising important questions in terms of financial market policy and corporate governance. State-owned funds represent just way of holding financial and corporate assets from a State's perspective. Alternatively, States can invest directly in financial assets, especially stocks, and act as passive or active minority or majority stakeholders. Similarly, State entities can hold assets on behalf of the State. These entities primarily include central banks, holding official reserves. Further, States can be indirect owners of financial assets via existing State-owned companies which in turn take stakes in private companies. Finally, States can take informal influence on private corporations, e.g. by influencing corporate decisions or management selection of private companies. These are important channels of State influence on the private sector that in many cases today are more significant inroads the SWFs'. |
| 2007 | US Department of the Treasury | 'A government investment vehicle which is funded by foreign exchange assets, and which<br><br>manages those assets separately from the official reserves of the monetary authorities (the Central Bank and reserve-related functions of the Finance Ministry).' |

| | | |
|---|---|---|
| 2008 | Aizenman and Glick | ‘Sovereign wealth funds (SWFs) are saving funds controlled by sovereign governments that hold and manage foreign assets. SWFs are fundamentally different from monetary authorities holding official foreign reserves, where liquidity and security issues necessitate a short investment horizon and low risk tolerance. Central banks generally invest their foreign exchange reserves conservatively in safe and marketable instruments that are readily available to monetary authorities to meet balance of payments needs. In contrast, SWFs typically seek to diversify foreign exchange assets and earn a higher return by investing in a broader range of asset classes, including longer-term government bonds, agency and asset-backed securities, corporate bonds, equities, commodities, real estate, derivatives, and foreign direct investment. SWFs typically make little use of leverage, in contrast to hedge funds and private equity funds which generally engage in highly leveraged transactions. SWFs also differ from large institutional private investors such as mutual and insurance funds, in that although they hold assets, they generally have no specific liabilities to be paid to shareholders or policyholders. SWFs similarly differ from sovereign pension funds (SPFs) in that the latter, while government owned, have explicit liabilities, such as worker pensions’. |
| | Caruana and Allen | ‘SWFs are special purpose public investment funds, or arrangements. These funds are owned or controlled by the government and hold, manage, or administer assets primarily for medium-to long-term macroeconomic and financial objectives. The funds are commonly established out of official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts |

| | | |
|---|---|---|
| | | resulting from commodity exports. These funds employ a set of investment strategies which include investments in foreign financial assets. SWFs are a heterogeneous group and may serve various purposes. Five types of SWFs can be distinguished based on their main objective: (i) stabilization funds, where the primary objective is to insulate the budget and the economy against commodity (usually oil) price swings; (ii) savings funds for future generations, which aim to convert non-renewable assets into a more diversified portfolio of assets and mitigate the effects of Dutch disease; (iii) reserve investment corporations, whose assets are often still counted as reserve assets, and are established to increase the return on reserves; (iv) development funds, which typically help fund socio-economic projects or promote industrial policies that might raise a country's potential output growth; and (v) contingent pension reserve funds, which provide (from sources other than individual pension contributions) for contingent unspecified pension liabilities on the government's balance sheet. These objectives may be multiple, overlapping, or changing over time. For example, in some countries (e.g., Botswana, Russia) stabilization funds have evolved into funds with a savings objective, as accumulated reserves increasingly exceeded the amounts needed for short-term fiscal stabilization. The various objectives of SWFs imply different investment horizons and risk/return trade-offs which have led to different approaches in managing these funds. SWFs with a stabilization objective would put more emphasis on liquidity and have a shorter-term investment horizon that SWFs with a saving objective, where liquidity needs are low'. |

| | | |
|---|---|---|
| 2008 | Beck and Fidora | ‘Sovereign wealth funds (SWFs), broadly defined as public investment agencies which manage part of the (foreign) assets of national States, have recently attracted considerable public attention. Three elements can be identified that are common to such funds: First, SWFs are State-owned. Second, SWFs have no or only very limited explicit liabilities and, third, SWFs are managed separately from official foreign exchange reserves. |
| 2008 | Blundell-Wignall | ‘A SWF is a fund set up to diversify and improve the return on foreign exchange reserves or commodity (typically oil) revenue, and sometimes to shield the domestic economy from (cycle inducing) fluctuations in commodity prices. As such most invest in foreign assets. This group (in order of size) includes the Abu Dhabi Investment Authority (ADIA), the Norway Government Pension fund – Global, the Government of Singapore Investment Corporation (GIC),the Kuwait Investment Authority (KIA), the Saudi Arabian Monetary Authority (SAMA), the China Investment Corporation (CIC), the Stabilisation Fund of the Russian Federation, Temasek Holdings (Singapore), The Reserve Fund of Libya, the Revenue Regulation Fund of Algeria, the Qatar Investment Authority (QIA), and many more. Where national resource funds are earmarked for particular regions, such as Canada‘s Alberta Heritage Savings Trust Fund, and the USA Alaska Permanent Fund, they are included as a SWF. Some of the above funds are set up to meet industrial objectives, such as regional development, as in Temasek. Sovereign Wealth Funds (SWFs) are pools of assets owned and managed directly or indirectly by governments to achieve national objectives. They may be funded by: (i) foreign exchange |

| | | |
|---|---|---|
| | | reserves; (ii) the sale of scarce resources such as oil; or (iii) from general tax and other revenue. There are a number of potential objectives of SWFs, which are not always easy to attribute to a particular fund; and some funds may have more than one of the distinguishable objectives. Some of these are: (i) to diversify assets; (ii) to get a better return on reserves; (iii) to provide for pensions in the future; (iv) to provide for future generations when natural resources run out; (v) price stabilisation schemes; (vi) to promote industrialisation; and (vii) to promote strategic and political objectives'. |
| 2008 | Ronald J Gilson and Curtis J Milhaupt | 'sovereign investment vehicles that are not central banks, monetary authorities in charge of foreign reserves, or national pension funds, unless they are financed by commodities exports', being their essential element the 'government ownership of the fund'. |
| 2008 | Greene E.F., B.A. Yeager | 'SWFs are large pools of capital controlled by a government and invested in private markets abroad'. |
| 2008 | Kimmitt R.M | 'SWFs are defined as special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies, including investing in foreign financial assets. The SWFs 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' |

| | | |
|---|---|---|
| 2008 | Santiago Principles - International Working Group | 'SWFs are defined as special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs 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. This definition excludes, inter alia, foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, operations of State-owned enterprises in the traditional sense, government-employee pension funds, or assets managed for the benefit of individuals. Three key elements: 1. Ownership: SWFs are owned by the general government, which includes both central government and subnational governments. 2. Investments: The investment strategies include investments in foreign financial assets, so it excludes those funds that solely invest in domestic assets. 3. Purposes and Objectives: Established by the general government for macroeconomic purposes, SWFs are created to invest government funds to achieve financial objectives, and (may) have liabilities that are only broadly defined, thus allowing SWFs to employ a wide range of investment strategies with a medium- to long-term timescale. SWFs are created to serve a different objective than, for example, reserve portfolios held only for traditional balance of payments purposes. While SWFs may include reserve assets, the intention is not to regard all reserve assets as SWFs. Furthermore, the |

| | | |
|---|---|---|
| | | reference in the definition that SWFs 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" reflects both the traditional background to the creation of SWFs—the revenues received from mineral wealth—and the more recent approach of transferring "excess reserves"'. |
| 2008 | Sovereign Wealth Fund Institute | 'A Sovereign Wealth Fund (SWF) is a State-owned investment fund or entity that is commonly established from balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, governmental transfer payments, fiscal surpluses, and/or receipts resulting from resource exports. The definition of sovereign wealth fund exclude, among other things, foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, State-owned enterprises (SOEs) in the traditional sense, government-employee pension funds (funded by employee/employer contributions), or assets managed for the benefit of individuals'. |
| 2009 | European Central Bank-Financial Stability Review | '[SWF is a] special investment fund created/owned by a government to hold assets for long-term purposes; it is typically funded from reserves or other foreign-currency sources, including commodity export revenues, and predominantly has significant ownership of foreign currency claims on non-residents'. |
| 2009 | MONITOR-Fondazione Eni Enrico Mattei | 'A sovereign wealth fund is an investment fund that meets five criteria: 1. It is owned directly by a sovereign government; 2. It is managed independently of other |

| | | |
|---|---|---|
| | | State financial institutions; 3. It does not have predominant explicit pension obligations; 4. It invests in a diverse set of financial asset classes in pursuit of commercial returns; 5. It has made a significant proportion of its publicly reported investments internationally'. |
| 2011 | Christopher Balding | 'a pool of capital controlled by a government or government related entity that invests in assets seeking returns above the risk free rate of return' |
| 2012 | Clark, Dixon and Monk | 'SWFs are government-owned and controlled (directly or indirectly) investment funds that have no outside beneficiaries or liabilities (beyond the government or the citizenry in abstract) and invest their assets, either in the short or long term, according to the interests and objectives of the sovereign sponsor. 1. Ownership: Governments, both central and sub-national, own and, to varying degrees, control SWFs. Control can be exerted either directly or indirectly through the appointment of the SWF board. 2. Liabilities: One point of agreement illustrated by the IWG's (2008, 15) survey of SWFs is that these SWFs "have no direct liabilities". This is perhaps a surprising point of agreement, as certain SWFs do have liabilities, such as sterilization debt or some deferred contractual liability to transfer money out of the SWF and into the general budget or a social security system (Rozanov 2008). However, the point is that SWFs have no outside (non-governmental) liabilities. For those funds that do have a liability, it is typically intra-governmental, i.e., one arm of the government owes another arm of the government money. For example, the SWF might owe funds to the Ministry of Finance, the central bank or even the social security reserve fund. |

| | | |
|---|---|---|
| | | However, SWFs have no external creditor, which means the assets are not encumbered by the property rights of outside, non-governmental owners. In short, SWF liabilities (if they have any) are part of the broader national balance sheet. 3. Beneficiary: Despite certain explicit goals (e.g., filling a future PAYG pension gap), SWFs are managed according to the interests and objectives of the government or sovereign. As the accounting distinction underpinning Point 2 above suggests, the ultimate beneficiary of a SWF is not a specific individual. Rather, the beneficiary is either the government itself, the country's citizenry in the abstract, the taxpayer generally or is simply left unidentified. This objective function drives the strategic choices made by funds' asset managers, as the notion of fiduciary duty, which disciplines the investment practices of western financial institutions like pension funds, does not apply'. |
| 2014 | IFSWF WG | 'SWFs, in nature, are government-owned or controlled funds operated as the government's investment tools, to achieve a series of economic and political objectives'. |
| 2014 | Sun X., Li J., Wang Y., W.W. Clark | SWFs are '(1) an investment fund rather than an operating company; (2) that is wholly owned by a sovereign government but organized separately from the central bank or finance ministry to protect it from excessive political influence; (3) that makes international and domestic investments in a variety of risky assets; (4) that is charged with seeking a commercial return; and (5) which is a wealth fund rather than a pension fund—meaning that the fund is not financed with contributions from pensioners and does not have a stream of liabilities committed to individual citizens'. |

| | | |
|---|---|---|
| 2015 | Megginson W.L., V. Fotak | 'A Sovereign Wealth Fund (SWF) is a State-owned investment fund or entity that is commonly established from balance of payments surpluses; official foreign currency operations; the proceeds of privatizations; governmental transfer payments; fiscal surpluses; and/or receipts resulting from resource exports. The definition of sovereign wealth fund excludes, among other things: Foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes; State-owned enterprises (SOEs) in the traditional sense; government-employee pension funds (funded by employee/employer contributions); or assets managed for the benefit of individuals'. |

* *

*

## ANNEX II - SWFS RANKING PER ASSETS UNDER MANAGEMENT (AUM)

| Ranking | SWF | AUM |
|---|---|---|
| 1. | Norway Government Pension Fund Global | $ 1,477,729,733,526 |
| 2. | China Investment Corporation | $ 1,350,863,000,000 |
| 3. | SAFE Investment Company | $ 1,019,600,000,000 |
| 4. | Abu Dhabi Investment Authority | $ 853,000,000,000 |
| 5. | Kuwait Investment Authority | $ 803,000,000,000 |
| 6. | Public Investment Fund | $ 776,657,356,350 |
| 7. | GIC Private Limited | $ 770,000,000,000 |
| 8. | Hong Kong Monetary Authority Investment Portfolio | $ 514,223,020,000 |
| 9. | Temasek Holdings | $ 492,208,248,000 |
| 10. | Qatar Investment Authority | $ 475,000,000,000 |
| 11. | National Council for Social Security Fund | Not Disclosed |
| 12. | Investment Corporation of Dubai | Not Disclosed |
| 13. | Mubadala Investment Company | Not Disclosed |
| 14. | Turkey Wealth Fund | Not Disclosed |
| 15. | Korea Investment Corporation | Not Disclosed |
| 16. | Abu Dhabi Developmental Holding Company | Not Disclosed |
| 17. | National Welfare Fund | Not Disclosed |
| 18. | Future Fund | Not Disclosed |

| | | |
|---|---|---|
| 19. | Alberta Investment Management Corporation | Not Disclosed |
| 20. | Emirates Investment Authority | Not Disclosed |
| 21. | Alaska Permanent Fund Corporation | Not Disclosed |
| 22. | Samruk-Kazyna | Not Disclosed |
| 23. | Brunei Investment Agency | Not Disclosed |
| 24. | Libyan Investment Authority | Not Disclosed |
| 25. | University of Texas Investment Management Company | Not Disclosed |
| 26. | Texas Permanent School Fund | Not Disclosed |
| 27. | Kazakhstan National Fund | Not Disclosed |
| 28. | Oman Investment Authority | Not Disclosed |
| 29. | State Oil Fund of Azerbaijan | Not Disclosed |
| 30. | New Mexico State Investment | Not Disclosed |
| 31. | Ethiopian Investment Holdings | Not Disclosed |
| 32. | New Zealand Superannuation Fund | Not Disclosed |
| 33. | Council Khazanah Nasional | Not Disclosed |
| 34. | CNIC Corporation Limited | Not Disclosed |
| 35. | Hong Kong Future Fund | Not Disclosed |
| 36. | Russian Direct Investment Fund | Not Disclosed |
| 37. | Wyoming State Loan and Investment Board | Not Disclosed |
| 38. | Nuclear Waste Disposal Fund | Not Disclosed |

| | | |
|---|---|---|
| 39. | Fund for Reconstruction and Development of Uzbekistan | Not Disclosed |
| 40. | Azerbaijan Investment Holding | Not Disclosed |
| 41. | Mumtalakat Holding | Not Disclosed |
| 42. | Malta Government Investments | Not Disclosed |
| 43. | Timor-Leste Petroleum Fund | Not Disclosed |
| 44. | Revenue Regulation Fund | Not Disclosed |
| 45. | Ireland Strategic Investment Fund | Not Disclosed |
| 46. | Sociedad Estatal de Participaciones Industriales | Not Disclosed |
| 47. | Sovereign Fund of Egypt | Not Disclosed |
| 48. | NSW Generations Fund | Not Disclosed |
| 49. | National Development Fund of Iran | Not Disclosed |
| 50. | North Dakota Legacy Fund | Not Disclosed |
| 51. | Solidium | Not Disclosed |
| 52. | Monaco Constitutional Reserve Fund | Not Disclosed |
| 53. | Hellenic Corporation of Assets and Participations S.A. | Not Disclosed |
| 54. | Social and Economic Stabilization Fund | Not Disclosed |
| 55. | Chile Pension Reserve Fund | Not Disclosed |
| 56. | Heritage and Stabilization Fund | Not Disclosed |
| 57. | Indonesia Investment Authority | Not Disclosed |

| | | |
|---|---|---|
| 58. | Pula Fund | Not Disclosed |
| 59. | Vaekstfonden | Not Disclosed |
| 60. | Oesterreichische Beteiligungs AG | Not Disclosed |
| 61. | Hong Kong Investment Corporation | Not Disclosed |
| 62. | Colombia Savings and Stabilization Fund | Not Disclosed |
| 63. | Japan Investment Corporation | Not Disclosed |
| 64. | Alabama Trust Fund | Not Disclosed |
| 65. | Regional Investment Company of Wallonia | Not Disclosed |
| 66. | Idaho Endowment Fund Investment Board | Not Disclosed |
| 67. | SFPI-FPIM | Not Disclosed |
| 68. | Utah SITFO | Not Disclosed |
| 69. | State Capital Investment Corporation | Not Disclosed |
| 70. | Nigeria Sovereign Investment Authority | Not Disclosed |
| 71. | Fundo Soberano de Angola | Not Disclosed |
| 72. | Royal Bafokeng Holdings | Not Disclosed |
| 73. | Mauritius Investment Corporation | Not Disclosed |
| 74. | Sharjah Asset Management | Not Disclosed |
| 75. | Oklahoma Tobacco Settlement Endowment Trust | Not Disclosed |
| 76. | Sarawak Sovereign Wealth Future Fund | Not Disclosed |
| 77. | Mohammed VI Investment Fund Morocco | Not Disclosed |

| | | |
|---|---|---|
| 78. | Louisiana Education Quality Trust Fund | Not Disclosed |
| 79. | Sentosa Development Corporation | Not Disclosed |
| 80. | Fondo de Ahorro de Panama | Not Disclosed |
| 81. | Guyana Natural Resource Fund | Not Disclosed |
| 82. | Colorado Public School Fund Investment Board | Not Disclosed |
| 83. | Mexico Budgetary Income Stabilization Fund | Not Disclosed |
| 84. | Fondo Mexicano del Petroleo | Not Disclosed |
| 85. | Slovenian Sovereign Holding | Not Disclosed |
| 86. | Armenian National Interests Fund | Not Disclosed |
| 87. | Western Australian Future Fund | Not Disclosed |
| 88. | Palestine Investment Fund | Not Disclosed |
| 89. | Senegal FONSIS | Not Disclosed |
| 90. | Fondo Strategico Nazionale del Made in Italy | Not Disclosed |
| 91. | National Development and Social Fund (Malta) | Not Disclosed |
| 92. | Ghana Heritage Fund | Not Disclosed |
| 93. | Bahrain Future Generations Reserve Fund | Not Disclosed |
| 94. | Kiribati Revenue Equalization Reserve Fund | Not Disclosed |
| 95. | Israeli Citizens Fund | Not Disclosed |
| 96. | Fujairah Holding | Not Disclosed |
| 97. | Luxembourg Intergenerational Sovereign Fund | Not Disclosed |
| 98. | Fund for Productive Industrial Revolution | Not Disclosed |

| | | |
|---|---|---|
| 99. | Native Hawaiian Trust Fund | Not Disclosed |
| 100. | Fundo Soberano de Estado do Rio do Janeiro | Not Disclosed |

*Last updated: 11 September 2023*

* *
*

**BIBLIOGRAPHY**


- Abate C and others, 'State ownership will gain importance as a result of COVID-19' (7 July 2020) <https://voxeu.org/article/state-ownership-will-gain-importance-result-covid-19> accessed 26 March 2021.
- Académie de droit international de La Haye, *Recueil Des Cours, Collected Courses* (vol 85, 1954).
- Ackermann T, *The Effects of Armed Conflict on Investment Treaties* (Cambridge University Press 2022).
- Adinolfi G, 'SWFs and State Immunity: Overcoming the Contradiction' in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015).
- Ahn D, 'Why Reform is Needed: WTO 'Public Body' Jurisprudence' (2021) 12(S3) Global Policy 61.
- Alami I and Dixon AD, 'State capitalism(s) redux? Theories, tensions, controversies' (2020) 24(1) Competition & Change 70.
- Alebeek R van, 'State Immunity' in Rosanne van Alebeek (ed), *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008).
- Alexander A, 'Jus Cogens and Immunity: Revisiting ILC Draft Article 7 on Immunity of State Officials from Foreign Criminal Jurisdiction' (2022) <http://opiniojuris.org/2022/07/19/jus-cogens-and-immunity-revisiting-ilc-draft-article-7-on-immunity-of-state- officials-from-foreign-criminal-jurisdiction/> accessed 4 October 2022.
- Alexandrov S A, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder (ed), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009).
- Al-Hassan A and others, 'Sovereign wealth funds: Aspects of governance structures and investment management' (Washington, DC). IMF working paper

<https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Sovereign-Wealth-Funds-Aspects-of-Governance- Structures-and-Investment-Management-41046> accessed 26 March 2021.

- Allen E W, *The Position of Foreign States before Belgian Courts* (Macmillan Co. 1929).
- Allen & Overy, 'Assets Owned by a State-Owned Enterprise not Immune from Enforcement' (29 November 2018) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/assets-owned-by-a-state-owned-enterprise-not-immune-from-enforcement> accessed 9 December 2022.
- Allen M and Caruana J, 'Sovereign Wealth Funds—A Work Agenda' [2008] International <https://www.imf.org/external/np/pp/eng/2008/022908.pdf> accessed 5 January 2023.
- Allott P, 'State Responsibility and the Unmaking of International Law' (1988) 29(1) Harvard International Law Journal 1.
- Alsweilem KA and others, 'A Comparative Study of Sovereign Investor Models: Institutions and Policies for Managing Sovereign Wealth' (April 2015). Belfer Center for Science and International Affairs and Center for International Development, Harvard Kennedy School Discussion Paper.
- Alter KJ, 'From Colonial to Multilateral International Law: A global Capitalism and Law Investigation' [2021] International Journal of Constitutional Law.
- American Bar Association, 'Limitation of Sovereign Immunity' (December 1960). Section of International and Comparative Law Bulletin 1 <https://www.jstor.org/stable/pdf/25743257.pdf?refreqid=excelsior%3A612ba802172b8efd3944bf5005dc4c03&ab_segments=&origin=> accessed 4 October 2022.
- Analytical Report' (4 August 2005) <https://rm.coe.int/168004c7a8> accessed 20 October 2022.
- Angell E, 'Sovereign Immunity. The Modern Trend' (1925) 35(2) The Yale Law Journal 150.
- Arcari M, 'The future of the Articles on State Responsibility: A matter of form or of

substance?' (2022) 93 Questions of International Law, Zoom-in 3.

- Argentini M, 'The New Patrimonio Rilancio and the Italian approach to Sovereign Wealth Funds' [2021] Questions of International Law 51.

- Arnoldi J, Villadsen A R, Chen X, Na C, 'Multi-Level State Capitalism: Chinese State-Owned Buisness Groups' (2019) 15(1) Management and Organization Review 55.

- Asian Development Bank, 'COVID-19 Active Response and Expenditure Support Program: Report and Recommendation of the President' (June 2020) <https://www.adb.org/sites/default/files/linked-documents/54188-001-sd-05.pdf> accessed 29 November 2022.

- Atanasova D, 'Definition of Investment' (2021) <https://jusmundi.com/en/document/wiki/en-definition-of-investment> accessed 28 September 2021.

- Atul A, 'Jus Cogens and Immunity: Revisiting ILC Draft Article 7 on Immunity of State Officials from Foreign Criminal Jurisdiction' (2022) <http://opiniojuris.org/2022/07/19/jus-cogens-and-immunity-revisiting-ilc-draft-article-7-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction/> accessed 4 October 2022.

- Auchie D P, 'Taurus Petroleum LTD v. State Oil Marketing Co. of the Ministry of Oil, Republic of Iraq' (2018) 1(1) Journal of Enforcement of Arbitration Awards 1.

- Babic M, Garcia-Bernardo J and Heemskerk EM, 'The Rise of Transnational State Capital: State-led Foreign Investment in the 21st Century' (2020) 27(3) Review of International Political Economy 433.

- Badia A, *Piercing the Veil of State Enterprises in International Arbitration* (International arbitration law library, Kluwer Law International 2014).

- Balding C, 'Sovereign Wealth: The Role of State Capital in the New Financial Order' [2011] papersssrncom <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1141531.> accessed 20 January 2021.

- Ballantyne J, 'Belgian Court Finds Stati Award Obtained by Fraud' [2021] Global

Arbitration Review <https://globalarbitrationreview.com/article/belgian-court-finds-stati-award-obtained-fraud#:~:text=A%20Belgian%20court%20has%20ruled,Stati%20obtained%20it%20through%20fraud> accessed 29 May 2023.

- Banifatemi Y, 'Jurisdictional Immunity of States – Commercial Transactions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).

- Bankas E K, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Second edition, Springer 2022).

- Barten M K S, 'State Immunity from Enforcement in The Netherlands: Will Creditors be Left Empty-Handed?' (25 April 2017) <http://arbitrationblog.kluwerarbitration.com/2017/04/25/state-immunity-from-enforcement-in-the-netherlands-will-creditors-be-left- empty-handed/> accessed 26 November 2022.

- Bassan F, 'Host States and Sovereign Wealth Funds, between National Security and International Law' [2010] European Business Law Review.

- ——, *The Law of Sovereign Wealth Funds* (Edward Elgar 2011).

- ——, 'Sovereign Wealth Funds: A Definition and Classification' in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015).

- Bauerle Danzman S and Kilcrease E, 'The Illusion of Controls: Unilateral Attempts to Contain China's Technology Ambitions Will Fail' Foreign Affairs (30 December 2022) <https://www.foreignaffairs.com/united-states/illusion-controls> accessed 9 March 2023.

- Baxter T C J, 'Recent Developments in Key Legal Issues of International Reserves Investments' (Federal Reserve Bank of New York, New York, 19 November 2010) <https://www.newyorkfed.org/newsevents/speeches/2010/bax101119> accessed 8 December 2022.

- Bederman D J, 'Beneficial Ownership of International Claims' (1989) 38(4) The International and Comparative Law Quarterly.
- Berkes A (ed), *International Human Rights Law Beyond State Territorial Control* (Cambridge University Press 2021).
- Bianchi A, 'L'immunité des Etats et les violations graves des droits de l'homme : la fonction de l'interprète dans la détermination du droit international' (2004) 108 Revue Générale de Droit International Public 63.
- Binder C, Kriebaum U, Reinisch A, Wittich S (eds), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009).
- Bird M G, 'State-Owned Enterprises: Rising, Falling and Returning? A Brief Overview' in Luc Bernier, Philippe Bance and Massimo Florio (eds), *The Routledge Handbook of State-Owned Enterprises* (Routledge international handbooks. Routledge 2020).
- Blackaby N, Partasides C, Redfern A and Hunter M, *Redfern and Hunter on International Arbitration* (Sixth edition, Oxford University Press 2015).
- Blacklock J, 'Foreign Direct Investment Regimes in China' [2022] ICLG <https://iclg.com/practice-areas/foreign-direct- investment-regimes-laws-and-regulations/china#:~:text=The%20Foreign%20Investment%20Law%20of,may%20impact%20the%20national%20security.> accessed 10 March 2023.
- Blanchette J, 'Confronting the Challenge of Chinese State Capitalism' (22 January 2021) <https://www.csis.org/analysis/confronting-challenge-chinese-state-capitalism>.
- Block F, 'Problems with the Concept of Capitalism in the Social Sciences' (2019) 51(5) Environ Plan A 1166.
- Blundell-Wignall A, Hu Y and Yermo J, 'Sovereign Wealth and Pension Fund Issues' [2008] OECD Working Papers on Insurance and Private Pensions <https://www.oecd-ilibrary.org/content/paper/243287223503> accessed 20 September 2019.
- Blyschak P, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?' (2011) 6(2) Journal of

International Law and International Relations 1-52.

- ——, ‘State-Owned Enterprises in International Investment’ (2016) 31(1) ICSID Review - Foreign Investment Law Journal.

- Bodeau-Livinec P (ed), *Les fonds souverains : entre affirmation et dilution de l’État face à la mondialisation* (8, Editions A. Pedone 2014).

- Bohmer L, ‘Analysis: In Ortiz v. Algeria, Arbitrators Offer in-Depth Analysis of trhe Criteria for Attributing Acts of the State- Owned Companies to the State; Claims Are Dismissed on the Merits’ [2020] Investment Arbitration Reporter <https://www.iareporter.com/articles/analysis-in-ortiz-v-algeria-arbitrators-offer-in-depth-analysis-of-the-criteria-for-attributing-acts-of- state-owned-companies-to-the-state-claims-are-dismissed-on-the-merits/> accessed 16 May 2022.

- ——, ‘In Mexican Offshore Oil Dispute, Canada and the United States Set Out Their Views on Claims by Dual Nationals, Reflective Losses, and State Enterprises under Nafta’ [2021] Investment Arbitration Reporter <https://www.iareporter.com/articles/in-mexican-offshore- oil-dispute-canada-and-the-united-states-set-out-their-views-on-claims-by-dual-nationals-reflective-losses-and-state-enterprises-under- nafta/> accessed 13 May 2022.

- Bonnitcha J, ‘The Return of Investment Screening as a Policy Tool’ (2020) 11(4) 7.

- Boon K E, ‘Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines’ (2014) 15(2) Melbourne Journal of International Law 1.

- Borlini L and Silingardi, S ‘The Foundations of International Economic Order in the Age of State Capitalism’ in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023).

- Born G, ‘The New York Convention: A Self-Executing Treaty’ [2018] MJIL 115.

- Bortolotti B, Fotak V and Megginson WL, ‘The Rise of Sovereign Wealth Funds: Definition, Organization, and Governance’ [2014] Baffi Center Research Paper 1 <https://ssrn.com/abstract=2538977> or <http://dx.doi.org/10.2139/ssrn.2538977>

accessed 2 March 2021.

- Bouchez L J, 'The Nature and Scope of State Immunity from Jurisdiction and Execution' (1979) 10 Netherlands Yearbook of International Law 3.

- Böwer U, 'State-Owned Enterprises in Emerging Europe: The Good, the Bad, and the Ugly' (2017) 17(221) IMF Working Papers.

- Boyd S B, *Challenging the Public/Private Divide* (University of Toronto Press 1997).

- Braun J, 'Uncovered: Tribunal in Previously-Unseen Award Against Russia Upheld Jurisdiction over Crimea-Related Claims, and Award over 1.3. Billion USD in Compensation' [2022] Investment Arbitration Reporter <https://www.iareporter.com/articles/uncovered-tribunal-in-previously-unseen-award-against-russia-upheld-jurisdiction-over-crimea-related-claims-and-awarded-over-1-3-billion-usd-in-compensation/> (accessed 11 September 2023).

- Bremmer I, *The End of the Free Market: Who Wins the War between States and Corporations?* (Portfolio 2012).

- Brown C and O'Keefe R, 'Part IV: State Immunity from Measures of Constraint in Connection with Proceedings before a Court' in Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013).

- Brown Scott J, *Resolutions of the Institute of International Law Dealing with the Law of Nations* (Oxford University Press (OUP) 1916).

- Bruff I, 'Overcoming the State/Market Dichotomy' in Stuart Shields, Ian Bruff and Huw Macartney (eds), *Critical International Political Economy: Dialogue, Debate and Dissensus* (Palgrave Macmillan; [distributor] Not Avail 2011).

- Cannon A and Ambrose H, 'In Practice: Dealing with Sovereign Wealth Funds: Immunity Concerns and Practical Steps to Mitigate Them' <https://hsfnotes.com/arbitration/wp-content/uploads/sites/4/2020/12/DEALING-WITH-SOVEREIGN-WEALTH- FUNDS-IMMUNITY-CONCERNS-AND-

PRACTICAL-STEPS-TO-MITIGATE-THEM.pdf> accessed 30 May 2022.

- Capapé J and Guerrero Blanco T, 'More Layers than an Onion: Looking for a Definition of Sovereign Wealth Funds' [2013] ESADE Business School Research Paper 1.

- Capapé J and others, 'Sovereign Wealth Funds 2021 - Changes and challenges accelerated by the Covid-19 Pandemic' (2022) <https://docs.ie.edu/cgc/SWF%202021%20IE%20SWR%20CGC%20-%20ICEX-Invest%20in%20Spain.pdf> accessed 30 January 2023.

- Caplan L M, 'State Immunity, Human Rights, and Jus Cogens : A Critique of the Normative Hierarchy Theory' (2003) 97(4) American Journal of International Law 741.

- Cardosi J, 'Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution' (2013) 41(1) Pepperdine Law Review.

- Caron D D, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96(4) American Journal of International Law 857.

- Carson M and Clark J, 'Asian Financial Crisis: July 1997–December 1998' (9 March 2023) <https://www.federalreservehistory.org/essays/asian-financial-crisis>.

- Cartland M, Depayre G and Woznowski J, 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46(5) Journal of World Trade 979.

- Cassese A, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) European Journal of International Law 649.

- Castelli M and Scacciavillani F, 'SWFs and State Investments: A Preliminary General Overview' in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015).

- Cerar M, 'The Relationship between Law and Politics' (2009) 15(1) Annual Survey of International & Comparative Law, 19.

- CGD Policy Paper 41 <http://www.cgdev.org/publication/sovereign-wealth-funds-and-long-term-development-finance-risks-and-opportunities> accessed 25 February 2021.

- Chaisse J and Dimitropoulos G, 'Domestic Investment Laws and International Economic Law in the Liberal International Order' (2023) 22(1) World Trade Review 1.
- Chaisse J, 'Untangling the Triangle: Issues for State-controlled Entities in Trade, Investment, and Competition Law' in Julien Chaisse and Tsai-yu Lin (ed), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford University Press 2016).
- Charlesworth H, 'Worlds Apart: Public/Private Distinctions in International Law' in Margaret Thornton (ed), *Public and Private: Feminist legal debates/edited by Margaret Thornton* (Oxford University Press 1995).
- Charlotin D, 'Analysis: Stabil v. Russia Tribunal Attributes Paramilitary Actions to Russia, and Awards 35 Million USD on Account of Expropriation of Ukrainian Petrol Investments' [2022] Investment Arbitration Reporter <https://www.iareporter.com/articles/analysis-stabil- v-russia-tribunal-attributes-paramilitary-actions-to-russia-and-awards-35-million-usd-for-expropriation-of-ukrainian-petrol-investments/>.
- ——, 'Analysis: Tribunal in Guris v. Libya Award Draws Contrast with Cengiz Award on FPS Interpretation and Sides with Majority of Prior Libya Awards with Respect to War Losses Clause' [2020] Investment Arbitration Reporter <https://www.iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and- sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/> accessed 16 May 2022.
- Chen C, 'The Theoretical Logic of Sovereign Wealth Funds' [16 June 16, 2009] SSRN Electronic Journal <https://ssrn.com/abstract=1420618 or http://dx.doi.org/10.2139/ssrn.1420618> accessed 20 January 2023.
- Chen S, 'Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration' (2013) 6(2) Contemporary Asia Arbitration Journal 299.
- Chiang TW, 'Chinese State-Owned Enterprises and WTO's Anti-Subsidy Regime' (2018) 49(2) Georgetown Journal of International Law 845.
- Chijioke-Oforji C, 'Sovereign Wealth Funds and State-Owned Enterprises as Claimants

under International Investment Agreements and ICSID' in Tom Mortimer and Chrispas Nyombi (eds), *Rebalancing International Investment Agreements in Favour of Host States* (Wildy 2018).

- Chimni B S, 'The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective' (2020) 31(4) European Journal of International Law 1211.
- ——, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14(1) Oregon Review of International Law 17.
- Chinkin C, 'A Critique of the Public/Private Dimension' (1999) 10(2) European Journal of International Law 387.
- Clark GL, Dixon AD and Monk AHB, *Sovereign Wealth Funds: Legitimacy, Governance, and Global Power* (Princeton university press 2017).
- Clifford Chance (Firm), 'The UK as a Leading Centre for International Sovereign Wealth Funds' (June 2021) 1-34 <https://www.thecityuk.com/media/1igjhdz5/the-uk-as-a-leading-centre-for-international-sovereign-wealth-funds.pdf>.
- ——, 'Foreign Direct Investment Regulation Guide' (Great Britain 2022) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/12/gcr_chapter_the%20_evolving_concept_of_national_securi ty_second_edition.pdf> accessed 9 March 2023.
- CNBC, 'Market Misery Deals Sovereign Wealth Funds Historic Setback in 2022: Study' (1 January 2023) <https://www.cnbc.com/2023/01/01/market-misery-deals-sovereign-wealth-funds-historic-setback-in-2022-study.html> accessed 9 March 2023.
- Cohen JL, 'The Democratic Construction of Inherently Sovereign Functions' (2021) 115 American Journal of International Law Unbound 312.
- Cohen Smutny A, 'State Responsibility and Attribution: when is a State Responsible for the Acts of State Enterprises? Emilio Agustín Maffezini v. the Kingdom of Spain' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May

2005).

- Colli A, ‘State Capitalism in Western Europe’, in Mike Wright and others (eds), *The Oxford Handbook of State Capitalism and the Firm*, (Oxford Handbooks 2022).

- Condorelli L and Kress C, ‘Part III The Sources of International Responsibility, Ch.18 The Rules of Attribution: General Considerations’ in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford commentaries on international law. Oxford University Press 2010).

- Cooban A and Stern C, ‘Germany blocks sale of chip factory to China over security fears’ *CNN Business* (10 November 2022) <https://edition.cnn.com/2022/11/09/tech/germany-blocks-chip-factory-sale-china/index.html> accessed 9 March 2023.

- Corbett M, ‘Oil Shock of 1973–74: October 1973 - January 1974’ <https://www.federalreservehistory.org/essays/oil-shock-of- 1973-74> accessed 9 March 2023.

- Cortesi G A, ‘Icsid Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law’ (2017) 16(1) The Law & Practice of International Courts and Tribunals 108.

- Council of Europe - Directorate of Legal Affairs, ‘Pilot Project of the Council of Europe on State Practice Regarding State Immunities.

- ——, ‘State Immunity under International Law and Current Challenges’ (2017) <https://rm.coe.int/final-publication- state-immunity-under-international-law-and-current-c/16807724e9> accessed 22 May 2023.

- Crawford J, ‘Execution of Judgments and Foreign Sovereign Immunity’ (1981) 75(4) American Journal of International Law.

- ——, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1984) 54(1) British Yearbook of International Law 75.

- ——, ‘Investment Arbitration and the ILC Articles on State Responsibility’ (2010) 25(1) ICSID Review - Foreign Investment Law Journal 127.

- ——, *Les articles de la CDI sur la responsabilité de l'État pour fait internationalement illicte [i.e. illicite]: Introduction, texte et commentaires* (A. Pedone 2003).
- ——, *State Responsibility: The General Part* (Cambridge studies in international and comparative law, Cambridge University Press.
- Crawford J and Baetens F, 'The ILC Articles on State Responsibility: More than a 'Plank in a Shipwreck'?' (2022) 37(1-2) ICSID Review 13.
- Crawford J and Brownlie I, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019).
- Creemers R, 'Certain Unresolved Aspects of the Law of State Immunity' in Pat Rogers (ed), Themes and Theories (Oxford University Press
- ——, 'National Security Law of the People's Republic of China' (1 July 2015) <https://digichina.stanford.edu/work/national-security-law-of-the-peoples-republic-of-china/> accessed 10 March 2023. Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford University Press 1995).
- Cremer A, 'German tate conservatives take tougher line on VW oversight' *Reuters* (8 August 2017) <https://www.reuters.com/article/us-germany-election-lowersaxony-vw-idUSKBN1AO08Z> accessed 11 November 2021.
- Cuervo-Cazurra A and others, 'Governments as Owners: State-owned Multinational Companies' (2014) 45(8) Journal of International Business Studies 919.
- Cumming D, Wood G, Filatotchev I, Juliane Reinecke, 'Preface' in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke (ed), *The Oxford Handbook of Sovereign Wealth Funds* (Oxford handbooks, First edition. Oxford University Press 2017).
- Cuniberti G, 'The Fluctuating Law of Diplomatic Immunity in France' (8 July 2020) <https://eapil.org/2020/07/08/the- fluctuating-law-of-diplomatic-immunity-in-france/> accessed 19 November 2022.
- Cutler A C, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4(2) Review of International Political Economy 261.

- d'Argent P and Lesaffre P, 'Immunities and Jus Cogens Violations' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).
- Dall'Orto Mas R, Vonessen B, Fehlker C, Arnold K, 'The case for central bank independence. A review of key issues in the international debate' (October 2020). Occasional Paper Series 248 <https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op248~28bebb193a.en.pdf> accessed 21 April 2023.
- Dams J, 'Europe will not soon forget this experience' *Die Welt* (15 March 2020) <https://www.welt.de/wirtschaft/plus206563595/Trump-will-deutsche-Impfstoff-Firma-CureVac-Traumatische-Erfahrung.html> accessed 10 March 2023.
- Davies T R, 'German court finds Greek debt claims inadmissible' (22 March 2016) <https://globalrestructuringreview.com/article/german-court-finds-greek-debt-claims-inadmissible> accessed 17 December 2022.
- Davis J, 'The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law' (2010) 51(1) Harvard International Law Journal 257.
- Davis J, Ossowski R, Daniel J, and Barnett S, 'Stabilization and Savings Funds for Nonrenewable Resources: Experience and Fiscal Policy Implications' [2001] IMF Occasional Paper 273.
- de Stefano C, 'Enhancing the Accountability of SOEs/SCEs in International Economic Adjudication through Competitive Neutrality' (2020) 17(6) Transnational Dispute Management.
- ——, 'Competitive Neutrality of Soes in International Investment Law' [2018] SSRN Electronic Journal 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209867>.
- ——, *Attribution in International Law and Arbitration* (Oxford University Press 2020).
- de Vattel E and Chitty J, *The Law of Nations* (Cambridge University Press 2015).
- Dekastros M, 'Sovereign Wealth Funds in International Economic Law' (European University Institute 2016).

- Delimatsis P, Dimitropoulos G and Gourgourinis A, 'State Capitalism and International Law - An Introduction' in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023).

- DeSouza P and Reisman WM, 'Sovereign Wealth Funds and National Security' in Karl P Sauvant, Lisa E Sachs and Jongbloed, Wouter P.F. Schmit Jongbloed (eds), *Sovereign investment: Concerns and policy reactions* (Oxford University Press 2012).

- Deutsche Bank, 'Commodity and Non-commodity Sovereign Wealth Funds' (18 July 2018). Deutsche Bank Research Paper Series 28 <https://www.oecd.org/dev/pgd/41212577.pdf> accessed 9 March 2023.

- Di Pietro D and Cheung K, 'The Definition of Investor in Investment Treaty Arbitration' in Julien Chaisse, Leïla Choukroune, Sufian Jusoh (ed), *Handbook of International Investment Law and Policy* (Springer Singapore 2021).

- Dickinson A, Lindsay R and Loonam JP, *State Immunity: Selected materials and commentary/ Andrew Dickinson, Rae Lindsay, James P. Loonam* (Oxford University Press 2004).

- Ding R, ''Public Body' or Not: Chinese State-Owned Enterprise' (2014) 48(1) Journal of World Trade 167.

- Ding Y, 'Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?' (2012) 26(2) Emory International Law Review 997.

- Dixon A D, 'Variegated Capitalism and the Geography of Finance: Towards a Common Agenda' (2011) 35(2) Progress in Human Geography 193.

- Djanic V, ''Banking Dispute Leads to South Sudan's Second Ever ICSID Arbitration' (9 October 2020) <https://www.iareporter.com/articles/banking-dispute-leads-to-south-sudans-second-ever-icsid-arbitration/> accessed 26 March 2021.

- ——, 'BIT Claim Against Ukraine is Allowed to Proceed, but One of the Claimants - The Republic of Tatarstan - Fails to Clear Jurisdictional Hurdle' (18 February 2020)

<https://www.iareporter.com/articles/claim-against-ukraine-is-allowed-to-proceed-but-one-of-the-claimants-fails-to-clear-jurisdictional-hurdle/> accessed 5 March 2021.

- Dolzer R and Schreuer C, Principles of International Investment Law (2nd, Oxford University Press 2012).
- Domke M, 'International Commercial Arbitration. The New York Convention. Compiled and edited by Giorgio Gaja' (1978) 72(4) American Journal of International Law 961.
- Dumberry P, ''Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction Over the Claims of Ukrainian Investors Against Russian Under the Ukraine-Russia Bit' (2018) 9(3) Journal of International Dispute Settlement 506.
- Dundas H R, 'State Immunity and the Enforcement of Awards against State Parties: AIG Capital Partners v Republic of Kazakhstan' (2006) 72(1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 77.
- Dupuy PM, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford commentaries on international law. Oxford University Press 2010).
- ——, 'Are States Liable for the Conducts of Their Instrumentalities? Concluding Remarks' in Emmanuel Gaillard and Jennifer Younan (ed), *State Entities in International Arbitration* (IAI series on international arbitration no. 4. Juris Publishing 2008).
- Ebrary.net, 'Reserve Investment Corporations' <https://ebrary.net/122933/political_science/reserve_investment_corporations> accessed 9 March 2023.
- Ejims O, 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019) 34(1) ICSID Review 62.
- El Boudouhi S, 'Barcelona Traction Re-Imagined' in Ingo Venzke and Kevin J Heller (eds), *Contingency in International Law* (Oxford University Press 2021).
- El Sawah S, '"Waiver of State Immunity over Central Bank Accounts! Say No More!", French Supreme Court Rules' (5 August 2021) <https://eapil.org/2021/08/05/waiver-of-

state-immunity-over-central-bank-accounts-say-no-more-french-supreme-court-rules/> accessed 19 November 2021.

- El-Erian M, 'Sovereign Wealth Funds in the New Normal' (2010) 47(2) FINANCE & DEVELOPMENT.

- Engel J, Barbary V and Hamirani H, 'Sovereign Wealth Funds and Innovation Investing in an Era of Mounting Uncertainty' in Soumitra Dutta, Bruno Lanvin, and Sacha Wunsch-Vincent (ed), *The Global Innovation Index - Who Will Finance Innovation?* (2020).

- Enrich D, Sidel R and Craig S, 'How Wall Street Firms Reached out to Asia' *Asian Wall Street Journal* (17 January 2008).

- Estrin S and Pelletier A, 'Privatization in Developing Countries: What Are the Lessons of Recent Experience?' (2018) 33(1) The World Bank Research Observer 65.

- European Commission, 'State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post Crisis Context: Institutional Paper' (July 2016) 031 <https://ec.europa.eu/info/sites/default/files/file_import/ip031_en_2.pdf> accessed 12 December 2021.

- Eurostat - European Commission, 'European System of Accounts - ESA 2010' (Luxembourg 2013) <https://ec.europa.eu/eurostat/documents/3859598/5925693/KS-02-13-269-EN.PDF/44cd9d01-bc64-40e5-bd40-d17df0c69334> accessed 9 March 2023.

- Evenett S J, 'What Caused The Resurgence In FDI Screening?' [2021] SUERF Policy Note - The European Money and Finance Forum <https://www.suerf.org/policynotes/24933/what-caused-the-resurgence-in-fdi-screening> accessed 25 February 2023.

- Farouk Y, 'The Notion of 'Investment' in ICSID Case Law: a Drifting Jurisdictional Requirement? Some "Un-Conventional" Thoughts on Salini, SGS & Mihaly' (2005) 22(2) Journal of International Arbitration 105.

- Feit M, 'Attribution and the Umbrella Clause- Is there a Way out of the Deadlock?'

(2012) 21(1) Minnesota Journal of International Law 21.

- ——, ‘Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity’ (2010) 28(1) Berkeley Journal of International Law 142.

- Feldman M, ‘State-Owned Enterprises as Claimants in International Investment Arbitration’ (2016) 31(1) ICSID Review - Foreign Investment Law Journal 24.

- Fensterwald B JR, ‘Sovereign Immunity and Soviet State Trading’ (1949-1950) 63(4) Harvard Law Review 614.

- Fernando J, ‘Resource Curse Definition’ (29 September 2023) <https://www.investopedia.com/terms/r/resource-curse.asp> accessed 25 January 2023.

- Fidora M and Beck R, ‘The Impact of Sovereign Wealth Funds on Global Financial Markets’ (2008) 43 Intereconomics.

- Finke J, ‘Sovereign Immunity: Rule, Comity or Something Else?’ (2010) 21(4) European Journal of International Law 853.

- Fiorini M, Hoekman B M, Mavroidis P C, Saluste M and Wolfe R, ‘WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members’ Revealed Preferences’ (2020) 54(5) Journal of World Trade 667.

- Fisler Damrosch L, ‘The Sources of Immunity Law – Between International and Domestic Law’ in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).

- Fitzmaurice GG, ‘State Immunity from Proceeding in Foreign Courts’ (1933) 14 British Yearbook of International Law 101.

- Flynn P and Rowe L, ‘Canadian Government Releases New Policy Regarding Foreign Investments from State-Owned Enterprises in Critical Minerals Under the Investment Canada Act’ (31 October 2022) <https://www.jdsupra.com/legalnews/canadian-government-releases-new-policy-7536523/?origin=CEG&utm_source=CEG&utm_medium=email&utm_campaign=CustomEmailDigest&utm_term=jds- article&utm_content=article-link> accessed 10 March

2023.

- Focarelli C, *International* Law (Edward Elgar Publishing 2019).
- Fogdestam-Agius M and Ahrel G, 'Swedish Supreme Court Weighs in on Immunity of Sovereign Wealth Fund Assets under Central Bank Management' [2022] Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2022/03/07/swedish-supreme- court-weighs-in-on-immunity-of-sovereign-wealth-fund-assets-under-central-bank-management/> accessed 27 May 2022.
- Fouret J (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Second edition, Globe Law and Business.
- Fox H, *The Law of State Immunity* (1st, Oxford University Press (OUP) 2004).
- Fox H and Webb P, *The Law of State Immunity* (3rd Edition) (Oxford University Press (OUP) 2013).
- Fox WTR, 'Competence of Courts in Regard to Non-Sovereign Acts of Foreign States' (1941) 35(4) American Journal of International Law 632.
- Frankfurter F, 'The Final Report of the Attorney General's Committee on Administrative Procedure. Foreword' (1941) 41(4) Columbia Law Review 585.
- Frynas J G, 'Sovereign Wealth Funds and The Resource Curse' in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke (ed), *The Oxford Handbook of Sovereign Wealth Funds* (Oxford handbooks, First edition. Oxford University Press 2017).
- Gaillard E and Penusliski M I, 'State Compliance with Investment Awards' [2021] ICSID Review - Foreign Investment Law Journal.
- Gaillard E and Younan J (ed), *State Entities in International Arbitration* (IAI series on international arbitration no. 4, Juris Publishing 2008).
- Gaillard E, 'Identity or Define? Reflection on the Evolution of the Concept of Investment in ICSID Practice' in Christina Binder (ed), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009).

- Gallus N, ‘State Enterprises as Organs of the State and BIT Claims’ (2006) 7(5) The Journal of World Investment & Trade 761.
- Gáspár-Szilágyi S and Usynin M, ‘Procedural Developments in Investment Arbitration’ (2020) 19(2) The Law & Practice of International Courts and Tribunals 269.
- Gaukrodger D, ‘Foreign State Immunity and Foreign Government Controlled Investors OECD Study’ (2010/02). OECD Working Papers on International Investment.
- ——, ‘Foreign State Immunity and Foreign Government Controlled Investors’ [2010] SSRN Electronic Journal.
- Gazzini T, ‘Nigeria and Morocco move towards a “new generation” of bilateral investment treaties’ [2017] Ejil: Talk! <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/> accessed 10 March 2023.
- Gelb A, Tordo S, Halland H with Arfaa N and Smith G, ‘Sovereign Wealth Funds and Long-Term Development Finance: Risks and Opportunities’ (Washington DC May 2014).
- Ghahramani S, ‘Sovereign Wealth and the Extraterritorial Manipulation of Corporate Conduct: A Multifaceted Paradigm in Transnational Law’ in Douglas Cumming, Geoffrey Wood, Igor Filatotchev, Juliane Reinecke (eds), *The Oxford Handbook of Sovereign Wealth Funds* (Oxford handbooks, First edition. Oxford University Press 2017).
- Gianni & Origoni, ‘Snapshot: foreign investment law and policy in Italy’ <https://www.lexology.com/library/detail.aspx?g=08d21aba-da6f-4fd9-aa5f-211f49cb6acb> accessed 10 March 2023.
- Gilson RJ and Milhaupt CJ, ‘Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Merchantilism’ (2008) 1 SSRN Electronic Journal.
- Giorgetti C, *Litigating International Investment Disputes: A Practitioner’s Guide* (International litigation in practice vol 8, Brill.
- Global SWF, ‘CADF’ <https://globalswf.com/fund/CADF> accessed 9 March 2023.

- ——, ‘2023 Annual Report - State-Owned Investors in a Multipolar World’ (1 January 2023) <https://global-swf.s3.amazonaws.com/file-uploads/mhWniVufvncRY1KM2QO7VUAlbBjcy2AEUToA4wVU.pdf> accessed 30 January 2023.

- Goodwin-Gill G S, ‘System of the Law of Nations: State Responsibility. Part I. By Ian Brownlie.’ (1985) 79(2) American Journal of International Law 471.

- Götz M and Jankowska B, ‘Internationalization by State-owned Enterprises (SOEs) and Sovereign Wealth Funds (SWFs) after the 2008 Crisis. Looking for Generalizations’ (2016) 50(1) International Journal of Management and Economics 63.

- Graefe L, ‘Oil Shock of 1978–79’ <https://www.federalreservehistory.org/essays/oil-shock-of-1978-79> accessed 9 March Laurens J.E. Timmer, ‘Meaning of Investment as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre’ (2012) 29(4) Journal of International Arbitration 363.

- Grandaubert V, ‘France Legislates on State Immunity from Execution: How to kill two birds with one stone?’ (23 January 2017) <https://www.ejiltalk.org/france-legislates-on-state-immunity-from-execution-how-to-kill-two-birds-with-one-stone/> accessed 19 November 2022.

- Grant T, ‘Article 2(1)(a) and (b)’ in Roger O’Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013).

- Greenaway J and Cannon A, ‘Liability of State-Owned Companies for Debts of State: Gécamines v FG Hemisphere Associates LLC’ [2012] Thomson Reuters Practical Law <https://uk.practicallaw.thomsonreuters.com/5-520-6833?transitionType=Default&contextData=%28sc.Default%29> accessed 25 October 2021.

- Grenville S, ‘What is a Sovereign Wealth Fund?’ in Renée Fry, Warwick J McKibbin and Justin O’Brien (eds), *Sovereign Wealth: The Role of State Capital in the New Financial Order* (Imperial College Press; Distributed by World Scientific 2011).

- Griebel J and Plücken M A, ‘New Developments Regarding the Rules of Attribution?

The International Court of Justice's Decision in Bosnia v. Serbia' (2008) 21(3) Leiden Journal of International Law 601.

- Grund S, 'Enforcing Sovereign Debt in Court: A Comparative Analysis of Litigation and Arbitration Following the Greek Debt Restructuring of 2012' [2018].

- Gu J and others, 'Chinese State Capitalism? Rethinking the Role of the State and Business in Chinese Development Cooperation in Africa' (2016) 81(9) World Development 24.

- Haeri H, Baró Huelmo C and Gasparotti G, 'International State Responsibility and Internal Law in Investment Arbitration: A Hierarchy of Sorts' (2022) 37(1-2) ICSID Review 210.

- Haeri H, Kryvoi Y, Gambarini C and Kovacs R, 'Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution' (September 2021) <https://www.biicl.org/documents/144_sovereign-wealth-funds-regulation-dispute-resolution-.pdf> accessed 23 September 2022.

- Hahn A, 'State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds' [2012] Revue Suisse de Droit des Affaires et du Marché Financier 103.

- Hamamoto S, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30(2) ICSID Review - Foreign Investment Law Journal 449.

- Hanessian G and Duggal K, 'The Role of Sovereign Wealth Funds and National Oil Companies in Investment Arbitrations' J William Rowley (ed), The Guide to Energy Arbitrations.

- Hansmann H and Kraakman R, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100(7) The Yale Law Journal 1879.

- Happold M, 'Immunity from Execution of Military and Cultural Property' in Tom Ruys and Nicolas Angelet (eds), *Cambridge Handbook on Immunities and International Law* (Cambridge University Press 2019).

- Harvard Law Review, 'Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis' (2010) 124(2) Harvard Law Review 550.

- Haug S, 'The "Global South" and research on world politics', *The Loop* <https://theloop.ecpr.eu/the-global-south-and-research-on-world-politics/?_thumbnail_id=4582> accessed 8 August 2023.

- Hawkins A, 'Chip wars: how semiconductors became a flashpoint in the US-China relationship' The Guardian (5 July 2023) <https://www.theguardian.com/world/2023/jul/05/chip-wars-how-semiconductors-became-a-flashpoint-in-the-us-china-relationship> accessed 8 August 2023.

- Hayes A, 'What Is a Special Purpose Vehicle (SPV) and Why Companies Form Them' (23 August 2022) <https://www.investopedia.com/terms/s/spv.asp> accessed 17 June 2023.

- Hepburn J, 'Full Details of Iranians' Arbitral Victory over Korea Finally Come into View, With Arbitrators Seiing Bit Breach After Investment Deposit Not Returned, But Disagreeing Whether Any Compensation Was Warranted' [2019] <https://www.iareporter.com/articles/details-of-iranians-arbitral-victory-over-korea-come-into-view-with-arbitrators-seeing-bit-breach- after-investment-deposit-not-returned-but-disagreeing-whether-any-compensation-was-warranted/> accessed 13 May 2022.

- Hepburn J, Luke E Peterson and Ridhi Kabra, 'India Round-Up: Updates on Five Pending Investment Treaty Arbitrations, Including Rulings (on Liability in Deutsche Telekom Case), Tribunals and Anti-Suit Injunctions' [2018] <https://www.iareporter.com/articles/india-round-up-updates-on-five-pending-investment-treaty-arbitrations-including-rulings-tribunals- and-anti-suit-injunctions/> accessed 23 September 2021.

- Hess B, *The private-public divide in international dispute resolution* (Pocketbooks of The Hague Academy of International Law, Brill/Nijhoff 2018).

- Hessbruegge J, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36(4) New York University Journal of International Law and Politics 265.

- Hiemstra H M, 'The Importance and Difficulties of Establishing and Clarifying the

International Legal Personality and Responsibility of Non-State Armed Groups' in Samantha Besson and Matthieu Loup (eds), *International Responsibility: Essays in Law, History and Philosophy* (Éditions romandes Volume 10. Schulthess 2017).

- Higgins R, 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom' (1977) 71(3) American Journal of International Law 423.
- Hildebrand P, 'The Challenge of Sovereign Wealth Funds' (Geneva, 18 December 2007) <https://www.snb.ch/en/mmr/speeches/id/ref_20071218_pmh/source/ref_20071218_pmh.en.pdf> accessed 30 January 2023.
- Hillebrand Pohl J, 'The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms Pages' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer International Publishing 2021).
- Hoogh AJJ de, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72(1) British Yearbook of International Law 255.
- Hope A, 'Antwerp puts end to potential Chinese energy deal' *The Bulletin* (3 October 2015) <https://www.thebulletin.be/antwerp- puts-end-potential-chinese-energy-deal> accessed 9 March 2023.
- Horwitz M J, 'The History of the Public/Private Distinction' (1982) 130(6) University of Pennsylvania Law Review 1423.
- Howse R and Chalamish E, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (2009) 20(4) European Journal of International Law 1087.
- Howse R, Ruiz-Fabri H, Ulfstein G, Zang M Q (ed), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge University Press 2018).
- Hoyle MSW, *Mixed Courts of Egypt* (Arabic and Islamic laws series, Graham & Trotman 1991).

- Hsu L, 'The role and future of sovereign wealth funds: A trade and investment perspective' (2017) 52(4) Wake Forest Law Review 837.
- I-Arb Africa, 'Zambia Pays First Installation of 380 Million USD Award' [2017] <https://www.iarbafrica.com/f/17-news- list/news/544-zambia-pays-first-installation-of-380-million-usd-award> accessed 23 September 2021.
- IFSWF, 'Implementing the Santiago Principles: 12 Case Studies: From Demonstrating Commitment to Creating Value' <https://www.ifswf.org/sites/default/files/IFSWF_CaseStudies_Nov2016_0.pdf> accessed 20 May 2023.
- IFSWF, 'Trends in Sovereign Wealth Funds' Asset Allocation over Time: A Survey' (2016) <https://www.ifswf.org/trends-sovereign- wealth-funds-asset-allocation-over-time-survey> accessed 5 February 2023.
- International Chamber of Commerce, 'ICC Dispute Resolution 2019 Statistics' (2020) <https://globalarbitrationnews.com/wp- content/uploads/2020/07/ICC-DR-2019-statistics.pdf> accessed 30 May 2022.
- ——, 'ICC Dispute Resolution 2020 Statistics' (2021) <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution- 2020-Statistics.pdfZ> accessed 30 May 2022.
- International Monetary Fund, 'Chapter 3 State-Owned Enterprises: the Other Government', *Fiscal Monitor 2020, April 2020: Policies to Support People during the COVID-19 Pandemic*.
- International Monetary Fund, 'Fiscal Monitor 2020, April 2020: Policies to Support People during the COVID-19 Pandemic' <https://www.imf.org/-/media/Files/Publications/fiscal-monitor/2020/April/English/ch3.ashx> accessed 17 January 2023.
- Investment Policy Monitor (7 December 2012) <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/2311/canada-approves-new-guidelines-for-the-screening-of-foreign-investments-by-state-owned-enterprises-soes-> accessed 10 March 2023.

- ——, ‘Increases scrutiny on investment by foreign State-owned enterprises in critical minerals sectors’ (28 October 2022) <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4161/canada-increases-scrutiny-on-investment-by-foreign-state- owned-enterprises-in-critical-minerals-sector> accessed 10 March 2023.

- Jen S L, ‘Sovereign Wealth Fund Investment Strategies: Complementing Central Bank Investment Strategies’ in Udaibir S. Das, Adnan Mazarei, and Han van der Hoorn (ed), *Economics of Sovereign Wealth Funds Issues for Policymakers* (IMF 2010).

- Juratovitch B, ‘Waiver of State Immunity and Enforcement of Arbitral Awards’ (2016) 6(2) Asian Journal of International Law 199.

- Jürgen Bröhmer, ‘State Immunity and Sovereign Bonds’ in Anne Peters, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015).

- Kamminga M T, ‘Confiscating Russia’s Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?’ (2023) 16 Netherlands International Law Review 175.

- Kania E and Laskai L, ‘Myths and Realities of China’s Military-Civil Fusion Strategy’ (28 January 2021) <https://www.cnas.org/publications/reports/myths-and-realities-of-chinas-military-civil-fusion-strategy> accessed 10 March 2023.

- Karametaxas X E, ‘Sovereign Wealth Funds as Socially Responsible Investors’ in Giovanna Adinolfi and others (eds), *International economic law: Contemporary issues* (Springer Nature 2017).

- Kees A, ‘Responsibility of States for Private Actors’ [2011] Max Planck Encyclopedias of International Law [MPIL] 1.

- Kennedy D, ‘Stages of the Decline of the Public/Private Distinction’ (1982) 130 University of Pennsylvania Law Review 1349.

- Kim M, ‘Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements’ (2017) 58(1) Harvard International Law Journal 225.

- Klabbers J, ‘The General, the Lords, and the Possible End of State Immunity’ (1999) 68(1) Nordic Journal of International Law.

- Koepp J, Kryvoi Y and Biggs J, 'Empirical Study: Annulment in ICSID Arbitration' (London 2021) <https://www.biicl.org/documents/10899_annulment-in-icsid-arbitration190821.pdf> accessed 27 July 2022.
- Kolb R (ed), *The International Law of State Responsibility* (Edward Elgar Publishing 2017).
- Kondrashov N, 'Sovereign Immunity from Execution (in Enforcement)' (2022) <https://jusmundi.com/en/document/publication/en-sovereign-inmunity-from-execution-in-enforcement> accessed 7 October 2022.
- Koskenniemi M, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) Modern Law Review 1.
- Kovács C, *Attribution in International Investment Law* (International arbitration law library volume 45, Kluwer Law International B. V 2018).
- Kowalski P and Rabaioli D, 'Bringing together international trade and investment perspectives on state enterprises' [2017] <https://www.oecd-ilibrary.org/content/paper/e4019e87-en>.
- Krajewski M and Singer C, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' in A. von Bogdandy and R. Wolfrum (ed), *Max Planck Yearbook of United Nations Law* (vol 16. Brill N.V. 2012).
- Kryvoi Y, 'Piercing the Corporate Veil in International Arbitration' (2011) 1(2) The Global Business Law Review 169.
- Kupelyants H, *Sovereign Defaults Before Domestic Courts* (vol 1, Oxford University Press 2018).
- Kurlantzick J, *State Capitalism: How the Return of Statism is Transforming the World* (Oxford University Press 2016).
- Kurtz J, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25(1) ICSID Review - Foreign Investment Law Journal 200.

- ——, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents’ (2009) 20(3) European Journal of International Law 749.
- Lauterpacht H ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 British Yearbook of International Law 220.
- Lawrence D M, ‘Private Exercise of Governmental Power’ (1986) 61(4) Indiana Law Journal 647.
- Lazzarini S G and Musacchio A, ‘State Ownership Reinvented? Explaining Performance Differences between State-Owned and Private Firms’ (2018) 26(4) Corporate Governance: An International Review 255.
- Lee P L, ‘Central Banks and Sovereign Immunity’ (2003) 41(2) Columbia Journal of Transnational Law. Lenihan AT, *Balancing Power without Weapons* (vol 166, Cambridge University Press 2018).
- Legum B, ‘Defining Investment and Investor: Who is Entitled to Claim?’ (2006) 22(4) Arbitration International 521.
- Lethbridge J, ‘The Politics of State-Owned Eterprises: The case of the rail sector’ in Luc Bernier, Philippe Bance and Massimo Florio (eds), *The Routledge Handbook of State-Owned Enterprises* (Routledge international handbooks. Routledge 2020).
- Levy J D (ed), *The State after Statism: New State Activities in the Age of Liberalization* (Harvard University Press 2006).
- Lillich R B, Gordon A Christenson, Jane Chalmers, David Caron, Pierre M. Dupuy, ‘Attribution Issues in State Responsibility’ (1990) 84 Proceedings of the Annual Meeting (American Society of International Law) 51.
- Lillich R B, Magraw D B and Bederman D J (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1997).
- Lo J E, ‘State-Controlled Entities as “Investors” under International Investment Agreements’ (8 October 2012). Columbia FDI Perspectives on topical foreign direct investment issues 80

<https://academiccommons.columbia.edu/doi/10.7916/D8VH5X1G/> accessed 25 February 2021.

- Lof K, Waller A, Hyder L and Swartling M, 'Quick Answers on State Immunity – Sweden' [2020] Kluwer Law International <https://www.mannheimerswartling.se/app/uploads/2021/07/Quick-Answers-on-State-Immunity-–-Sweden-Kristoffer-Lof- Asa-Waller-Lisa-Hyder.pdf> accessed 20 November 2022.

- López D, 'Preface to 2023 Annual Report - SOIs in a Multipolar World' (1 January 2023) <https://globalswf.com/reports/2023annual> accessed 30 January 2023.

- Lowther J AA, 'Cloaked by the Sovereign Veil: Recent Swedish Decision Applies Sovereign Immunity "Categorically"' (10 September 2020) <http://arbitrationblog.kluwerarbitration.com/2020/09/10/cloaked-by-the-sovereign-veil-recent-swedish-decision-applies- sovereign-immunity-categorically/> accessed 2 December 2022.

- Lustig D and Benvenisti E, 'The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings' (2014) 15(1) Theoretical Inquiries in Law.

- Luttwak E, 'From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce' [1990] The Natioanal Interest Efraim Chalamish, 'Global Investment Regulation and Sovereign Funds' (2012) 13(2) Theoretical Inquiries in Law.

- Mačák K, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) 21(3) Journal of Conflict and Security Law 405.

- Maddocks J, 'Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution' (2019) 59(1) Virginia Journal of International Law.

- Magnusson Law, 'The Swedish Supreme Court: Certain Property Owned by a Central Bank is not Protected from Enforcement According to International Principles of State Immunity' <https://www.magnussonlaw.com/news/the-swedish-supreme-court-certain-property-owned-by-central-bank-is-not-protected-from-enforcement-according-to-

international-principles-of-state-immunity/#:~:text=The%20Supreme%20Court%20concluded%20that,by%20state%20immunity%20from%20enforcement.> accessed 29 May 2023.

- Maher AG, 'Global South', in O'Brien E (Ed) *Oxford Bibliographies in Literary and Critical Theory*, Oxford University Press, New York, USA, 2017.
- Mallien A, Van den Bossche M, van der Haegen O, 'Enforcement of Investment Treaty Awards against Sovereign States in a Landscape of Sovereign Immunity' in Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Second edition. Globe Law and Business 2021).
- Mann F A, 'Immunity of Sovereign States' (1938) 2(1) The Modern Law Review 57.
- Mark W and Weidemaier C, 'Piercing the (Sovereign) Veil: The Role of Limited Liability in State Owned Enterprises' (2021) 46(2) Brigham Young University Law Review, UNC Legal Studies Research Paper 795.
- Marxsen C, 'The Crimea Crisis from an International Law Perspective' [2016] Kyiv-Mohyla Law and Politics Journal 13.
- Matsushita M and Lim C L, 'Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules' (2020) 19(3) World Trade Review 402.
- Maupin J A, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54(2) Virginia Journal of International Law 367.
- Mavroidis P C and Sapir A, *China and the WTO: Why Multilateralism still Matters* (Princeton university press 2021).
- McCalman P and others, 'Screening of Chinese investments intensifies' [2022] Investment Treaty News <https://www.iisd.org/itn/en/2022/12/26/screening-of-chinese-investments-intensifies1-phillip-mccalman-laura-puzzello-tania-voon- andrew-walter/#_ftnref6> accessed 10 March 2023.
- McGregor L, 'State Immunity and Human Rights: Is There a Future after Germany v. Italy?' (2013) 11(1) Journal of International Criminal Justice 125.

- McLaughlin M, ‘Defining a State-Owned Enterprise in International Investment Agreements’ (2020) 34(3) ICSID Review - Foreign Investment Law Journal 1.
- Megginson WL and others, ‘Sovereign Wealth Fund Investment Patterns and Performance’ (Working Papers, 2009) 2009. <https://EconPapers.repec.org/RePEc:fem:femwpa:2009.22> accessed 25 March 2021.
- Megginson WL, Lopez D and Malik AI, ‘The Rise of State-Owned Investors: Sovereign Wealth Funds and Public Pension Funds’ (2021) 13(1) Annual Review of Financial Economics 247.
- Mégret F, ‘Are There “Inherently Sovereign Functions” in International Law?’ (2021) 115(3) American Journal of International Law.
- Micklitz HW, ‘Rethinking the public/private divide’ in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law* (Cambridge University Press 2014).
- Milano E, ‘The Investment Arbitration between Italy and Cuba: The Application of Customary International Law under Scrutiny’ (2012) 11(3) The Law & Practice of International Courts and Tribunals 499.
- Milanović M, ‘State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken’ (2009) 22(2) Leiden Journal of International Law 307.
- Miles C, ‘State Debts and State-owned Corporations: Trans-Atlantic Perspectives: Searching for an Identity: Sovereign Wealth Funds between their Private and Public Nature in International and Domestic Litigation’ (2021) 81(7) Questions of International Law.
- Milhench C, ‘Kazakhstan’s frozen billions sound alarm for sovereign funds’ [2018] Reuters <https://www.reuters.com/article/us- global-swf-kazakhstan-analysis-idUSKCN1G40MI> accessed 29 May 2023.
- Miroudot S and Ragoussis A, ‘Actors in the International Investment Scenario: Objectives, performance and advantages of affiliates of state-owned enterprises and sovereign wealth funds’ in Roberto Echandi and Pierre Sauve (ed), Prospects in International Investment Law and Policy (Cambridge University Press 2013).

- Mohtashami R and El-Hosseny F, 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?' (2016) 3(2) BCDR International Arbitration Review 371.

- Momtaz D, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford commentaries on international law. Oxford University Press 2010).

- Monitor-FEEM, 'Weathering the Storm: Sovereign Wealth Funuds in the Global Economic Crisis of 2008 - SWF Annual Report 2008' (April 2009) <https://bafficarefin.unibocconi.eu/sites/default/files/media/attach/2008-SWF-Annual-Report.pdf> accessed 24 January.

- Montanaro F and Violi F, 'The Remains of the Day: The International Economic Order in the Era of Disintegration' (2020) 23(2) Journal of International Economic Law 299.

- Morgan-Foster J and Savoie P, 'World Court finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide' (2007) 11(9) American Society of International Law-Insights.

- Muchlinski P, 'Corporations in International Law' [2014] Max Planck Encyclopedias of International Law [MPIL] 1 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1513>.

- —— 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' in Christina Binder (ed), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009).

- Muchlinski P and Rogge E, *Multinational Enterprises and the Law* (The Oxford international law library, Third edition, Oxford University Press 2021).

- Murray Scot Tanner, 'Beijing's New National Intelligence Law: From Defense to Offense' *Lawfare* (20 July 2017) <https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense> accessed 10 March 2023.

- Musacchio A and Lazzarini S G, 'Chinese Exceptionalism or New Global Varieties of State Capitalism' in Benjamin L Liebman and Curtis J Milhaupt (eds), *Regulating the visible hand?: The institutional implications of Chinese state capitalism/ edited by Benjamin L. Liebman and Curtis J. Milhaupt* (Oxford University Press 2016).
- ——, *Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond* (Harvard University Press 2014).
- Nalbandian B, 'The Relevance of the Green Swan Risk: Accounting for Climate Change in the Legal Framework of Sovereign Investors' in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023).
- ——, 'EU Foreign Direct Investment Screening in Pandemic Times: Between EU Protection and EU' (2020) <https://blogdroiteuropeen.com/2020/04/07/eu-foreign-direct-investment-screening-in-pandemic-times-between-eu-protection-and-eu-protectionisms-by-bianca-nalbandian/> accessed 14 February 2023.
- ——, 'Security for Costs' [2020] Max Planck Encyclopedias of International Law [MPIL] 1 <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2766.013.2766/law-mpeipro-e2766> accessed 25 May 2023.
- ——, 'State Capitalists as Claimants in International Investor-State Arbitration' (2021) 81(7) Questions of International Law 5.
- Nazarian B, 'Sovereign Wealth Funds and Their Rights under the Current Investor-State Arbitration System' (2017) 9(1) Bocconi Legal Papers.
- Nelson D, 'How Do You Solve a Problem Like Maria? US – Countervailing Measures (China) (21.5), 20 (2021), 556, at 558.' (2021) 20(4) World Trade Review 556.
- Newcombe A and Paradell L, *Law and practice of investment treaties: Standards of treatment/ by Andrew Newcombe, Lluís Paradell* (Wolters Kluwer 2009).
- Nolte G, 'From Dionisio Anzillotti to Roberto Ago: The Classical International Law on State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13(5) European Journal of International Law 1083.

- Norton JJ, 'The 'Santiago Principles' for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes' (2010) 13(3) Journal of International Economic Law 645.

- Nouvel Y, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement : Nouveaux développements* (Bibliothèque de l'Institut des hautes études internationales de Paris. Anthemis; L.G.D.J 2006).

- Nußberger B J, Victoria Otto, 'Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)' [2015] Max Planck Encyclopedia Public International Law 1.

- O'Keefe R, Tams C, Tzanakopoulos A (Assistant Editor) (ed), The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary (Oxford University Press 2013).

- Oddenino A and Bonetto D, 'The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law' (2020) 20(3) Global Jurist.

- OECD, 'State-Owned Holding Companies: A Background Note for the OECD Asia-Pacific Network Meeting on Corporate Governance of State-Owned Enterprises 8-9 December' (8 December 2022) <https://www.oecd.org/corporate/ca/state-owned-holding-companies- background-note.pdf> accessed 5 December 2022.

- ——, 'International Investment Implications of Russia's War against Ukraine (abridged version)' (4 May 2022). Policy Responses: Ukraine - Tackling The Policy Challenges <https://www.oecd-ilibrary.org/deliver/6224dc77-en.pdf?itemId=%2Fcontent%2Fpaper%2F6224dc77-en&mimeType=pdf> accessed 10 March 2023.

- ——, 'International Investment Law: Understanding Concepts and Tracking Innovations' (Paris).

- ——, 'Investment Newsletter' (October 2007) issue 5 <http://www.oecd.org/daf/inv/investment-policy/39534401.pdf> accessed 20 February 2021.

- ——, ‘Multi-dimensional Review of Kazakhstan: In-depth Analysis and Recommendations’ (2017) <https://www.oecd- ilibrary.org/development/multi-dimensional-review-of-kazakhstan_9789264269200-en> accessed 1 December 2022.
- ——, ‘OECD Benchmark Definition of Foreign Direct Investment’ (2008) 1-254 <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf> accessed 25 February 2023.
- ——, ‘State Owned Enterprises and the Principle of Competitive Neutrality’ [2010] 1 <https://www.oecd.org/daf/competition/46734249.pdf> accessed 2 November 2021.
- ——, ‘The Relationship between FDI Screening and Merger Control Reviews –Note by BIAC’ (18 November 2022) <https://one.oecd.org/document/DAF/COMP/WD(2022)115/en/pdf> accessed 25 February 2023.
- Oleg Alyoshin, Olha Nosenko and Ivan Yavnych, ‘The Investment Treaty Arbitration Review: Attribution of Acts or Omissions to the State’ [2021] The Law Reviews <https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/attribution-of-acts-or- omissions-to-the-state#footnote 016-backlink> accessed 20 November 2022.
- Olleson S, ‘Attribution in Investment Treaty Arbitration’ (2016) 31(2) ICSID Review - Foreign Investment Law Journal 457. Simon Weber, ‘Jurisdiction Ratione Materiae’ (2021) <https://jusmundi.com/en/document/wiki/en-jurisdiction-ratione-materiae> accessed 28 September 2021.
- Oppenheim L, Jennings RY and Watts A, *Oppenheim’s International Law* (9th ed. Longman 1996). Orakhelashvili A (ed), *Peremptory Norms in International Law* (Oxford University PressOxford 2008).
- —, ‘State Practice, Treaty practice and State Immunity in International and English Law’ in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation* (Cambridge University Press 2015).
- Orakhelashvili A, ‘Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide’ in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge

University Press 2019).

- Ostranský J, ‘State Capitalism, ‘Normal’ Capitalism and Other Capitalisms? A Discreet Place of the State in Neoliberal International Investment Law’ in Panagiotis Delimatsis and others (eds), *State Capitalism and International Investment Law* (Studies in international trade and investment law vol 28. Hart Publishing an imprint of Bloomsbury Publishing 2023).

- Ouni Z, Bernard P and Plaisent M, ‘Sovereign Wealth Funds Definition: Challenges and Concerns’ (2020) 8(6) Advances in Economics and Business 362.

- Özdan S, ‘State immunity or State impunity in Cases of Violations of Human Rights Recognised as Jus Cogens Norms’ (2019) 23(9) The International Journal of Human Rights 1521.

- Palchetti P, ‘De Facto Organs of a State’ [2017] Max Planck Encyclopedias of International Law [MPIL] 1.

- Parra A R, *ICSID: An Introduction to the Convention and Centre* (Oxford University Press 2020).

- Parry C and others, *Parry & Grant encyclopaedic dictionary of international law* (3rd ed. Oxford University Press 2009).

- Patel R, ‘Quite Extreme Circumstances: Privy Council Determines the $100m Question in La Générale des Carrières et des Mines (‘Gécamines’) v F.G. Hemisphere LLC (‘Hemisphere’)’ (31 July 2012) <http://arbitrationblog.kluwerarbitration.com/2012/07/31/quite-extreme-circumstances-privy-council-determines-the-100m-question-in-la- generale-des-carrieres-et-des-mines-gecamines-v-f-g-hemisphere-llc-hemisphere/> accessed 9 December 2022.

- Patrikis E T, ‘Foreign Central Bank Property: Immunity from Attachment in the United States’ [1982] University of Illinois Law Review 265.

- ——, ‘Sovereign Immunity and Central Bank Immunity in the United States’ in International Monetary Fund (ed), *Current Legal Issues Affecting Central Banks, Volume I* (INTERNATIONAL MONETARY FUND 1992).

- Pauwelyn J, ‘Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China’ (2013) 12(2) World Trade Review 235.

- Pellet A, ‘The Case Law of the ICJ in Investment Arbitration’ (2013) 28(2) ICSID Review 223.

- Peter CM, ‘Selected Essays: World Bank, Icsid, and Other Subjects of Public and Private International Law. By Aron Broches. Martinus Nijoff Publishers, Dordrecht/Boston/London, 1995.’ (1996) 11(2) ICSID Review - Foreign Investment Law Journal 500.

- Peters A, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015).

- Peterson L E, ‘Kazakhstan Seeks to Annul $125 Million ICSID Award in Telecoms Dispute; We Review Earlier Kazakh Arbitrations’ (12 November 2008) <https://www.iareporter.com/articles/kazakhstan-seeks-to-annul-125-million-icsid-award-in-telecoms- dispute-we-review-earlier-kazakh-arbitrations/> accessed 9 December 2022.

- ——, ‘Moldovans Secure $500+ Million Arbitral Award in Claim against Kazakhstan under Energy Charter Treaty’ [2014] <https://www.iareporter.com/articles/moldovans-secure-500-million-arbitral-award-in-claim-against-kazakhstan-under-energy-charter-treaty/> accessed 29 May 2023.

- ——, ‘Oman’s sovereign wealth fund is the latest claimant to try to hold a sovereign state – this time, Bulgaria – liable for losses tied to a bank failure’ [2015] Investment Arbitration Reporter <https://www.iareporter.com/articles/omans-sovereign-wealth-fund-is-the-latest- claimant-to-try-to-hold-a-sovereign-state-this-time-bulgaria-liable-for-losses-tied-to-a-bank-failure/> accessed 25 May 2021.

- Petrochilos G, ‘Attribution: State Organs and Entities Exercising Elements of Governmental Authority’ in Katia Yannaca-Small (ed), *Arbitration under international investment agreements: A guide to the key issues/ edited by Katia Yannaca-Small* (Second edition. Oxford University Press 2018).

- ——, ‘Attribution’ in Katia Yannaca-Small (ed), *Arbitration under international investment agreements: A guide to the key issues/ edited by Katia Yannaca-Small* (Oxford University Press 2010).
- Preqin, ‘Sovereign Wealth Funds in Motion’ (May 2021) <https://www.preqin.com/insights/research/reports/sovereign-wealth- funds-in-motion> accessed 14 February 2023.
- Puig S and Shaffer G C, ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’, (2018) 112 American Journal of International Law 361.
- ——, ‘Social Capital in the Arbitration Market’, (2014) 25(2) European Journal of International Law, 387.
- Qi D, ‘State Immunity, China and Its Shifting Position’ (2008) 7(2) Chinese Journal of International Law 307. Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).
- Rajavuori M and Huhta K, ‘Investment Screening: Implications for the Energy Sector and Energy Security’ (2020) 144 Energy Policy 1.
- Ramsundar NK, *State Responsibility for Support of Armed Groups in the Commission of International Crimes* (Queen Mary studies in international law volume 40, Brill Nijhoff 2020).
- Ranjan P, ‘Germany agrees investment in 50Hertz, fending off China’s State Grid’ (27 July 2018) <https://www.reuters.com/article/50hertz-ma-kfw-idUSL5N1UN1HU> accessed 9 March 2023.
- ——, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (First edition, Oxford University Press 2019). Renz F, *State Responsibility and New Trends in the Privatization of Warfare* (Edward Elgar Publishing Limited 2020).
- Rapp Nilsen H and Sjåfjell B and Richardson B J, ‘The Norwegian Government Pension Fund Global. Risk Based versus Ethical Investments’ (2019) 88(1) Vierteljahrshefte zur Wirtschaftsforschung 65.
- Reddy S K, ‘Pot the ball? Sovereign wealth funds’ outward FDI in times of global

financial market turbulence: A yield institutions-based view' (2019) 19(4) Central Bank Review 129.

- Reece Thomas K and Small J, 'Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture?' (1999) 50(1) Netherlands International Law Review 1.

- Reinisch A, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17(4) European Journal of International Law 803.

- Remy J Y, 'The Application of the Articles on Responsibility of States for Internationally Wrongful Acts in the WTO Regime' EJIL Talk! Blog of the European Journal of International Law <https://www.ejiltalk.org/the-application-of-the-articles-on-responsibility-of- states-for-internationally-wrongful-acts-in-the-wto-regime/> accessed 24 February 2022.

- Richardson B J, 'Sovereign Wealth Funds and Socially Responsible Investing: An Emerging Public Fiduciary' [2012] Global Journal of Comparative Law 125 <https://brill.com/view/journals/gjcl/1/2/article-p125_1.xml> accessed 10 March 2023.

- ——, 'Sovereign Wealth Funds and the Quest for Sustainability: Insights from Norway and New Zealand' [2011] Nordic Journal of Commercial Law 1.

- Risvas M, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non- Signatories' (2022) 71(1) International and Comparative Law Quarterly 183.

- Roberts A, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(1) ICLQ 57.

- Roberts A, Moraes Choer H, Ferguson V, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22(4) Journal of International Economic Law 655.

- Robinson W I, *Global Capitalism and the Crisis of Humanity* (Cambridge University Press 2014).

- Rodrik D, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton university press 2018).

- Rozanov A, 'Definitional Challenges of Dealing with Sovereign Wealth Funds' (2011) 1(2) Asian Journal of International Law 249.
- ——, 'Who Holds the Wealth of Nations?' (2005) 15(4) Central Banking Journal 52.
- Ruiz Fabri H and Paine J, 'The Procedural Cross-Fertilization Pull' in Mark P Chiara Giorgetti (ed), *Beyond Fragmentation* (Cambridge University Press 2022).
- Ṣabāḥī B, Rubins N, Wallace D, *Investor-State Arbitration* (Second edition, Oxford University Press 2019).
- Salacuse J W, *The Law of International Investment Treaties* (Oxford international law library, Oxford University Press 2010). Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?' (2016) 19(2) Journal of International Economic Law 417.
- Santiso J, 'Sovereign Development Funds: Key Financial Actors of the Shifting Wealth of Nations' (October 2008). OECD Emerging Markets Network Working Paper <https://www.oecd.org/dev/41944381.pdf> accessed 3 February 2023.
- Sauvant K P, Sachs L E and Jongbloed, Schmit Jongbloed W P F (eds), Sovereign investment: Concerns and policy reactions (Oxford University Press 2012).
- Schicho L, *State entities in International Investment Law* (Studien zum internationalen Investitionsrecht Bd. 4, 1. Aufl. Nomos; facultas.wuv; Dike 2012).
- Schill S and Briese R, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' in Armin von Bogdandy and Rüdiger Wolfrum (eds.) (ed), *Max Planck Yearbook of United Nations Law Online* (Volume 13: Issue 1. Brill | Nijhoff 2009).
- Schlemmer E C, 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski, Federico Ortino, Christoph Schreuer (ed), *The Oxford handbook of International Investment Law* (Oxford University Press 2008).
- Schloemann H L and Ohlhoff S, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93(2) American Journal of International Law 424.

- Schmidt V A, 'Putting the Political Back into Political Economy by Bringing the State Back in Yet Again' (2009) 61(3) World Politics
- Schmit Jongbloed W P F, Sachs L E and Sauvant K P, 'Sovereign Investment: An Introduction' in Karl P Sauvant, Lisa E Sachs and Jongbloed, Wouter P.F. Schmit Jongbloed (eds), *Sovereign investment: Concerns and policy reactions* (Oxford University Press 2012).
- Schneiderman D (ed), Investment Law's Alibis (Cambridge University Press 2022).
- Schreuer C, State Immunity: Some Recent Developments (Hersch Lauterpacht memorial lectures vol 8, Repr. of the ed. Grotius 1988, Grotius 1995).
- Schreuer C, *The ICSID convention: A commentary on the convention on the settlement of investment disputes between states and nationals of other states* (Loretta Malintoppi, August Reinisch and Anthony Sinclair tr, 2. ed. Cambridge University Press 2009).
- Shalakany A, 'Arbitration and the Third World: Bias under the Scepter of Neo-Liberalism', (2000) 41 Harvard International Law Journal 419.
- Shang S C and Wei S, 'When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: Is There Still a Black Hole in International Law?' (2018) 31(4) Leiden Journal of International Law 915.
- Shirlow E and Duggal K, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) 37(1-2) ICSID Review.
- Simma B and Kill T, 'Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology' in Christina Binder (ed), International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer (Oxford University Press 2009).
- Singh Bachher J, Dixon A D and Monk A H B, *The New Frontier Investors: How Pension Funds, Sovereign Funds, and Endowments are Changing the Business of Investment Management and Long-Term Investing* (Palgrave Macmillan 2016).
- Siqi Li X T, 'Reforming WTO Subsidy Rules: Past Experiences and Prospects' (2020) 54(6) Journal of World Trade 853.

- Solano Meardi A, ‘State Attribution: Whether State Ownership of a Private Entity Is Important in Determining if the Actions of that Entity Are Attributable to the State’ (2021) 7(1) Arbitration Brief 1.
- Sornarajah M, ‘Problems in Applying the Restrictive Theory of Sovereign Immunity’ (1982) 31(4) International and Comparative Law Quarterly 661.
- Sovereign Wealth Funds Institute (SWFI), ‘What Is a Sovereign Wealth Fund?’ <https://www.swfinstitute.org/research/sovereign- wealth-fund> accessed 20 February 2021.
- Spagnolo A, ‘A European Way to Approach (and Limit) the Law on State Immunity? The Court of Justice in the RINA Case’ (2020) 5(1) European Papers 645.
- Spano A, ‘State-Owned Enterprises in ISDS: European Perspective’ in Yuwen Li, Tong Qi and Cheng Bian (eds), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (The rule of law in China and comparative perspectives, 1st. Routledge 2020).
- Spechler MC, Ahrens J and Hoen HW, *State capitalism in Eurasia* (World Scientific 2017).
- Sperber N, ‘Servants of the State or Masters of Capital? Thinking through the Class Implications of State-Owned Capital’ (2022) 28(3) Contemporary Politics 264.
- Steinitz M, ‘Foreign Direct Investment by State-Controlled Entities at a Crossroad of Economic History’ in Karl P Sauvant, Lisa E Sachs and Jongbloed, Wouter P.F. Schmit Jongbloed (eds), *Sovereign investment: Concerns and policy reactions* (Oxford University Press 2012).
- Stern B, ‘The Elements of An Internationally Wrongful Act’ in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (ed), *The Law of International Responsibility* (Oxford Commentaries on International Law. Oxford University Press 2010).
- Stoll P, ‘State Immunity’ [2011] Max Planck Encyclopedia of Public International Law 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106> accessed 25 November 2021.

- Subramanya R, 'How Fortune 500 reveals long-term showdown between US and China: Not yet an economic superpower status, India's significance remains geopolitical' NIKKEI Asia <https://asia.nikkei.com/Opinion/How-Fortune-500-reveals-long-term-showdown- between-US-and-China> accessed 12 February 2023.

- Sucharitkul S, 'Asser Institute Lectures on International Law: Developments and Prospects of the Doctrine of State Immunity – Some Aspects of Codification and Progressive Development' (1982) 29(02) Netherlands International Law Review 252.

- SWF Global, 'Changes in Abu Dhabi: A Tale of Two Brothers, Two Sons, and Two Key Advisors' <https://globalswf.com/news/changes-in-abu-dhabi-a-tale-of-two-brothers-two-sons-and-two-key-advisors> accessed 10 March 2023.

- ——, 'Russian Sovereign Funds Hammered by Sanctions and Geopolitical Risk' (25th March 2022) <https://globalswf.com/news/russian-sovereign-funds-hammered-by-sanctions-and-geopolitical-risk> accessed 9 March 2023.

- SWFI, 'Linaburg-Maduell Transparency Index (LMTI)' <https://www.swfinstitute.org/research/linaburg-maduell-transparency-index#:~:text=The%20Linaburg%2DMaduell%20transparency%20index%20is%20a%20method%20of%20rating,funds%20to%20show%2 0their%20intentions.> accessed 9 March 2023.

- Talmon S, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58(3) The International and Comparative Law Quarterly 493.

- Tams C J, 'All's Well that Ends Well? Comments on the ILC's Articles on State Responsibilty' (2002) 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 759.

- Tan C, 'China slaps export curbs on chipmaking metals in tech war warning to U.S., Europe' *CNBC* (7 July 2023) <https://www.cnbc.com/2023/07/04/china-imposes-export-curbs-on-chipmaking-metals-in-tech-war-with-the-us.html> accessed 8 August 2023.

- Tanzi A M, 'Su immunità ed evoluzione della società internazionale' in Alessandra Lanciotti and Attila Tanzi (eds), *Le immunità nel diritto internazionale: Temi scelti: atti*

*del convegno di Perugia 23-25 maggio 2006* (G. Giappichelli 2007).

- te Velde D W, 'Policies Towards Foreign Direct Investment in Developing Countries: Emerging Best-Practices and Outstanding Issues, 2001, 17-18.' (London March 2001) <https://cdn.odi.org/media/documents/5543.pdf> accessed 22 February 2023.
- Tejera V J, 'The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds' (2016) 25(1) University of Miami Business Law Review 1.
- Terzieva V, 'State Immunity and Victims' Rights to Access to Court, Reparation, and the Truth' (2022) 22(4) International Criminal Law Review 780.
- Thatcher M and Vlandas T, *Foreign States in Domestic Markets: Sovereign Wealth Funds and the West* (First edition, Oxford University Press 2021).
- The Economist, 'China's "going out" strategy - The Chinese put reserves to work' *The Economist* (21 July 2009) <https://www.economist.com/free-exchange/2009/07/21/chinas-going-out-strategy> accessed 3 March 2021.
- The Economist, 'The Rise of State Capitalism' *The Economist* (21 January 2012).
- The Economist, The Economist Intelligence, 'Democracy Index 2021: The China Challenge' (2022).
- Thomas Junghanns JK, 'The Potential for a Sovereign Wealth Fund to Acquire and Exert Influence over the Eurozone' (2022) 57(3) Intereconomics 179.
- Thompson C, 'Botas v Tepe: State Immunity in the Context of Arbitration Enforcement' (29 November 2018) <http://arbitrationblog.practicallaw.com/botas-v-tepe-state-immunity-in-the-context-of-arbitration-enforcement/> accessed 9 December 2022.
- Thornton M (ed), *Public and Private: Feminist legal debates/edited by Margaret Thornton* (Oxford University Press 1995).
- Thouvenin J-M and Grandaubert V, 'The Material Scope of State Immunity from Execution' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).
- Timberg S, 'Sovereign Immunity, State Trading, Socialism and Self-Deception' (1961-

1962) 56(1) Northwestern University Law Review 109.

- Tomuschat C, ‘7 The Case of Germany v. Italy before the ICJ’ in Anne Peters, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed),
- ——, ‘Attribution of International Responsibility: Direction and Control’ in Malcolm Evans and Panos Koutrakos (ed), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013).
- ——, ‘The International Law of State Immunity and Its Development by National Institutions National Institutions’ (2011) 44(4) The International Law of State Immunity and Its Development by National Institutions National Institutions 1105.
- ——, *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015).
- Townsend G, ‘State Responsibility for Acts of De Facto Agents’ (1997) 635(14) Arizona Journal of International & Comparative Law 635.
- Tran M, ‘Chinese oil firm drops Unocal bid’ The Guardian (2 August 2005) <https://www.theguardian.com/business/2005/aug/02/oil.money> accessed 9 March 2023.
- Trapp K, *State Responsibility for International Terrorism: Problems and Prospects* (Oxford monographs in international law, Oxford University Press 2011).
- Truman E M, *Sovereign Wealth Funds: Threat or Salvation?* (Peterson Institute for International Economics 2010).
- UK Department for Business, Energy & Industrial Strategy and The Rt Hon Sir Alok Sharma KCMG MP, ‘New powers to protect UK from malicious investment and strengthen economic resilience’ (11 November 2020) <https://www.gov.uk/government/news/new- powers-to-protect-uk-from-malicious-investment-and-strengthen-economic-resilience?utm_source=3296e277-d0a4-44ec-9ff2- d6db10546512&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate> accessed 10 March 2023.
- UNCTAD, ‘International Investment Agreements: Key Issues, Volume I’ (2004) <https://unctad.org/system/files/official- document/iteiit200410_en.pdf> accessed 26

March 2021.

- ——, ‘National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments’ (December 2019). Investment Policy Monitor - Special Issue <https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf> accessed 10 March 2023.

- ——, ‘The Evolution of FDI Screening Mechanisms: - Key Trends and Features -’ (February 2023). Investment Policy Monitor 25 <https://unctad.org/system/files/official-document/diaepcbinf2023d2_en.pdf> accessed 25 February 2023.

- ——, ‘The Evolution of FDI Screening Mechanisms: Key Trends and Features’ (2023). Investment Policy Monitor <https://unctad.org/system/files/official-document/diaepcbinf2023d2_en.pdf> accessed 9 March 2023.

- ——, ‘World Investment Report 2008: Transnational corporations and the Infrastructure Challenge’ (2008) <https://unctad.org/system/files/official-document/wir2008_en.pdf> accessed 20 October 2021.

- ——, ‘World Investment Report: Investment and the Digital Economy 2017’ (Geneva 2017) <https://unctad.org/system/files/official- document/wir2017_en.pdf> accessed 9 March 2023.

- ——, *Scope and definition: UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD series on issues in international investment agreements II, United Nations 2011).

- ——, United Nations Conference on Trade and Development, ‘Most Favoured Nation Treatment – UNCTAD Series on Issues in International Investment Agreements II’ (2010) <https://unctad.org/system/files/official-document/diaeia20101_en.pdf> accessed 10 November 2021.

- Ungerer J, ‘Sovereign Debt and Immunity: The Controversy of Subsequent Liability Limitation for State Bonds’ in Régis Bismuth and others (eds), *Sovereign Immunity Under Pressure* (Springer International Publishing 2022).

- United Nations Conference on Trade and Development, ‘The Protection of National

Security in IIAs' <https://unctad.org/system/files/official-document/diaeia20085_en.pdf> accessed 2 November 2021.

- United States, Law Library of Congress – Global Research Center, 'Law Lifting Sovereign Immunity in Selected Countries: Cuba, Iran, Libya, Russian Federation, Sudan, Syria' (May 2016,) <www.loc.gov/ law/ help/ sovereign- immunity/ lifting-sovereign- immunity.pdf> accessed 29 May 2023.

- Üstün E Y, *International Investment Dispute Awards: Facilitating Enforcement* (Lloyd's arbitration law library, 1st, Informa Law from Routledge 2022).

- van Aaken A, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution' in Anne Peters, Evelyne Lagrange, Stefan Oeter, Christian Tomuschat (ed), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015).

- van Aartsen C, 'The End of the Public-Private Divide' (14 September 2016) <https://www.maastrichtuniversity.nl/blog/2016/09/end-public-private-divide> accessed 11 November 2021.

- Van Bael & Bellis, 'Brussels Court of Appeal Upholds Attachment Order against Kazakhstan' (3 August 2021) <https://www.vbb.com/insights/trade-and-customs/brussels-court-of-appeal-upholds-attachment-order-against-kazakhstan> accessed 19 November 2021.

- van Harten G, 'The Public—Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56(2) International and Comparative Law Quarterly 371.

- van Hooft A, 'Netherlands' in Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Second edition. Globe Law and Business 2021).

- Vandevelde KJ, 'A Brief History of International Investment Agreements' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows/ edited by Karl P. Sauvant and Lisa E. Sachs* (Oxford University Press 2009).

- Varges G S, ‘Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention’ (1985) 26 Harvard International Law Journal 102.
- Varvitsioti E, ‘Piraeus port deal intensifies Greece’s unease over China links: Beijing cements control of key EU infrastructure but locals say they have not seen the investment they expected’ *Financial Times* (19 October 2021) <https://www.ft.com/content/3e91c6d2- c3ff-496a-91e8-b9c81aed6eb8> accessed 9 March 2023.
- Ventouratou A, ‘The Law on State Responsibility and the World Trade Organization’ (2021) 22(5-6) The Journal of World Investment & Trade 759.
- Verdier P and Voeten E, ‘How Does Customary International Law Change? The Case of State Immunity’ (2015) 59 International Studies Quarterly 209.
- Verdier PH, ‘How Does Customary International Law Change? The Case of State Immunity’ (2015) 59(2) International Studies Quarterly.
- Vinayak V, ‘The Pre-Establishment National Treatment Obligation: How Common Is It?’ [2019] EFILA Blog <https://efilablog.org/2019/01/14/the-pre-establishment-national-treatment-obligation-how-common-is-it/> accessed 10 March 2023.
- Viñuales J E, ‘Attribution of Conduct to States in Investment Arbitration’ (2022) 20 ICSID Reports 13.
- Viterbo A, *Sovereign Debt Restructuring: The Role and Limits of Public International Law* (Giappichelli Editore 2020).
- Voon T and Merriman D, ‘Incoming: How International Investment Law Constrains Foreign Investment Screening’ [2022] The Journal of World Investment & Trade 75.
- Waibel M and others, ‘The Backlash against Investment Arbitration: Perceptions and Reality’ [2010].
- Wang D and others, ‘Leviathan as Foreign Investor: Geopolitics and Sovereign Wealth Funds’ (2021) 52(7) Journal of International Business Studies 1238.

- Wang J, ‘State Capitalism and Sovereign Wealth Funds: Finding a “soft” Location in International Economic Law’ in Chin L Lim (ed), *Alternative Visions of the International Law on Foreign Investment* (Cambridge University Press 2016).
- Wang L, ‘Chinese SOE Investments and the National Security Protection under IIAs’ in Julien Chaisse (ed), *China’s international investment strategy: Bilateral, regional, and global law and policy/ edited by Julien Chaisse* (International economic law series, First Edition. Oxford University Press 2019).
- Ward C, Brill F and Raco M, ‘State capitalism, Capitalist Statism: Sovereign Wealth funds and the Geopolitics of London’s Real Estate Market’ (2022) 51(5) Environment and Planning: A-Economy and Space 1-18.
- Weatherall T (ed), *Duality of Responsibility in International Law* (Brill | Nijhoff 2022).
- Wehrlé F and Christiansen H, ‘State-owned Enterprises, International Investment and National Security: The Way Forward’ (23 July 2023) <https://medium.com/@OECD/state-owned-enterprises-international-investment-and-national-security-the-way- forward-c21982c9fa8c> accessed 10 March 2023.
- Wei S, ‘FG Hemisphere Associates v. Democratic Republic of the Congo’ (2014) 108(4) American Journal of International Law 776.
- Shan W and Wang P, ‘Divergent Views on State Immunity in the International Community’ in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).
- Whitsitt E and Weiler T, ‘Sovereign Wealth Funds and Bilateral Investment Treaties’ New Models: Issues, New Trends and State Practice’ in Fabio Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Edward Elgar 2015).
- Williams Z, ‘Emirati Investor Files UNCITRAL BIT Arbitration against India’ [2017] Investment Arbitration Reporter <https://www.iareporter.com/articles/emirati-investor-files-uncitral-bit-arbitration-against-india/> accessed 23 September 2021.
- Wilson R C and Cheng M, ‘An Introduction to Sovereign Wealth Funds’ (31 January

2022) <https://www.investopedia.com/articles/economics/08/sovereign-wealth-fund.asp> accessed 9 March 2023.

- Winch P D, 'State Immunity and the Execution of Investment Arbitration Awards' in Catharine Titi (ed), *Public Actors in International Investment Law* (Springer International Publishing 2021).
- Wittich S, 'Article 10' in Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013).
- ——, 'Article 2(1)c and (2) and (3)' in Roger O'Keefe, Christian Tams, Antonios Tzanakopoulos (Assistant Editor) (ed), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013).
- ——, 'Investment Arbitration as an Engine of Development of the Rules of Attribution - with Particular Focus on Lex Specialis and De Facto State Organs' in Christian Tams, Stephan Schill and Rainer Hofmann (eds), *International Investment Law and General International Law* (Edward Elgar Publishing 2023).
- ——, 'The Definition of Commercial Acts' in Gerhard Hafner, Marcelo Kohen and Susan Breau (eds), *State Practice Regarding State Immunities/La Pratique des Etats concernant les Immunités des Etats* (Brill | Nijhoff 2006).
- Wooldridge A, 'The Visible Hand' *The Economist*, Special Report - State Capitalism (21 January 2012).
- Wright M and others, 'State Capitalism in International Context: Varieties and Variations' (2021) 56(2) Journal of World Business.
- Wu M, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 261. Marko Milanovic, 'Special Rules of Attributionof Conduct in International Law' (2020) 96 International Law Studies 296.
- Wu Y, 'Reforming WTO Rules on State-Owned Enterprises: SOEs and Financial Advantages' (2019) 39(3) Northwestern Journal of International Law & Business 275.
- Wuerth I, 'Foreign Official Immunity Determinations in U.S. Courts: The Case Against

the State Department' (2011) 51(4) Journal of International Law.

- Wuerth I, 'Immunity from Execution of Central Bank Assets' in Tom Ruys, Nicolas Angelet, Luca Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019).

- Xu Y-C and Bahgat G, *The Political Economy of Sovereign Wealth Funds* (International political economy series, Palgrave Macmillan 2010).

- Yang X, *State Immunity in International Law* (Cambridge University Press 2012).

- Yanos AA and Bromberek KK, 'Enforcement Strategies where the Opponent is a Sovereign' in William J. Rowley, Emmanuel Gaillard, Gordon E. Kaiser, Benjamin Siino (ed), *The Guide to Challenging and Enforcing Arbitration Awards* (Second edition. Law Business Research Ltd 2021).

- Yuri S, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey' [2015] OECD Working Papers on International Investment 1 <http://www.oecd.org/investment/investment-policy/WP-2015-01.pdf> accessed 25 February 2021.

- Zdobnõh D RV, 'State Immunity from Execution: In Search of a Remedy' (2010) 4(161-183).

* *

*