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Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution

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BICL British Institute of International and Comparative Law

withers LLP

Contents

Table of common or recurring abbreviations

ADIA	Abu Dhabi Investment Authority
ADQ	Abu Dhabi Developmental Holding Company
APFC	Alaska Permanent Fund Corporation
ARSIWA	ILC 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts[1]
BIICL	British Institute of International and Comparative Law
BIT(s)	Bilateral investment treaty / treaties
CIC	China Investment Corporation
DSB	WTO Dispute Settlement Body
DSU	Dispute Settlement Understanding[2]
EU	European Union
FDI	Foreign Direct Investment
FTA(s)	Free Trade Agreement(s)
Future Fund	Future Fund Management Agency
GATS	General Agreement on Trade Services[3]
GATT	General Agreement on Tariffs and Trade[4]
Global SWF 2021 Annual Report	Global SWF, '2021 Annual Report, State-Owned Investors in a post-pandemic age'[5]
GIC	GIC Private Limited
GPFG	Government Pension Fund Global
HKMA EF	Hong Kong Monetary Authority Exchange Fund
ICD	Investment Corporation of Dubai
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States[6]
IFSWF	International Forum of Sovereign Wealth Funds

Table of common or recurring abbreviations

IIA(s)	International investment agreement(s) (broadly including investment chapters of FTA(s) and BIT(s))
IMF	International Monetary Fund
IWG	International Working Group of SWFs
KIA	Kuwait Investment Authority
KIC	Korea Investment Corporation
LAFICO	Libyan Arab Foreign Investment Company
LIA	Libyan Investment Authority
Mubadala	Mubadala Investment Company PJSC
NBIM	Norges Bank Investment Management
NCSSF	National Council for Social Security Fund
NWF	National Wealth Fund
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PIF	Public Investment Fund
QIA	Qatar Investment Authority
QIC	Queensland Investment Corporation
SAFE IC	State Administration of Foreign Exchange Investment Company
Santiago Principles	The IWG's Generally Accepted Principles and Practices in relation to SWFs[7]
SOE(s)	State-Owned Entity / Entities
SPV(s)	Special Purpose Vehicle(s)
SWF(s)	Sovereign Wealth Fund / Funds
SWFI	The Sovereign Wealth Fund Institute
TCorp	New South Wales Treasury Corporation
UNCTAD	The United Nations Conference on Trade and Development
US	The United States of America
Withers	Withers LLP
WTO	The World Trade Organisation
Temasek	Temasek Holdings
TRIPS Agreement	Trade-related Aspects of Intellectual Property Rights[8]
UAE	United Arab Emirates
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UN Convention on State Immunity	United Nations Convention on Jurisdictional Immunities of States and Their Property[9]
UN Guiding Principles	UN Guiding Principles on Business and Human Rights[10]
UN-PRI	UN Principles for Responsible Investment[11]
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
Withers	Withers LLP
WTO	World Trade Organisation

Introduction

With assets under management worth over USD 10 trillion[12] and about 7.8% of all listed equities worldwide[13] under their control, SWFs are among the world's most powerful economic actors. The 20 largest SWFs own 89% of these assets.[14] Despite their significance, the topic of SWFs and dispute resolution has not until now received the comprehensive consideration and analysis that its importance merits.

This joint Report of the BIICL and Withers fills this gap by examining the structure and dispute resolution matters related to SWFs, as well as related questions of sovereign immunity, enforcement, sanctions and future trends.

The Report focuses on the transnational dimension of SWFs. It reviews different approaches to defining SWFs, their origins and cross-border operations. The Report explores transnational dispute resolution involving SWFs before both national courts and international courts and tribunals and discusses strategic legal issues such as the fora in which disputes involving SWFs are settled, the subject matter of disputes involving SWFs and a host of related jurisdictional and merits issues.

The Report further considers regulatory and other issues related to the position of SWFs in a changing world with sections dealing with questions related to the screening of SWF investments, sanctions affecting the operations of SWFs and the impact of business and human rights on SWF's operations. The Report further brings together institutional definitions of SWFs, lists the largest SWFs and examines their corporate structures. Finally, it provides detailed summaries of cases involving SWFs from key jurisdictions.

The authors would like to thank the following lawyers from Withers for their invaluable assistance in preparing the Report: Dr Aniruddha Rajput, Ms Jovana Crnevic, Ms Clàudia Baró Huelmo, Ms Christina Liew, Mr Giacomo Gasparotti, Ms Martha Male and Ms Yousra Salem. The authors would also like to thank everyone who kindly reviewed drafts of the Report and provided feedback including in particular: Mr Diego Lopez, Dr Claudia Annacker and Dr Dini Sejko. A special thanks goes to Mr Diego Lopez and Global SWF also for supplying up-to-date and unpublished data and graphs on SWFs and their investment activities that are incorporated into this Report.

> This joint Report of the BIICL and the London office of Withers fills this gap by examining the structure, dispute resolution patterns of SWFs as well as related questions of sovereign immunity, enforcement and future trends.

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Executive summary

… to identify a framework of generally accepted principles and practices that properly reflect appropriate governance and accountability arrangements as well as the conduct of investment practices by SWFs on a prudent and sound basis.

As the presence of SWFs in the global economy grows so does their involvement in international disputes. SWFs involved in commercial activities present a particular set of challenges for regulators, adjudicators and legal practitioners. Although corporate structuring of SWFs differs, international courts and tribunals often tend to apply similar sets of public international law principles to determine the issues of their standing in investor-State disputes or attribution of their activities to their home States, as well as the possibility of claims being raised on their behalf by their home State.

Domestic law plays a key role when it comes to questions of admission of SWFs as foreign investors, issues of foreign sovereign immunity, sanctions or issues of responsible investment or of business and human rights. However, increasingly States coordinate their approaches to the regulation of SWFs. As at today, the 2008 Santiago Principles remains the main instrument of self-regulation of SWFs. As stated in the 'Object and Purpose' section of the Santiago Principles, the Santiago Principles' aim is:

> …to identify a framework of generally accepted principles and practices that properly reflect appropriate governance and accountability arrangements as well as the conduct of investment practices by SWFs on a prudent and sound basis.[15]

The increased significance and cross border activities of SWFs have contributed to the adoption of new forms of regulation including national legislation on investment screening and sanctions at the UN, EU and domestic level – such as the Foreign Investment and National Security Act of 2007 in the US – as well as instruments promoting responsible investment, human rights and the environment. In many areas, the regulation of SWFs is still underdeveloped, a prominent example being IIAs. Most IIAs lack clear provisions on the protection of SWFs. Only a relatively small number of new generation IIAs contain express provisions on SWFs, which differ from one treaty to another.

As their importance and value have grown, so have the number of questions surrounding SWFs in relation to their investment strategy, their independence, and their relationship with methods of dispute resolution. The lack of formal regulation presents one of the foremost challenges.

There is a recent surge in scrutiny which has resulted in a body of scholarship starting from 2009 onwards. However, jurisprudence in this field is still at an early stage and many cases remain confidential.

The limited publicly available case law of domestic courts and commercial arbitral tribunals shows that SWFs recur to commercial dispute resolution as any other economic actors. However, some disputes relate to the inherent characteristics of SWFs such as their real or perceived ambivalent private and public nature. That includes the issue of corporate structuring, the relationship between SWFs and their home States and sovereign immunity. Similar questions may arise in the context of the WTO and other forms of public international law dispute resolution, thereby creating a need to have a specialised understanding of the nature and functioning of SWFs.

SWFs may be involved in various capacities in dispute resolution. They may initiate proceedings by themselves or request their home State to initiate proceedings on their behalf. Their actions or inactions may also be a basis for an action against them or against the State to which they belong or have a direct or indirect nexus.

Only a few reported cases involve SWFs as claimants against host States. Possibly, SWFs may prefer to rely on diplomacy, further emphasising the dual nature of SWFs and the complexity they bring to the analysis of existing dispute resolution practices.

In the available investor-State cases key issues which the tribunals tackle include corporate structuring and the relationship between SWFs and their home States. The question often arises as to whether a SWF as a state-owned entity can commence arbitration proceedings against a host State. According to the prevailing view, the investment guarantee provisions of IIAs usually cover SWFs unless they contain explicit carve-outs for SWFs or State-owned entities. Investor-State tribunals may focus on whether the activities of SWFs have a commercial or governmental nature. The protections for SWFs in the FDI admission process (such as investment screening) are relatively limited and depend on the language of each specific treaty.

SWFs might play (and have played) a role in investor-State arbitration also on the opposite side, namely as organs or instrumentalities of the host State. In that case, the investor would have to show that the conduct of the SWF in question is 'attributable' to the host State according to the rules of international responsibility under international law.

A SWF-related litigation may also arise under one of the WTO Agreements. These proceedings may involve proceedings initiated by a State to protect the interests of its SWF, regarding a measure that may affect their interests, such as under the TRIMs or TRIPs. Additionally, measures taken by a State to prefer its own SWF may form a basis of proceedings by another State. There may be other situations of market access or non-tariff barriers or a challenged based under other WTO agreements. These situations can exist generally for any entity, but they are particularly important due to a present or perceived connection between the State and SWFs.

Whether an SWF can rely on sovereign immunity to resist jurisdiction of courts or tribunals or enforcement attempts depends on the law under which proceedings are brought. It also depends on the extent of the SWFs autonomy from the State in its corporate governance structure and the law of the jurisdiction where such proceedings are commenced. If a SWF benefits from State immunity, this may create a jurisdictional obstacle to bringing claims against the SWF or an obstacle in enforcing a court judgment or arbitral award against it.

The determination of SWF activities as commercial often plays a decisive role in any given case and would usually turn on the 'commercial activity' exception contained in particular domestic laws. A uniform practice regarding the application of these doctrines to SWFs has not crystallised yet and differs from one jurisdiction to another. On the other hand, the subject of State immunity is not a pure question of domestic law: it also falls under the purview of customary international law. There appears to be some support for the proposition that a 'commercial exception' to State immunity is recognised on the international plane (although the precise contours thereof may not be uncontroversial).[16]

States hosting SWF investments can view the economic power and influence of SWFs with suspicion, as evidenced by legislation on foreign investment screening and national security laws. New types of disputes involving SWFs and investment screening decisions might arise in the future, and this might prompt SWFs to resort to the available domestic and international dispute settlement tools, including domestic litigation, commercial arbitration or investor-State arbitration.

Methodology

This Report resulted from over seventeen months of legal and factual research that BIICL and Withers have carried out together.

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This Report adopts a comparative, analytical and doctrinal approach. It discusses and compares a broad array of primary sources including statues, international treaties and 'soft law' instruments, as well as publicly available decisions, judgments and awards from national courts of key jurisdictions, commercial and investment arbitral tribunals and other international adjudicatory bodies.

This Report also examines studies and papers published by international institutions and scholars devoted to SWFs.

The views expressed in this Report do not necessarily correspond to the views of the authors, their affiliated institutions or clients.

Introduction to sovereign wealth funds

The SWFs' growing role in foreign direct investment is a relatively recent phenomenon.[17] Their concentrated economic power may have important implications for host States and their investment choices can have an important social effect on different industries and geographies. Researchers and international organisations discuss the role SWFs that may play in the transition towards a 'greener' economy and a more sustainable development.[18] Moreover, in recent times SWFs have played a role in helping Governments to offset the financial impact of the Covid-19 crisis.[19] SWFs may also need protection of their investments abroad due to the cross-border nature of such investments.

Before moving to discussing the core issues of the Report, it is key to consider the notion and essential characteristics of SWFs, how and why SWFs came into being and how they are organised.

WHAT ARE SWFs?

Various institutions have articulated their own definitions of SWFs in the absence of a universally accepted definition (see *Annex 1*).[20] The IFSWF has observed that 'the definition of a SWF has never been fully agreed by all experts of all institutions involved with them or following them'.[21] This difficulty is understandable due to the diverse nature, constitution and functioning of SWFs. One of the challenges in defining SWFs is that 'there is no such thing as a 'typical' sovereign wealth fund, as they differ in structure, governance, policy objectives, risk-return profiles, investment horizons, eligible asset classes, and instruments, not to mention levels of transparency and accessibility'.[22]

The Santiago Principles define SWFs as follows:

> … 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.[23]

A 2008 working paper published by the OECD sets out a similarly broad definition of SWFs as:

> … 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.[24]

In the same year, 2008, the EU defined SWFs as:

> … state-owned investment vehicles, which manage a diversified portfolio of domestic and international financial assets... The distinguishing feature of SWFs from other investment vehicles is that they are state-funded. In general, SWFs are funded from accumulated foreign-exchange reserves in their sponsor countries, but are managed separately from the official reserves. Typically, SWFs have a diversified investment strategy, with a higher level of risk accepted in search of higher returns. SWF portfolios include a wider range of financial assets, including fixed-income securities but also equities, real estate and alternative investments.[25]

Despite having some commonalities with the first two definitions, the EU definition has a material difference. It defines SWFs as entities, namely 'vehicles, which manage … assets'. The Santiago Principles and the definition contained in the OECD working paper refer to SWFs as 'funds' or 'pools of assets'. This definitional divergence reveals one of the tensions inherent to the concept of SWF, ie, whether SWFs are themselves entities or simply pools of assets.

Global SWF defines SWFs as 'investment vehicles owned by a national or regional government that buys, holds, and sells securities and/or assets on behalf of its citizenry in pursuit of financial and/or economic returns'.[26]

Various definitions of SWFs include the following characteristics:

- a degree of State ownership and/or control
- is typically in the form of an investment fund
- is managed separately from the official reserves of a State
- is funded via sales of a commodity or commodities, foreign exchange reserves, privatisations and/or other public funding
- has a long-term investment outlook
- can invest domestically and/or internationally
- has a commercial objective, which is to produce returns on investments

No consensus has emerged as to the characteristics of a SWF. Another approach is to specify which entities fall outside the scope of the present Report.

WHAT TYPES OF FUNDS FALL OUTSIDE THE SCOPE OF SWFs?

Entities that possess the following features are excluded from the scope of the Report, namely if:

- it does not operate with a view to profit
- it is a traditional pension fund funded by employer contributions;[27] and / or
- it is held by monetary authorities of a State for the purpose of monetary policy (unless it refers to the investable portfolios of certain Central Banks).

In terms of definition, some of the entities may not fall within the definition of a SWF. The Santiago Principles include in their definition of SWFs an indication of what will be excluded:

> 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.[28]

It is further possible to distinguish, at least in principle, SWFs from SOEs, although such a distinction is not set in stone.[29] Various differences have been identified in this respect, including the fact that SWFs are totally owned by the State, whereas SOEs may be just partially State-owned.[30] Further, SOEs are separate entities from the State with their own personality, whereas this is not necessarily true of SWFs.[31]

It appears easier to exclude entities that are not SWFs than to delineate a single definition that captures all forms of SWF structure, form and activity. However, for the purposes of this Report, the broad set of characteristics identified earlier will inform the decision to include certain SWFs as opposed to others.

THE ORIGINS AND DEVELOPMENT OF SWFs

The origins of SWFs go back to at least the 1940s and the number of SWFs has increased particularly in the 2000s and 2010s as the following graph shows on the next page.

Traditionally, SWFs emerged with the need of several States to manage surplus revenues from abundant natural resources.[32] Even today, most countries with SWFs possess significant natural resources. However, most recently countries such as China or Singapore have established SWFs not based primarily on natural resources revenues. These emerging SWFs aim to diversify foreign exchange reserves and other governmental funds. According to Global

SWF, as at today, 51% of sovereign funds are capitalised from natural-resource revenues, mainly from oil and gas, with the remaining 49% being funded from non-commodity sources such as foreign exchange reserves and fiscal savings rules.[33]

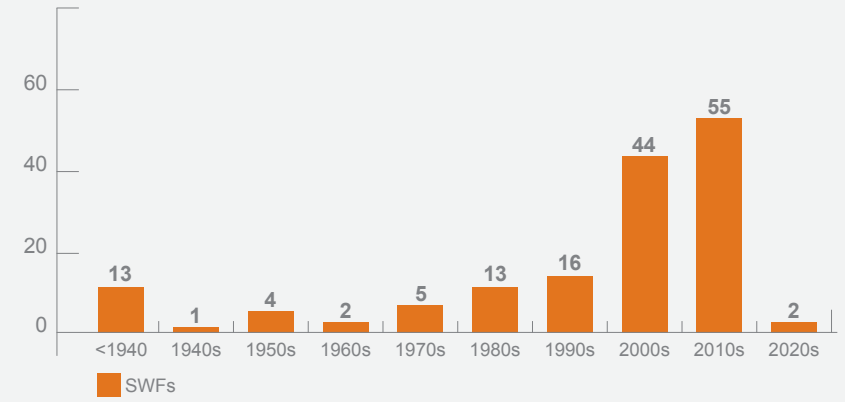
The graph also shows that the last 30 years have seen a significant growth in the number of new SWFs. It shows, in particular, that, since 2000, over 100 new SWFs have emerged. SWFs have grown also in terms of assets under management: the below graph, based on data collected and analysed by Global SWF, shows that the assets of SWFs grew by 212% between 2008 and 2021.

A list of the 20 largest SWFs as at 22 August 2021 is set out in *Annex 2*. The chart below shows the largest 10 SWFs per estimated number of assets (expressed in billions of USD) as at 16 August 2021:[34]

The importance of SWFs in the global economy has grown in the years following the financial crisis of 2008, and 'with many governments assuming … the role of guardians of substantial amounts of their countries' financial assets, effective wealth management has become an important public sector responsibility'.[35] The value of SWFs amplifies their impact on the world economy. As an example, to date, Norway's NGIM / GPFG alone is valued at USD 1.365 trillion.[36] Other sources report that NGIM / GPFG alone holds almost 1.5% of the world's stocks and shares.[37]

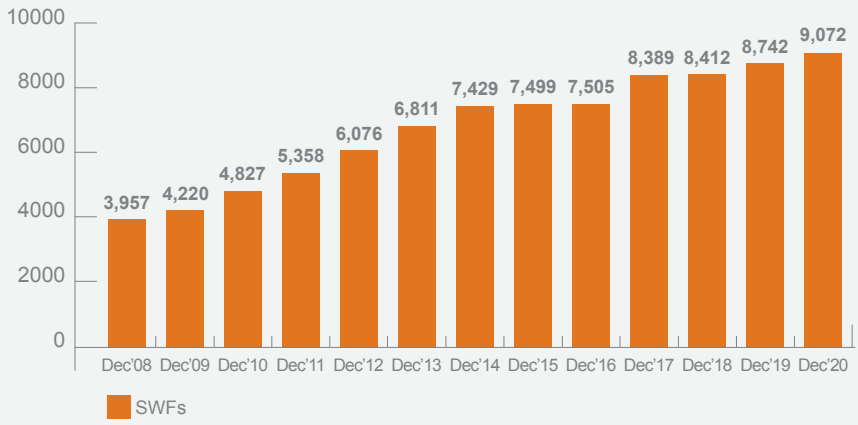
SWFs invest directly in target companies or through investment schemes, such as investing in companies alongside the General Partners of private equity funds, which operate portfolio companies in strategic investment sectors worldwide.[38] SWFs may also acquire shares of entities owning the investment, therefore investing indirectly into the target company / investment.

NUMBER OF SWFs ESTABLISHED OVER TIME



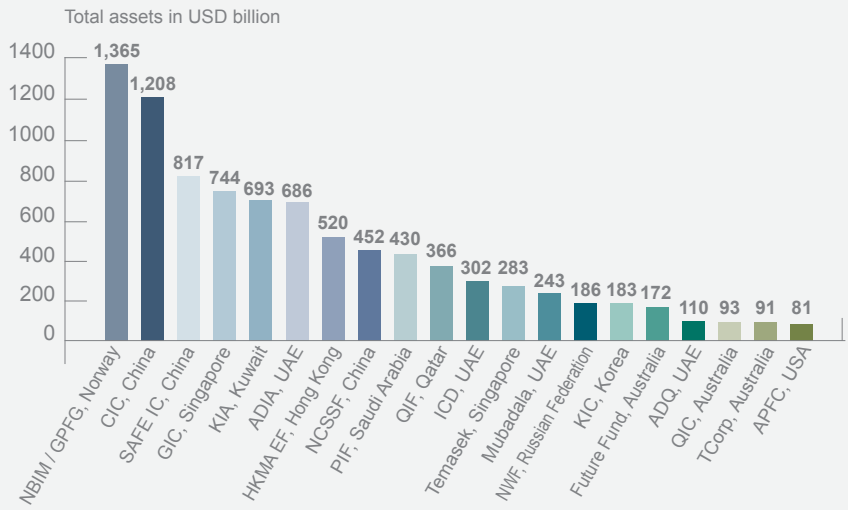
Data taken from Global SWF 2021 Annual Report, 9

SWF ASSETS UNDER MANAGEMENT BETWEEN DECEMBER 2008 AND DECEMBER 2020 (IN BILLIONS OF USD)



Data taken from Global SWF 2021 Annual Report, 15 (figure 16)

20 LARGEST SWFs BY ASSETS UNDER MANAGEMENT



Data taken from Global SWF, 'Top 100' https://globalswf.com/top-100 accessed 22 August 2021

SWFs are located worldwide. The 20 largest SWFs are spread across the Middle East, Asia, Europe, North America and Australia as shown in the following map:

See *Annex 2* for full information

MAP OF LARGEST 20 SWFs AS AT 22 AUGUST 2021

North America
20 Alaska Permanent Fund Corporation (APFC, USA)

Europe
01 Norges Bank Investment Management / Government Pension Fund Global (NBIM / GPFG, Norway)

Middle East
05 Kuwait Investment Authority (KIA, Kuwait)
06 Abu Dhabi Investment Authority (ADIA, UAE)
09 Public Investment Fund (PIF, Saudi Arabia)
10 Qatar Investment Authority (QIF, Qatar)
11 Investment Corporation of Dubai (ICD, UAE)
13 Mubadala Investment Company PJSC (Mubadala, UAE)
17 Abu Dhabi Developmental Holding Company (ADQ, UAE)

Europe/Asia
14 National Wealth Fund (NWF, Russian Federation)

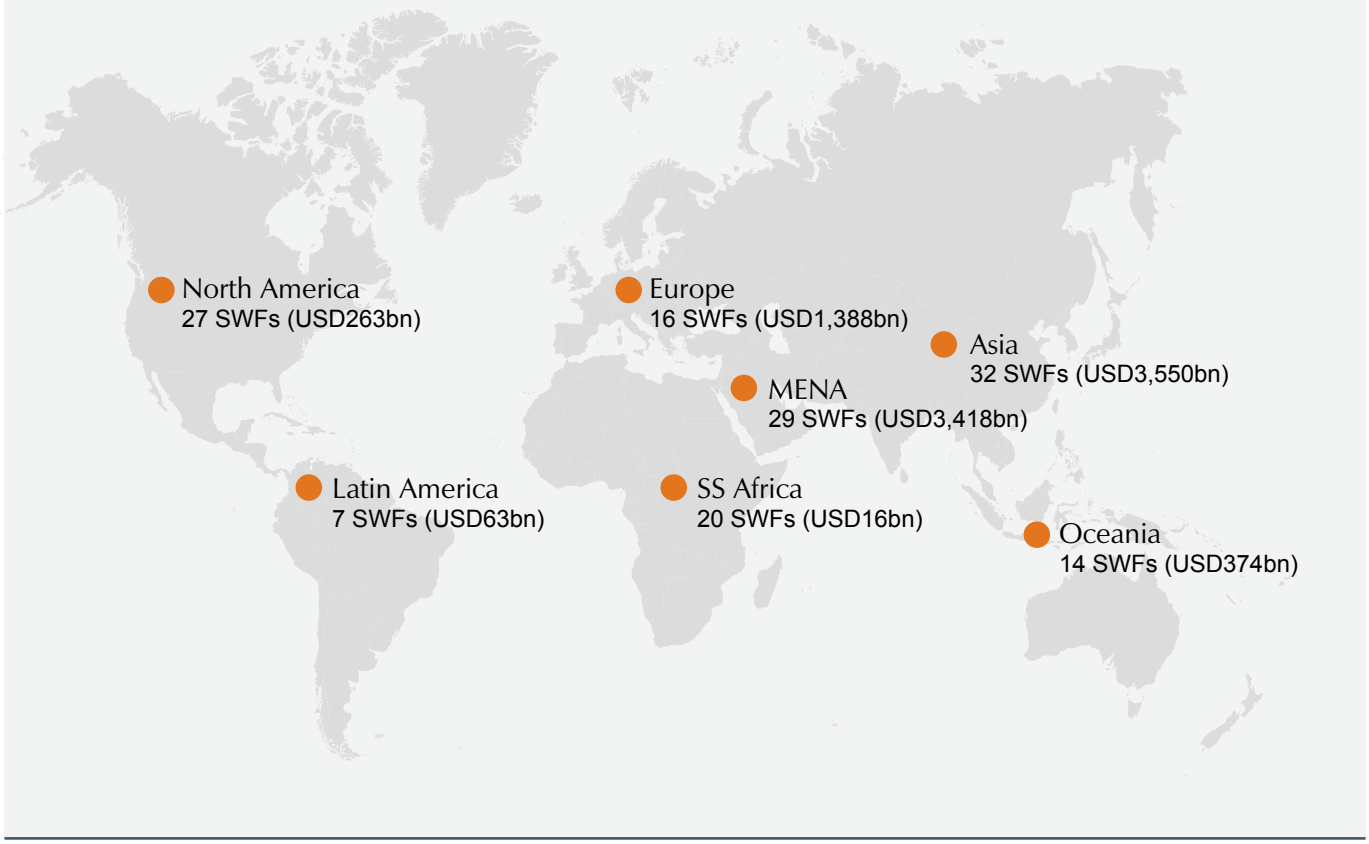
Asia
02 China Investment Corporation (CIC, China)
03 State Administration of Foreign Exchange Investment Company (SAFE IC, China)
04 GIC Private Limited (GIC, Singapore)
07 Hong Kong Monetary Authority Exchange Fund (HKMA EF, Hong Kong)
08 National Council for Social Security Funds (NCSSF, China)
12 Temasek Holdings (Temasek, Singapore)
15 Korea Investment Corporation (KIC, Korea)

Australia and Pacific
16 Future Fund Management Agency (Future Fund, Australia)
18 Queensland Investment Corporation (QIC, Australia)
19 New South Wales Treasury Corporation (TCorp, Australia)

Data taken from Global SWF, 'Top 100' https://globalswf.com/top-100 accessed 22 August 2021

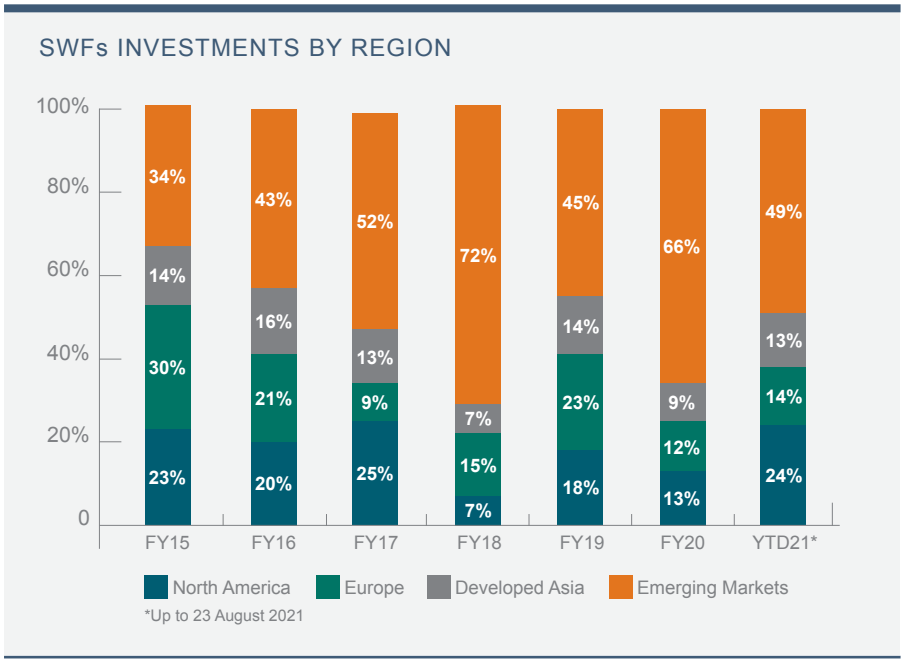
As illustrated in the next chart, although SWFs' investment geography is varied, it is notable that between 2015 and 2021 SWFs have invested predominantly in emerging markets.[39] In 2020, SWFs investments in emerging markets amounted to 66% of SWFs' investment by region.[40] By 2021, the trend decreased, but emerging markets still represent almost 49% of SWFs target regions to invest in.[41] The rest of SWFs' investments is divided among North America, Europe and developed Asia, with a significant growth in North America (24%) in the first eight months of 2021.[42]

MAP OF SWFs BY REGION

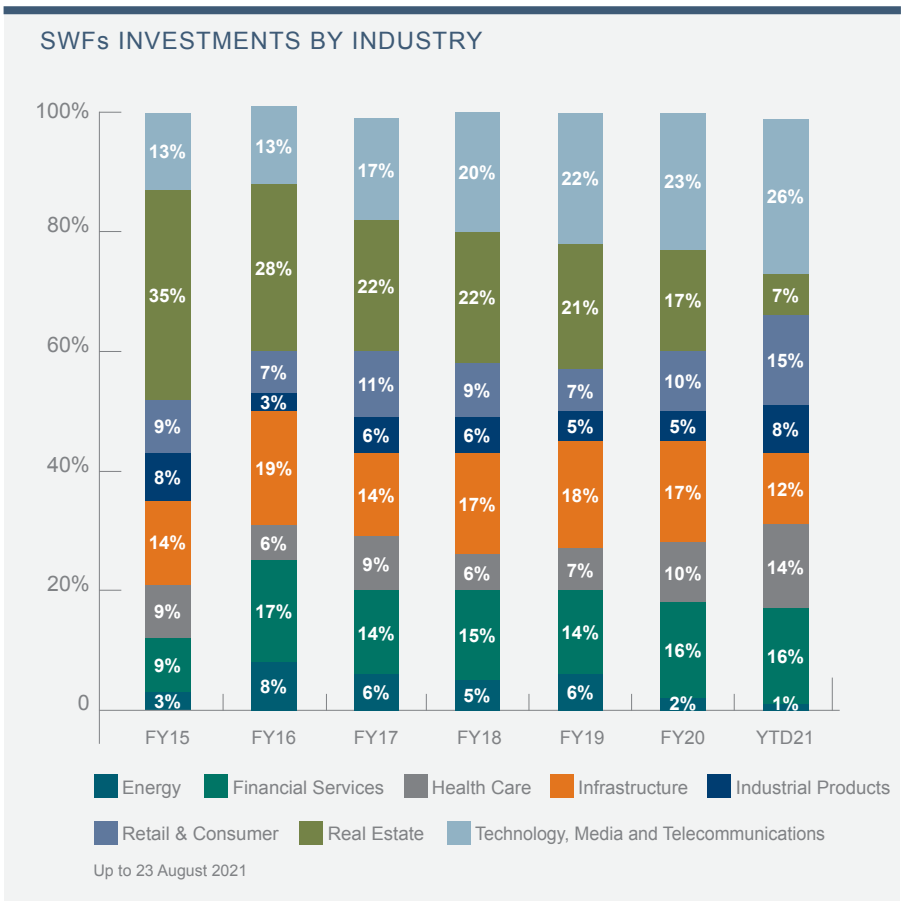


Data taken from Global SWF 2021 Annual Report, 9–10

Traditionally SWFs have sought relatively 'safe' investments in the real estate and infrastructure industries.[43] Another sector in which SWFs have invested is transportation, as shown in the graph.[44] These trends seem to have changed over the last six years with SWFs investing more in oil and gas but also renewables, the latter possibly being part of some SWFs' strategy to take action on climate change through their portfolio assets.[45]

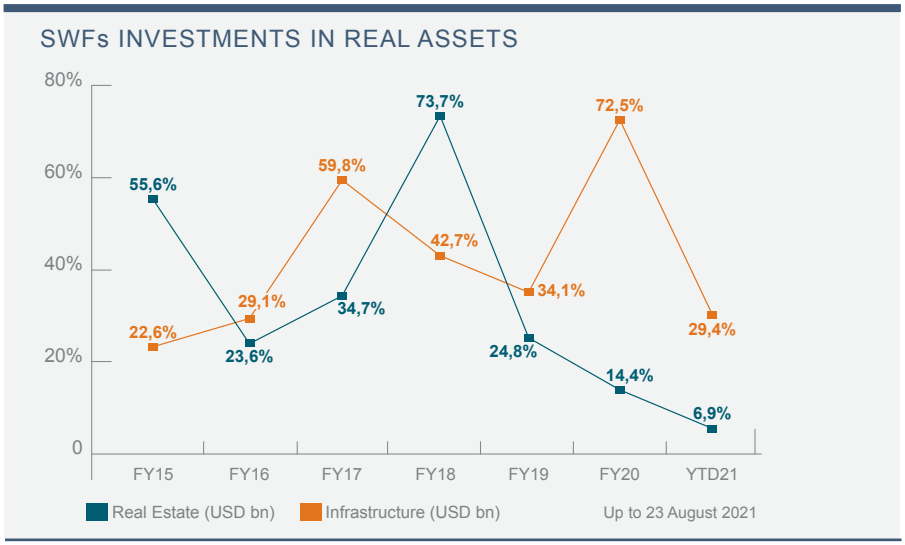


Data and graph supplied by Global SWF for this Report



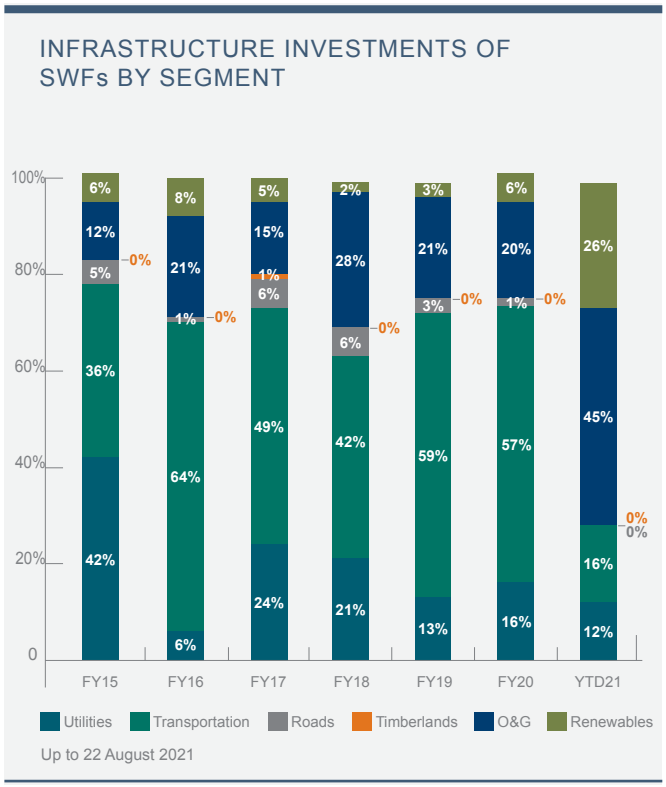
Data and graph supplied by Global SWF for this Report

Between 2020 and mid-2021 SWFs have turned their investment strategy away from traditional 'safe' industries such as real estate and infrastructure.[46] SWFs have increasingly invested in other sectors, including regulated sectors such as the TMT and healthcare industries.[47] A fifth of the investments carried out in 2020 were in TMT.[48] Healthcare is also a significant sector in which SFWs invest, probably due to the Covid-19 pandemic and the increased interest in businesses pursuing vaccines and biotech.[49]

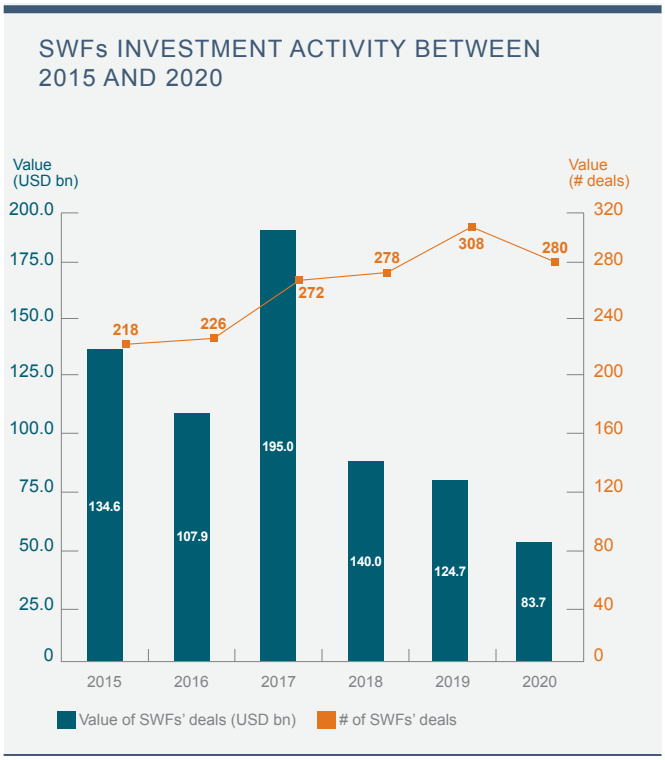


Data and graph supplied by Global SWF for this Report

Finally, the last graph presented below shows that, in 2020, the number of deals concluded by SWFs has reduced, possibly as a result of the immediate effect of the Covid-19 outbreak.[50]



Data and graph supplied by Global SWF for this Report



Data taken from the Global SWF 2021 Annual Report, 10 (figure 9)

WHAT ARE THE STRUCTURES OF SWFs?

SWFs have different governance models, but have common patterns in their structure (when considered broadly). The table at *Annex 3* compares the corporate structures of the largest 10 SWFs for which information is publicly available, and helps to identify three broad organisational models as follows:

1. The 'fund model': certain SWFs are structured as funds rather than private or public entities. An example of this kind is the HKMA EF (managed by Hong Kong's Monetary Authority).[51] Norway's GPFG might be seen as another example. However, if one considers as the relevant SWF NBIM, rather than GPFG itself, this example would fit in the 'public entity model'.

2. The 'public entity model': certain SWFs are structured as public bodies or entities and are managed by a governing body that often comprises members of the Government. Examples of this kind include the KIA, the ADIA, the QIA, the PIF of Saudi Arabia and China's NCSSF.[52]

3. The 'State-owned entity model': certain SWFs are structured as SOEs, with the Government holding shares in the SWFs and exerting a certain degree of control and/or supervision over their activities. Examples include the CIC, GIC and the ICD.[53]

Fund model

Examples:
- Hong Kong Monetary Authority Investment Portfolio (HKMA IP)

Public entity model

Examples:
- Kuwait Investment Authority (KIA)
- Abu Dhabi Investment Authority (ADIA)
- Public Investment Fund of Saudi Arabia (PIF)
- National Council for Social Security Fund (NCSSF)
- Qatar Investment Authority

State-owned entity model

Examples:
- China Investmet Corporation (CIC)
- GIC Private Limited (GIC)
- Investment Corporation of Dubai (ICD)

Such organisational models can imply a degree of Government control over the management and activities of the SWF. However, this does not necessarily preclude a SWF from making investment choices based on commercial rather than political grounds. For example, the ADIA, which follows the 'public entity model', purports to conduct its investment activities 'without reference to the Government of Abu Dhabi',[54] and the Articles of Association of the CIC state that: '[t]he Company shall separate its commercial activities from governmental functions, make its business decisions independently and operate based on commercial grounds'.[55]

A SWF's organisational model influences whether the SWF has separate legal personality from its home State as well as the legal framework governing the SWF's activities. This has implications on several aspects of dispute resolution, such as attribution, jurisdiction ratione personae in investor-State arbitration, and sovereign immunity. For example, a SWF's legal and investment structure can have an impact on standing and jurisdiction in the context of investor-State arbitration.

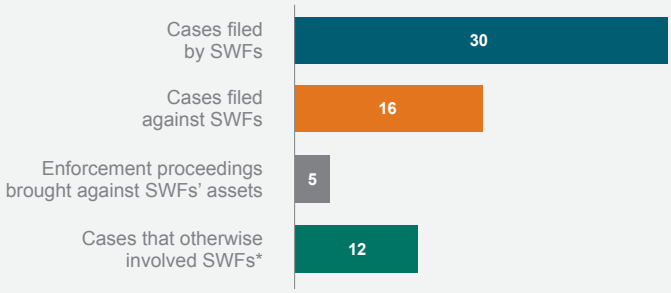
A SWF's organisational model influences whether the SWF has separate legal personality from its home State as well as the legal framework governing the SWF's activities. This has implications on several aspects of dispute resolution, such as attribution, jurisdiction ratione personae in investor-State arbitration, and sovereign immunity.

How do SWFs resolve disputes?

SWFs are powerful economic actors in the world economy engaging in major cross-border acquisitions and corporate transactions in economic sectors such as real estate, infrastructure, TMT and healthcare. Disputes involving SWFs may include proceedings before national courts, commercial arbitrations, investment treaty arbitrations, and, to some extent, State-to-State disputes before international courts and tribunals.

Annex 4 presents a cross-section of arbitral and court cases involving SWFs. We summarise below some of the salient features of these cases to demonstrate some of the issues faced by SWFs, including approaches that SWFs can take to dispute resolution. Important issues include standing, the extent to which a SWF can sue and be sued in its own right as well as regarding jurisdiction related to SWFs and claims against SWFs.

QUANTITATIVE ANALYSIS OF DOMESTIC AND INTERNATIONAL CASE LAW ON SWFs REVIEWED



* including cases brought by or against entities controlled by a SWF; cases involving individuals that managed (r claimed they were entitled to manage assets of a SWF) a SWF; cases involving measures taken by SWFs and challenged in investor-State arbitration; cases in which SWFs were otherwise involved in the factual matrix of the dispute.

Appeals against court judgments are not counted as separate cases, whereas award setting aside proceedings, enforcement proceedings and other arbitration-related court proceedings are counted as separate cases from the underlying arbitral proceedings.

SWFs AS PARTIES TO LITIGATION BEFORE NATIONAL COURTS

The significant expansion of SWFs over the last 15 years has led to a rise in SWFs as parties to disputes in domestic courts, particularly in contractual disputes. Domestic courts of various jurisdictions have considered this type of dispute, including the courts of England and Wales, the United States, South Africa, Italy, Germany, and China.

Annex 4 sets out some of the cases heard by national and international courts and tribunals and below we analyse the variety of issues involved.

The case law in England and Wales shows that SWFs have been involved in a diverse range of commercial disputes. These range from joint venture disputes, to actions for fraud / breach of fiduciary duties, insolvency-related proceedings and applications

for injunctive relief, as well as matters pertaining to enforcement against States. Recent disputes over competing appointments of directors of the LIA are notable. In at least two cases, SWFs have been involved not as claimants or respondents: the cases were brought against and by subjects in charge of managing such SWFs.[56]

US courts have a significant number of reported cases involving SWFs, most often commenced in US federal rather than State courts. SWFs are involved as both the claimant and respondent. Cases with SWFs as claimant involve federal statutory claims for securities violations (and related common law claims) arising out of alleged wrongful conduct (including by various financial institutions) in which the SWF may have invested. Conversely, various investors and institutions have sued SWFs in relation to investment or ownership of certain subsidiary or affiliated entities.

In South Africa, the *Pembani Group Proprietary v Shanduka Group Proprietary Limited* case concerned the approval by the Competition Tribunal of a merger, which entailed the acquisition of a stake in a subsidiary of China's SWF China Investment Corporation.[57]

Italy has attracted significant SWFs' investments in the past.[58] SWFs that have invested in Italy include Mubadala Investment Company PJSC, the Qatar Investment Authority and GIC Private Limited. The Italian Supreme Court heard a reported case involving a SWF, which arose out of criminal measures adopted by the Italian authorities in relation to LAFICO.[59]

In Germany, NBIM (the entity that manages Norway's GFPG) stated it had filed a case against the Volkswagen Group before Gemany's Braunschweig District Court in June 2016.[60] Reportedly, the complaint is part of a joint legal action commenced by Volkswagen's institutional investors that sustained financial loss because of the Volkswagen Group's emissions scandal.[61] According to news reports, NBIM sought damages in the amount of EUR 680m.[62] It is not known how the case unfolded.

In China, SWFs have been involved in various commercial disputes in the Chinese courts.[63] These include mainly claims by Chinese SWFs relating to contract disputes and applications for execution of CIETAC arbitration awards or Chinese court judgments issued in the SWF's favour.[64] Other disputes include employment disputes, claims for misappropriation of monies from the SWF's bank account with a Chinese bank, as well as applications by a Singaporean SWF for review of the Chinese Trademark Review and Adjudication Board's decision on registration of trademarks.[65]

Further cases reviewed relating to SWFs (discussed in *Annex 4*) were filed in Switzerland and Belgium.

SWFs AS PARTIES TO INTERNATIONAL COMMERCIAL ARBITRATION

Relatively few publicly available commercial arbitration cases involving SWFs have surfaced for public scrutiny (discussed in *Annex 4*). This is perhaps unsurprising given that commercial arbitrations are typically confidential. Accessible cases show that SWFs have been involved as both claimants and respondents in disputes involving various commercial transactions. In at least one case, *Al Kharafi v Libya*, a SWF (the LIA) successfully challenged the arbitral Tribunal's jurisdiction.[66] This case, arising out of a public contract arbitration agreement, focussed on the SWF's relationship with the State and the Government to determine the scope of the arbitration agreement and whether the SWF was a proper 'respondent' in the arbitration.

Although there is a scarcity of publicly available information on international arbitrations involving SWFs, it is likely that in the future SWFs will in many cases prefer resorting to international commercial arbitration to resolve disputes as opposed to litigation before domestic courts.

The same considerations that lead multinational companies to use international arbitration to solve complex cross-border disputes also apply to SWFs. Confidentiality of proceedings is generally considered a feature of international arbitration. This may be a key factor for a SWF to introduce an arbitration clause in a contract or enter into a submission agreement to submit a dispute that has already arisen to arbitration, particularly if the dispute triggers potential reputational damage for a SWF.

SWFs may also use international arbitration because they trust the specific competences (as well as the independence and impartiality) of the adjudicators which the arbitration mechanism will generally allow them to choose. This may be another important factor for SWFs investing in emerging markets – a growing trend in the last years as noted above[67] – or jurisdictions where there are concerns.

Although there is a scarcity of publicly available information on international arbitrations involving SWFs, it is likely that in the future SWFs will in many cases prefer resorting to international commercial arbitration to resolve disputes as opposed to litigation before domestic courts.

SWFs AS PARTIES TO INVESTMENT TREATY ARBITRATION

SWFs are important actors in cross-border transactions in sectors that may be subject to the regulation of the State hosting the SWF's investment. This is particularly the case of investments in regulated sectors such as the TMT and healthcare industries that SWFs have increasingly targeted – as seen above[68] – through investments made directly in subsidiaries, private equity funds or indirectly through the acquisition of shares of entities owning the target company in the host State. As in the case of private companies or individuals, SWFs may resort to investor-State arbitration to bring claims against host States where the host State takes measures damaging or destroying a SWF's investment.

The first known investment treaty arbitration under an IIA, *AAPL v Sri Lanka* was registered in 1987.[69] The first publicly available investor-State arbitration involving a SWF was registered only in 2010.[70] In 2015, the State General Reserve Fund of the Sultanate of Oman ('SGRF'), a former SWF of the Sultanate of Oman (which no longer exists following the transfer of its assets in 2020 to the Oman Investment Authority),[71] commenced ICSID arbitration proceedings against Bulgaria.[72] The claim is reported to relate to the SGRF's shareholding in the Bulgarian bank, Corporate Commercial Bank. The Claimant subsequently withdrew its claim.[73] Reportedly, the Ras Al-Khaimah Investment Authority initiated a case against India under the UNCITRAL Arbitration Rules pursuant to the UAE-India BIT for an alleged termination of a supply agreement.[74] The hearing is yet to take place[75] and thus, the approach of the UNCITRAL tribunal is yet to be seen.

The LIA has reportedly brought several claims against a number of African States. The LIA secured a USD 380 million Award in a London-based arbitration against Zambia for nationalising Zamtel, a Zambian telecom company in 2011.[76] It was also reported that the LIA brought similar claims against other African countries, including Rwanda and Chad.[77] The LIA alleges in these proceedings that these States took advantage of 'Libya's political turmoil to nationalise assets belonging to the country's USD 66 billion sovereign funds' following the eight-month-long conflict that ended Muammar Gaddafi's forty-year rule.[78] However, it remains unclear from the limited information available on these cases whether these proceedings were investment treaty based or purely commercial disputes referred to arbitration by virtue of contracts concluded by the LIA with the relevant host States.

The few reported cases involving SWFs as claimants against host States evidence the relatively limited use of investor-State arbitration by SWFs as at 2021. This may indicate that SWFs prefer in some cases to rely on diplomacy – emphasising the private / public nature of SWFs. That said, the participation of SWFs to investor-State arbitration will likely increase in the future because of their growing global investments, broader awareness of investor-State arbitration and potential disputes.

FROM THE ORIGINS OF INVESTMENT TREATY ARBITRATION TO TREATY CASES INVOLVING SWFs

1987 — ICSID registers the first known investment treaty arbitration under an IIA (*Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3)

2010 — The first known investment treaty arbitration involving a SWF (on the respondent's side) is filed (*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*, SCC Case No V 116/2010)

2015 — *State General Reserve Fund of the Sultanate of Oman v Republic of Bulgaria*, ICSID Case No ARB/15/43

2017 — *Ras Al-Khaimah Investment Authority v Republic of India*, UNCITRAL Case

A SWF's decision to commence investor-State arbitration proceedings against a host State under an IIA raises the question on the requirements that a SWF has to satisfy to act as a claimant to protect its investment. This would include whether a SWF (i) is a protected investor; and (ii) has a protected investment.

SWFs as investors

To qualify as a protected investor, a SWF will have to satisfy the test set forth in the relevant IIA and potentially, in the context of ICSID arbitrations, the ICSID Convention. An increasing number of IIAs includes provisions addressing SWFs in the definitions related to a tribunal's jurisdiction.

With regard to IIAs not expressly covering SWFs within the list of protected investor, a SWF's legal structure may be relevant for the purpose of an investor-State tribunal's jurisdiction *ratione personae*.

In the context of arbitrations under the ICSID Convention, using SOEs as an analogy, the Broches test (discussed below) aims at identifying the commercial nature of the investor in order to have a protected investor. The commercial purpose of a SWF's investment will be an important factor to satisfy this requirement. In principle, this would not be an obstacle. Although a SWF may be based on a 'public model' or a 'SOE model', it may still act as a private investor without reference to the home State's policy as in the case of ADIA and CIC.[79] This, however, would not necessarily overcome potential issues stemming from a SWF's structure if it does not fall within the definition of protected investor in the applicable IIA. The jurisdictional risk may be that the SWF falls within the Broches test, but it may not be a protected investor under the terms of the applicable IIA, which is the lex specialis applicable to the dispute. Furthermore, issues of jurisdiction and locus standi may arise if the SWF that made the relevant investment is organised in accordance with what we have called the 'fund model'.

As SWFs are important economic players that continue to increase in number, size and investments internationally, the next generation of IIAs may well increasingly include provisions covering SWFs expressly, such as in the definition of protected investors. This, however, should not restrict SWFs from considering the impact of their corporate and investment structure if they want to obtain the protection of investor-State arbitration under existing IIAs.

> ...a SWF's legal structure may be relevant for the purpose of an investor-State tribunal's jurisdiction ratione personae.

Qualifying as an investor: IIAs

A SWF needs to meet the definition of protected investor under the IIA applicable to the dispute. However, every IIA has a different list of definitions.

The 2004 US-Singapore FTA is a treaty that expressly excludes SWFs from the class of protected entities.[80] This treaty includes in its investment provisions, under the general definition of 'investor of a Party',[81] governmentally owned or controlled enterprises for purposes of protection and claims against the US as host State.[82] Conversely, this FTA expressly excludes 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' (Singapore's second largest SWF).[83]

In contrast, a few recent IIAs expressly include SWFs in the definition of protected 'investor'. An example of this is the 2016 Iran-Slovakia BIT, whose Article 1(3) reads as follows:

> The term '**investor**' means the following natural persons or entities that have made across border investment in the territory of the Host State and that, on the date on which the alleged breach of this agreement occurred as well as on the date on which the claim was submitted to arbitration are:
>
> enterprises (other than branches and representative offices), **sovereign wealth funds** and non-profit organizations focused on research and development 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.[84]

Another recent IIA, the 2017 Rwanda-UAE BIT (not yet in force), does not expressly include SWFs in the definition of 'investor' (although it does include 'legal entities' and the 'Government of [a] Contracting Party').[85] It is however notable that this IIA provides for specific substantive protection to SWFs and sovereign assets in the provision concerning lawful and unlawful expropriation, which reads as follows:

> Notwithstanding 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.[86]

Another recent IIA contains express provisions on SWFs that are more concerned with their regulation rather than protection. The 2018 EU-Singapore Investment Protection Agreement (not yet in force) reads as follows: 'Each Party shall encourage its **sovereign wealth funds** to respect the Generally Accepted Principles and Practices – Santiago Principles'.[87] This is the only express provision of the EU-Singapore Investment Protection Agreement referring to SWFs.

The vast majority of existing IIAs, particularly BITs, however neither contain express provisions on SWFs nor include SWFs in the respective definitions of protected 'investors'. Although the definition of 'investor' may generally be interpreted to cover SWFs – unless explicitly excluded[88] – three different approaches emerge which would, in principle, include SWFs:

1) The treaty expressly includes 'governmentally-owned' or 'government-controlled' entities. This is the approach taken in 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.[89]

   As another example, the 1999 US-Bahrain BIT includes a broad definition of 'company' which covers:

   > ...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.[90]

   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.[91]

b) The treaty expressly includes 'State-corporations'. The China-Ghana BIT adopts this approach in its definition of 'investor' in respect of Ghana, which includes: 'state-corporations and agencies and companies registered under the laws of Ghana which invest or trade abroad'.[92]

c) The treaty neither expressly includes nor expressly excludes SOEs. For example, the (now-terminated) India-Turkmenistan BIT defines 'companies' in respect of Turkmenistan as 'every juridical person, associations, firms, companies and other societies or unions with the rights of a juridical entity founded in accordance with the legislation of Turkmenistan and located on its territory'.[93]

Many other treaties adopt, with variations, the third approach,[94] neither expressly including nor excluding SWFs from their definition of 'investor'. Traditionally, IIAs usually include both natural persons and corporations who are nationals of a contracting State as qualifying investors. A tribunal's interpretation of an IIA's definition of protected investors is crucial. An investment tribunal would need to engage in an interpretative exercise under the Vienna Convention on the Law of Treaties (or the interpretative provisions in it that form part of customary international law) to determine whether

a SWF qualifies as an investor.[95] This interpretative task may also require an investor-State tribunal to consider the evidence on the structure of a SWF (and its investment).

As noted above, there is not a common definition of SWFs. However, SWFs can take the form of an investment fund.[96] SWFs, as sophisticated investors, would be expected to structure their investments to improve tax efficiency and ensure the investment meets regulatory requirements. However, SWFs can also consider the impact that an investment structure may have on an investor-State tribunal's jurisdiction *ratione personae*.

SWFs may operate as corporations. Generally, corporations are the most often used structuring device for investment treaty protection because of their established separate legal personality under many domestic legal systems. However, some BITs require the company's seat or principal seat of business to be in the relevant State. Depending on the definition, there may also be a requirement of effective management or significant economic activities or substantial operation activities from the seat or the home State, as opposed to simply a place of incorporation.

If a SWF operates through an SPV 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'.[97]

Whilst investing directly into the target company is an option, SWFs also invest through complex shareholding structures. It may be that the potential claimant is held by a parent company / shareholder in a third country. Subject to the wording of the relevant IIA, tribunals have generally accepted their jurisdiction to hear the claims of non-controlling and indirect shareholders.[98] This is because the shares in a company in the host State (whether held directly or indirectly) are often included in the definition of protected investment.

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'.[99]

Finally, SWFs that follow the 'fund model' are more akin to pools of assets than legal entities. In the context of investor-State arbitration this may give rise to questions of jurisdiction and *locus standi* similarly to the situation of trusts or other unincorporated bodies.[100] Another question that may arise when it comes to investments of 'fund model' SWFs relates to whether investment protection is afforded to investments that the host State has made itself (at least when the assets of the 'fund model' SWF involved belong to the home State itself). The legal position largely depends on the specific provisions of the applicable IIA. In the context of ICSID arbitration, a few observations on whether sovereign investments are protected under the ICSID Convention are set out below.

Qualifying as an investor under the ICSID Convention

To access ICSID arbitration, a SWF would not only need to meet the relevant requirements under the relevant IIA, national law or contract, but also the requirements under Article 25 of the ICSID Convention.[101] To act as a qualifying investor a SWF must show that the legal dispute is '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'.[102]

The term 'national of another Contracting State' is understood pursuant to Article 25(2) to include 'natural' and 'juridical' persons. However, Article 25 does not define the two terms. SWFs may take the form of a 'juridical' person. Some issues may arise as to whether the reference to 'private' investment in the ICSID Convention preamble would cover SWFs, whose investments may be categorised as 'public' investments. This has raised the question of whether disputes arising out of investments by SWFs would be covered by the ICSID Convention.[103]

SWFs have, by definition, a 'sovereign' element, which is not present in privately-owned commercial companies or in other private incorporated bodies. The preamble to the ICSID Convention might seem, on a narrow textual reading, to indicate that the ICSID Convention was designed with a focus on the protection of 'private' as opposed to 'public' investment.[104] This raises the issue of whether the ICSID Convention covers disputes arising out of investments made by SWFs and, more generally, by States, including their subdivisions or agencies.[105] The issue is to what extent SWFs fall under the personal scope of the ICSID Convention as defined by Article 25(2) of the ICSID Convention.

Taking SOEs as a comparator, Mr Aron Broches, the main architect of the ICSID Convention, noted the possibility that they may be covered by the ICSID Convention:

> There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in the legal characteristics and

> in their activities. It would seem, therefore, that for the purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function.[106]

Mr Broches therefore suggested that the corporate structure and source of capital, private or public, would not constitute a limitation to an entity, such as a SWF, to access the ICSID system. The focus would be more on the level of agency and relationship between the SWF and the home State. In this regard, in the afore-cited passage, Mr Broches sets out a two-limb test to determine whether the acts of the entity in question should be equated as acts of the State, namely:

- whether the mixed company or State enterprise acts as an agent of the home State in relation to the investment which is alleged to be harmed by the host State's conduct; or
- whether the mixed company or State enterprise performs a governmental function on behalf of the home State in relation to the investment in question.

In *CSOB v Slovak Republic* case a Tribunal for the first time concluded that the Broches test was the appropriate way to determine whether a State-owned entity's activities fell under the scope of the ICSID Convention.[107] It ruled that, even though the Government of the Czech Republic owned CSOB, its activities were inherently commercial as opposed to governmental. The Tribunal focused on the nature of CSOB's activities in the discharge of its functions on behalf of the State noting that:

> … in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purpose of the State, the activities themselves were essentially commercial rather than governmental in nature.[108]

The ICSID Tribunal and *Ad Hoc* Committee in *CDC v the Republic of Seychelles* also appear to have relied (albeit unadmittedly) on the Broches test.[109] Although the Respondent does not seem to have formulated a specific jurisdictional objection on this point, in its Final Award, the Tribunal considered it necessary to point out that the nature of CDC's activities was commercial and not governmental.[110] The Ad Hoc Committee in the same case subsequently described CDC as a 'governmental instrumentality for investing in developing countries [that was] wholly owned by the UK Government, but acted on a day-to-day basis without government instruction or operational involvement'.[111]

In *Beijing Urban v Yemen*,[112] the Claimant entered into a construction contract with Yemen Civil Aviation Authority to improve the facilities of the Sana'a International Airport. The Claimant complained of a series of measures attributable to Yemen that culminated in the termination of the contract.[110] Yemen argued that the Tribunal did not have jurisdiction *ratione personae* because the Claimant, being a State-owned entity, acted as an agent of the Chinese Government and discharged governmental functions 'even in its ostensible commercial undertakings'.[114] The Claimant responded that it was a protected investor under the ICSID Convention because it acted in a commercial capacity and was not under the control of the Chinese government.[115] The Tribunal noted that 'corporate controls and mechanisms are not surprising in the context of PRC State-owned corporations'[116] and the issue was 'not the corporate framework of the State-owned enterprise, but whether it functions as an agent of the State in the fact-specific context'.[117]

The Tribunal applied the evidence to the Broches test, ie (i) whether the Claimant was acting as an agent for the government *or* (the Tribunal placed emphasis on the 'or' part); and (ii) whether the Claimant was discharging an essentially governmental function.[118] The Tribunal held that the Claimant was not acting as an agent of the Chinese State because it participated in the investment project acting as a general contractor following an open tender in competition with other contractors and its bid was selected on its commercial merits.[119] The Tribunal concluded that the Claimant performed its work under a construction contract as a commercial contractor and not as an agent of the Chinese Government.[120] The Tribunal further held that the Claimant was not discharging an essentially governmental function and the Respondent's assertion that the Chinese State was the ultimate decision maker for key management, operational and strategic decisions was 'too remote from the facts of the … project to be relevant'.[121] Therefore, the Tribunal dismissed the Respondent's objection *ratione personae* focussing on the commercial functions of the Claimant.[122]

The two-part Broches test finds some parallels in Articles 8 and 5 respectively of the ARSIWA. However, the factors for determining whether a State enterprise can be equated to the State for purposes of an analysis under Article 25 of the ICSID Convention should not be confused with the ARSIWA rules on attribution for purposes of State responsibility. Their application would differ based on whether the SWF is a party to the dispute or its actions are attributed to a State for the purposes of State responsibility.

In this regard, the case of *Masdar v Spain* illustrates the difference. A Dutch company ultimately owned by the government of Abu Dhabi asserted a claim against Spain.[123]

Spain argued that the conduct of the Claimant was attributable to the UAE, meaning that the dispute was essentially one between two States and therefore the Tribunal lacked jurisdiction.[124] Spain admitted that it was not making an argument that Article 8 ARSIWA was directly applicable for jurisdictional purposes, but put forward the argument that it was 'evidence of the existence of principles of international customary law on attribution'.[125] In turn, the Tribunal held that it had 'little hesitation in dismissing this objection to its jurisdiction'.[126] Applying the reasoning adopted in *CSOB v Slovakia*, the Tribunal found that the claimant could not be disqualified as it was not 'acting as an agent for the government or discharging an essentially government function'.[127]

Therefore, investor-State tribunals may rely on the Broches test to determine whether a SWF is a protected investor under the ICSID Convention. Based on the reported investment-treaty jurisprudence, it is likely that an arbitral tribunal would not consider that a SWF's structure (eg whether the SWF follows the 'fund model', the 'public entity model' or the 'State-owned entity model') is determinative to answer this question. An investor-State tribunal would most likely approach this question on a case-by-case basis considering the evidence that the parties provide. Independently from the level of control of the State on the SWF and depending on the IIA, a SWF may be considered a protected investor if it demonstrates that it acts in a commercial capacity without discharging a governmental function or acting as an agent of the State.

The investments of SWFs

Most IIAs tend to define the term 'investment' broadly in order to afford protection to a wide group of assets,[128] including direct or indirect shares in a company.[129] As other economic actors, SWFs generally invest in host States through the direct acquisition of shares of the target company[130] or indirectly, investing in SPVs or private equity funds as seen above.

Direct shares in target companies or indirect ownership of the investment through other investment vehicles are usually included in the definition of protected investments under the IIA applicable to the dispute.[131] However, some particularities may arise: (1) in the ICSID context; and (2) depending on whether a host State restricts SWFs from holding certain types of investment.

The concept of investment under the ICSID Convention

The ICSID Convention does not define the term 'investment'.[132] Accordingly, investment-treaty jurisprudence has developed a series of criteria to determine what constitutes an investment under Article 25 of the ICSID

Direct shares in target companies or indirect ownership of the investment through other investment vehicles are usually included in the definition of protected investments under the IIA applicable to the dispute.[128] However, some particularities may arise: (1) in the ICSID context; and (2) depending on whether a host State restricts SWFs from holding certain types of investment.

Convention. If the disputes are covered by the ICSID Convention, in addition to the definition of 'investment' contained in the IIA, a SWF may have to satisfy the definition of 'investment' under Article 25 of the ICSID Convention (i.e. what is commonly referred to as the 'double barrel' test).

The ICSID Tribunal in *Salini v Morocco* listed four elements of the definition of investment under Article 25: (i) contribution; (ii) duration; (iii) risk; and (iv) promotion of the economic development of the host State.[133] While not all tribunals have applied this test, the need for a contribution is a feature that is often applied and can result in different approaches to determine whether the ICSID Convention applies to a SWF's investment.

It is generally accepted that a contribution can be either a cash contribution or contribution in-kind, such as equipment, know-how, personnel or services.[134] For example, in *Gavazzi v Romania*, the Tribunal found that the purchase price paid by the Claimants for the shares in a Romanian company constituted a contribution.[135] The situation may be more complicated if a SWF operates through or together with a limited partnership, trusts or other complex structures. In *Eiser v Spain*, the Respondent had argued *inter alia* that the first Claimant, the general partner of a limited partnership, had not made any qualifying 'investment' because the funds were provided by the limited partners.[136]

The Tribunal in that case rejected the Respondent's argument and considered that 'the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction', and therefore it had jurisdiction over the dispute.[137] In *RREEF v Spain*, the Respondent had argued that the Claimants, including the general partner of a limited partnership, had not made any contribution because the funds were contributed by the limited partner of the funds. The Tribunal there affirmed its jurisdiction on the basis that there was no restriction as to the origins of the capital in the relevant treaty.[138] In *Mason Capital v Korea*, the Tribunal considered the issue of what the Claimant had actually contributed itself and delved into the detail of whether the

Claimant had made any contribution in kind, given that it had not made any cash contributions.[139] The Tribunal held that there was sufficient contribution on the basis of the investor's contributions in kind, namely, its investment decision-making, management and expertise.[140]

A SWF's investment structure can be relevant (in addition to the definition of protected investor) to determine whether an investment is protected under the ICSID Convention. However, even if for some reason a SWF is unable to satisfy the jurisdictional requirements under Article 25 of the ICSID Convention, it might still be able to bring an investment treaty claim pursuant to other institutional rules (for example, UNCITRAL, SCC or ICC Rules) administered either *ad hoc* or by another arbitral institution (such as the PCA, the SCC, the ICC or indeed ICSID).

Protection for pre-investment measures

Given the voluntary and non-binding nature of the Santiago Principles and the growing relevance of SWF's investments in foreign jurisdictions, concerned host States have adopted further measures to regulate SWFs at the national level. Notably, certain States have established pre-admission screening measures applicable to SWFs before their investments may be admitted into the host State (see, on this point, below at section 7).

Typically, the purpose of this review is primarily to consider:

> … the extent to which the basic investment management policies of the investor require investment decisions to be based solely on commercial grounds; the degree to which, in practice, the investor's management and investment decisions are exercised independently from the controlling government, including whether governance structures are in place to ensure independence; the degree of transparency and disclosure of the purpose, investment objectives, institutional arrangements, and financial information of the investor; and the degree to which the investor complies with applicable regulatory and disclosure requirements of the countries in which they invest.[141]

These screening measures can hinder investments from SWFs and subject SWFs to potentially discriminatory or arbitrary regulatory or administrative treatment, which may be in breach of BIT standards. However, if the SWF is subject to these measures before its investment, it might be difficult for the affected SWF to invoke IIA protection and bring an investment claim before an arbitral tribunal (depending on whether the IIA covers 'pre-investment').

Investment screening is, to a significant extent, a matter of national law, underpinned by the traditional view that 'under customary international law, states have the sovereign right to control the admission of foreign investors and investments into their respective territories'.[142]

Frequently, IIAs deal neither with the entry nor with the establishment of foreign investments at all, or they provide that this phase be subject to the host State's internal laws or, again, they only contain weak protections relating to this phase such as in the form of 'promotion and encouragement' obligations.[143] The following approaches emerged:[144]

The treaty is silent: BIT protection may not extend to pre-admission reviews. An arbitral tribunal may not have jurisdiction over a claim by a SWF arising out of a pre-investment measure.

Admission of an investment being conditional on host state laws and policy: a BIT may provide, for example, 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.[145]
>
> In this case, the host State would be in breach of the BIT if it has failed to admit the SWF's investment 'in accordance with its laws and policy' existing at the time the SWF was seeking to make its investment in the host State.

Other IIAs, though, afford more robust, albeit not absolute, protection to investment in the establishment phase. These include US-style treaties, which follow the so-called 'pre-entry model' in relation to the 'national treatment' or 'most-favoured nation treatment' standards of protection.[146] Such a feature is not limited to US-style international investment agreements. Recent examples are the investment protection provisions contained in Chapter 8 of the EU-Canada Comprehensive Economic and Trade Agreement ('**CETA**').[147] Some of the substantive provisions set out in Chapter 8 expressly cover the establishment of investment,[148] although it is excluded from the scope of Chapter 8 dealing with investor-State dispute settlement provisions.[149]

Under 'pre-entry model' IIAs, unfair investment screening measures affecting a SWF might entitle the SWF to bring a treaty claim against the host State. However, this might require the SWF to establish that it was in 'in like circumstances' and not given equal treatment to domestic investors or investors from a third country. Considering the nature of SWFs, an issue may be identifying a suitable comparator for the SWF to satisfy the 'in like circumstances' requirement. The outcome may depend on the formulation of the 'national treatment' or 'most-favoured nation treatment' clause in question. According to a scholar, 'it is unlikely that any national investor would have the 'deep pockets' of the SWF, its association with a foreign state, or possess motivation by national as well as commercial interests'.[150]

Further, the protection afforded by pre-entry national treatment or most-favoured nation treatment clauses may be subject to the exceptions contained in the relevant IIA, including national security exceptions.[151] In such case, as it has been rightly pointed out, one of the relevant issues that might arise is whether the relevant exception is 'self-judging' or not.[152]

SWFs as organs or instrumentalities of the host State

SWFs might also play (and have played) a role in investor-State arbitration also as on the opposite side as organs or instrumentalities of the host State. Most often, the respondent in investor-State arbitration is the State itself, with the exception of the ICSID regime, in which designated sub-entities of the State can be parties to ICSID proceedings under ICSID Convention Article 25(1) and (3). It is also not inconceivable that the conduct of a SWF of the host State *vis-à-vis* a foreign investor might give rise to an investment claim against the host State.

To succeed in such a claim, the investor would have to show that the conduct of the SWF in question is 'attributable' to the host State under the principles codified in Articles 4, 5, 8 (or 11) of the ARSIWA. It would usually be necessary to prove that the SWF is an organ of the State or that it is empowered with, and exercised, elements of governmental authority.[153] The test under Article 8 of the ARSIWA requires that the SWF have in fact acted on the instructions of, or under the direction or control of, its home State in carrying out the conduct complained of. The more independent from the State and commercially-oriented the SWF is, the more difficult it would be to establish attribution.

In *Stati v Kazakhstan,* the Claimants complained *inter alia* that, as part of a broader harassment campaign allegedly mounted against them by the Respondent, they encountered difficulties with one of their largest customers, a company called Kemikal.[155] Kazakhstan objected that Kemikal's acts were not attributable to it.[156] The Arbitral Tribunal considered otherwise. It observed that 'Kemikal was managed by Samruk-Kazyna, which is the Kazakh state welfare fund and is 100% owned and controlled by Kazakhstan' and that the former deputy manager of Samruk-Kazyna had close family ties with Kazakhstan's President.[157]

The question of attribution of the acts of a sovereign wealth fund (the LIA) surfaced (albeit tangentially) also in *Öztaş v Libya*.[158] The case (analysed in *Annex 4*) concerned claims arising out of the conduct of the Libyan Investment Development Company, an indirect subsidiary of the LIA, which the Claimant claimed were attributable to Libya.

SWFs AND STATE-TO-STATE DISPUTE RESOLUTION

State-to-State dispute resolution may be used *inter alia* to pursue claims based on the interpretation and application of treaty provisions. This includes claims based on diplomatic protection. Diplomatic protection allows States to protect their nationals at an international level. Where a foreign investor has a claim against a host State, the home State may have access on behalf of its national to a remedy at the public international dispute settlement level. This include the situation when an investor alleges that a host State has violated international law treatment standards *vis-à-vis* the investor. The investor's home State may be able to rely on diplomatic protection to bring a claim against the host State, despite the home State not suffering the loss itself. To apply the principle to SWFs, where a SWF has a claim based on an investment made in a host State's territory, the SWF's home State may be able to bring a claim on behalf of the SWF, either arguing that the SWF is a State organ or exercising diplomatic protection over the SWF as a separate entity.

The ICJ and its predecessor, the PCIJ, considered a number of claims based on diplomatic protection. In the *Serbian Loans* case, the PCIJ recognised that, although the dispute was concerned with relations between the borrowing State and private persons (the creditors), a dispute also existed between the French Government and the Serbian Government. The Court held that the French Government was exercising its right to protect its nationals 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf'.[159]

Similarly, in the case of *Ambatielos*, Greece pursued a diplomatic protection claim against the UK on behalf of a Greek national.[160] In its 1952 Judgment on the UK's preliminary objections, the ICJ found that it had jurisdiction

to decide whether the UK was required to submit the dispute relating to the validity of Ambatielos' claim to arbitration (but not to adjudicate the merits of Ambatielos' underlying claim).[161] In its subsequent 1953 Judgment, the ICJ found that the UK was under an obligation to submit to arbitration the dispute over the validity of Ambatielos' claim under a 'Declaration' and a treaty the UK had entered into with Greece in 1886 and 1926 respectively.[162]

In *Barcelona Traction*, Belgium sought compensation for damage caused to its nationals (the shareholders of the Barcelona Traction, Light and Power Company, a holding company incorporated in Canada) because of acts contrary to international law allegedly committed by Spanish State organs.[163] Spain submitted that the claim was inadmissible and unfounded.[164] The ICJ found that Belgium had no legal standing to exercise diplomatic protection of shareholders in a Canadian company in respect of measures taken against that company in Spain.[165] The Court accepted that there may be exceptions to this rule such as when States have agreed on affording shareholders diplomatic protection in treaty provisions and that when 'considerations of equity' so require that standing be recognised the State of the company's shareholders.[166] However, as a general rule, diplomatic protection is only afforded to the home State of the corporation, which was Canada rather than Belgium.[167] Applying this reasoning to SWFs, SWFs would not *a priori* be able to rely on diplomatic protection standards if it is incorporated in a different jurisdiction to its home State.

State-to-State dispute resolution and the use of diplomatic protection can also take place in the context of investment treaty arbitration. For instance, in *Italy v Cuba*, Italy pursued diplomatic protection claims on behalf of its nationals who had invested in Cuba.[168] One of the claims submitted on a diplomatic protection basis concerned a Cuban State-owned hotel.[169] The majority of the Tribunal held that hotel management did not involve an exercise of governmental authority and was by its nature a commercial activity and, therefore, the acts of the hotel could not be attributed to Cuba.[170] Dissenting arbitrator Tanzi disagreed.[171] In Professor Tanzi's view, State organs include State-owned companies, particularly if the company is aimed at developing a key national economic sector, is integrated in the State structure and is controlled by the State.[172]

State-to-State dispute resolution is a potentially underestimated avenue for a SWF to bring a claim against the host State of its investment. This may be done in two ways. First, the SWF may request its home State to act on its behalf as in *Italy v Cuba*.[173] As in an indirect claim, the home State acts in its own name to seek redress for the wrong done to its nationals and the exhaustion of local remedies is a condition of admissibility for a State-State claim.[174]

Second, if the SWF is a State organ, the home State could pursue the dispute on its own behalf as a direct claim. However, in this case, the State brings the claims 'to secure objectives principally on its own'[175] What is inherent in this concept is that the injury directly affects the litigating State and the substantive protections apply to investments made by the home State.[176] A practical procedural consequence is that the rule on the exhaustion of local remedies does not apply and 'such an immediate breach of international law is actionable at once, and the rules regarding denial of justice and exhaustion of local remedies do not come into operation at all.'[177]

SWFs may also be involved in the broader factual matrix of a State-to-State dispute without being a direct party to the dispute. This is the case, for example, of the Railway Land Arbitration between Malaysia and Singapore.[178] The case concerned the question whether a joint venture company established for land development purposes by the Government of Malaysia, acting through a wholly-owned State company, and the Government of Singapore, acting through its SWF Temasek, was due to pay a 'development charge' in Singapore. The joint venture had been established within the framework of an agreement between the two Governments.

SWFs AND WTO DISPUTE RESOLUTION

Settling WTO disputes is the responsibility of the DSB, which consists of all WTO members.[179] Contrary to investor-State arbitration, only States can commence proceedings before the DSB.[180]

Several trade disputes involve private actions having some governmental connection or endorsement. One panel defined 'sufficient government involvement' as the decisive criterion as to whether a private action may be deemed to be a governmental 'measure'.[181] Therefore, if a SWF is closely linked to or managed by State agents, it may have sufficient government involvement to be involved in WTO dispute settlement. However, it is unlikely that the actions of a SWF alone would give rise to a trade dispute against the SWF's home State.

Where a SWF is a service provider in a host State, it may rely on the GATS. For its provisions to apply, the GATS requires that a service supplier of a Member State, including governmentally-owned legal entities,[182] have a 'commercial presence'.[183] The scope of these rules may include some SWFs. However, this will depend on the level of governmental authority over the SWF in question. The GATS expressly excludes from the scope of its application 'services supplied in the exercise of governmental authority', which have been defined as 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'.[184]

Moreover, the GATS will only cover circumstances where the service supplier owns a controlling stake in the juridical entity in the host Member State that has been impacted by the disputed measures.[185] Thus, subject to the exemptions listed in the GATS and any limits or restrictions set out in the schedule of the host State's specific commitments,[186] a SWF may be afforded the guarantees and protections provided under the GATS depending on the corporate structure. This includes when the SWF holds a majority and controlling interest in a local company or has a branch or representative office providing services on a commercial basis and in competition with other service suppliers in the host Member State[187] within a protected sector.[188] Such guarantees and protections include treatment no less favourable than that accorded by the host State to like services and service suppliers of any other country[189] or its own nationals,[190] and no less favourable treatment with respect to market access in the host State.[191]

If a SWF, which meets all the above requirements, faces any measures by the host State violating its obligations and specific commitments under the GATS, the SWF's home State may have recourse to the DSU against the host State.[192]

A SWF may also seek to rely on the terms of the TRIPS Agreement, if its intellectual property rights are violated by a host Member State of the WTO. The TRIPS Agreement accords minimum standards of protection to be provided by a host State to natural or legal persons of another Member State in the area of intellectual property so long as they meet 'the criteria for eligibility for protection provided for in the Paris Convention (1967),[193] the Berne Convention (1971),[194] the Rome Convention[195] and the Treaty on Intellectual Property in Respect of Integrated Circuits' which is reasonably wide.[196] Thus, so long as a SWF holds protected intellectual property rights under the TRIPS and such rights have been violated by another Member State, its home State may refer the dispute on its behalf to the dispute settlement procedures under the DSU.[197]

Importantly, the outcome of any WTO dispute resolution process, whether for breaches of the GATS, the TRIPS or any other WTO agreement, would not lead to any damages being awarded to the home State or SWF in question. However, the WTO panel and appellate body, may recommend that the host State brings 'the measure in conformity with [the] agreement';[198] and suggest ways in which the host State concerned 'could implement the recommendations'.[199] Compensation and suspension of concessions may also in certain circumstances be recommended, as 'temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable time'.[200]

Do SWFs benefit from State immunity

from jurisdiction and / or execution?

Issues of enforcement and State immunity in respect of SWFs are becoming increasingly relevant because of SWFs' investments in a variety of sectors and jurisdictions.

Immunity is a procedural issue. Whether an SWF can assert immunity depends on the law under which proceedings are brought. It may also depend on the way in which the specific SWF is structured, and the extent of its autonomy from the State. If a SWF benefits from State immunity, this may create a jurisdictional obstacle to bringing claims against the SWF (immunity from jurisdiction) or enforcing a court judgment or arbitral award against its assets (immunity from execution).

ARE SWFs PRIVATE OR PUBLIC ACTORS?

The intersection of SWFs and sovereign immunity is something of a legal 'black hole' because

> … the 'more sovereign' nature of SWFs and lighter 'commercial purposes', the dual role of the state being both sovereign and corporate, has made SWF's legal status more ambiguous'.[201]

In reality, neither the Santiago Principles, academic analysis nor any other initiative has arrived at a conclusion as to whether SWFs are essentially private or public actors. SWFs tend to be formally public but functionally private, acting as private legal entities in the context of commercial transactions. Therefore, their potential ability to invoke protections afforded to entities carrying out sovereign authority raises a number of legal issues. SWFs generally remain legally autonomous from the State, either established under the company laws of the State, under legislation or managed via an investment mandate given to the State's national bank. Therefore, a tension exists between the separate legal personality of a SWF as divorced from the State itself (when the SWF has separate legal personality, which may not always be the case), and the function they are intended to perform within the State apparatus.[202]

In *GSS v National Port Authority*, the Federal District Court for the District of Columbia considered that the National Port Authority (the '**NPA**') was falling 'somewhere between' the categories of a foreign sovereign and a private foreign person.[203]

According to the Court, the test that would apply to a private foreign person (the 'minimum contacts' test) would not apply to States and their instrumentalities.[204] The petitioner did not contest evidence of the NPA's independence from Liberia.[205] The petitioner noted that the NPA was responsible for its own finances, received no funding or subsidies from the Government of Liberia, that its primary purposes were commercial, and that the Government was not involved in its day-to-day management.[206] The Court ultimately concluded that the NPA benefitted from the due process protections afforded to private foreign persons for purposes of personal jurisdiction.[207]

SWFs may be precluded from invoking immunity from jurisdiction or enforcement because of their inherently commercial activities and their inability to exercise sovereign authority. In this regard, SWFs fall within the broader rubric of consideration in many States of courts determining what amounts to a commercial activity (acts *iure gestionis*) and whether that activity falls under the umbrella of State immunity.

As a final consideration, whether SWFs are considered as public or private actors may also affect their standing as claimants in investment treaty arbitration. As seen above, in *CSOB v The Slovak Republic*, the Tribunal focused on the nature of CSOB's actions, not on the purpose of those actions.[208] Notwithstanding that CSOB was owned by the Czech Government, faced with the assertion by Slovakia that CSOB acted on behalf of the State, the Tribunal concluded that even though CSOB did carry out activities which promoted government objectives, the specific activities were commercial in nature and it was thus permitted to bring a claim.[209]

IMMUNITY FROM JURISDICTION

Structural issues can inform the question of immunity from court jurisdiction. For example, in the United States under the 1976 Foreign Sovereign Immunities Act,[210] if considered an agency or instrumentality of a foreign State, SWFs would generally benefit from sovereign immunity excluding jurisdiction of the US courts. However, immunity would not generally apply if they were not considered an agency or instrumentality of a foreign State.

Accordingly, the application of the FSIA does not always render consistent results on the issue of immunity regarding SWFs:

> SWFs with separate legal personality, will enjoy the immunity from jurisdiction that the FSIA affords to foreign states, as long as those SWFs may be characterized as 'agencies or instrumentalities.' At the same time, a SWFs with separate legal personality that does not qualify for "agency or instrumentality" status, will not be covered by the regimes of sovereign immunity provided for under the FSIA. In other words, not all SWFs with separate legal personality will automatically enjoy sovereign immunity from jurisdiction under the U.S. legal system. This lack of consistency under U.S. law, results in unequal treatment of SWFs which generates injustice for the very SWFs, their contractual partners and their creditors.[211]

In the United States, a SWF may lose or limit sovereign immunity *inter alia* where the SWF: (i) is involved in 'commercial activities' in or affecting the US; or (ii) waives sovereign immunity, either expressly or by implication.[212]

For example, the case of *Atlantica Holdings v Samruk-Kazyna*[213] concerned a dispute between investors and Kazakhstan's Samruk-Kazyna fund in respect of misrepresentations made during a debt restructuring by a second bank in which the SWF had a controlling interest. The Second Circuit in this case held that, relying on the commercial exception as set out in s 1605(a)(2) of the Foreign Sovereign Immunities Act, the SWF was not entitled to claim sovereign immunity on the basis that its actions (the issuance of debt securities) had 'direct effect' in the US, notwithstanding the fact the issue was actually made outside the US.

Conversely, in *Janvey v Libyan Investment Authority*, the Fifth Circuit Court of Appeals determined that the SWF was not subject to the commercial activity exception because the SWF did not exercise sufficient control over or participate in the underlying alleged commercial activity. Therefore, the LIA could benefit from immunity from jurisdiction.[214]

An argument could be made that any agreement into which a SWF enters with a counterparty containing an arbitration clause contains a waiver of sovereign immunity from jurisdiction.[215] Essentially, if SWFs enter the market as private players, they should not then '… be permitted to avoid the economic and legal consequences of its actions simply by virtue of its sovereign affiliation'.[216] While the 'commercial exception' is commonplace in jurisdictions where the doctrine of restrictive sovereign immunity is favoured, there still appears to be a reluctance in some jurisdictions to treat SWFs as purely commercial entities carrying out activities in the same manner as any non-state entity.

Most notably, China has continued to assert a more expansive doctrine of State immunity.[217] China considers that State immunity can be available to State entities even where the State entity in question is performing duties which are commercial in nature.[218] Although the Chinese position may evolve,[219] this approach varies from the view reflected in many States that jurisdiction can be upheld in circumstances where the State entity in question is acting in a commercial nature.

The ambiguity concerning the status of SWFs complicates the legal position when it comes to determining whether a SWF is covered by jurisdictional immunities. 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) and this would, to some extent, simplify the position.

IMMUNITY FROM ENFORCEMENT

A SWF may claim State immunity from enforcement to prevent execution of an arbitral award or court judgment against its assets. An issue of enforcement would most obviously arise in circumstances where a claimant has been granted an arbitral award or a positive judgment against a SWF and has to resort to court proceedings for enforcement purposes. Enforcement issues would also be relevant to successful claimants in investor-State arbitrations or commercial arbitrations against a State attempting to enforce an award against State assets held by SWFs.[220]

It should be noted that States generally limit their waiver of immunity to jurisdiction without expressly addressing the issue of enforcement of awards or judgment.[221] In some jurisdictions, such as the UK, a State's consent to the adjudicatory jurisdiction of the courts will not be equated with consent to the enforcement jurisdiction of the same.[222]

As in the case of immunity from jurisdiction, the most commonly accepted test to determine whether certain assets are immune from enforcement or not is whether they are used for commercial (*iure gestionis*) or sovereign purposes (*iure imperii*). Both UK and US legislation, for example, provide for enforcement against assets used for commercial purposes.[223]

It is therefore often up to the enforcing party to show that the property which is the subject of enforcement proceedings is used for commercial purposes. The definition of 'commercial purposes' in any given case would then turn on the particular domestic laws in place. As has been noted, '… there does not appear to be any established case law regarding the application of these doctrines to SWFs, and in some situations, SWFs have indeed benefitted from sovereign immunity'.[224] Accordingly, 'the legal autonomy of state-owned

entities may, in combination with the principle of state immunity, sometimes have the effect of rendering claims against states *de facto* unenforceable'.[225]

Enforcement of an award or judgment with a SWF against the State

In the event an award or judgment against a SWF with separate legal personality to the State is sought to be enforced against that State, the court of the enforcement may 'pierce the veil' and order execution against State assets. The position is far from 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'.[226]

The structural distinction between the SWF and its State in some cases may mean that, subject to domestic legislation, enforcement against a SWF could be interpreted to mirror enforcement against a private investor. This would be in line with the Santiago Principles that ask that '… the separate legal existence of SWFs is recognized by courts and that their assets will not be treated as assets of the state'.[227]

National legislation will dictate the requirements for enforcement, which differ from one jurisdiction to another. However, a number of issues would arise in every jurisdiction concerning the attachment of assets belonging to a State.[228]

For example, a claimant must show that the property in question is not subject to immunity against enforcement. The UN Convention on State Immunity, which has been regarded as '… the most authoritative statement available in the current international understanding of the limits of State immunity in civil cases', states, in Article 19, that:

> No post-judgment measures of constraint, such as attachment, arrest or execution, against 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 expressly consented to the taking of such measures as indicated:
> 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; or
> - the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
> - 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.[229]

Although it remains questionable whether all aspects of Article 19 above reflect customary international law, the ICJ has confirmed in the *Jurisdictional Immunities of the State* case that the following conditions contained in the Article must be satisfied for constraints to be taken against State property in light of the well-established practice applied by certain domestic courts:

> … that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim ….[230]

Enforcement of an award or judgment with a SWF directly against the SWF

Where the SWF is the respondent in a case, the assets sought by the prevailing party would belong either to the State or the SWF itself. In these circumstances, the courts may decline to order the enforcement because the assets are protected by the doctrine of sovereign immunity.[231] This approach would also affect ICSID awards. Indeed, such a scenario was expressly contemplated by the Executive Directors of the World Bank who recognised in their Report on the ICSID Convention that:

> the doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed.[232]

Article 55 of the ICSID Convention clarifies the position by emphasising that '[n]othing 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'.[233] Thus, SWFs could in principle benefit from sovereign immunity under the applicable local law of the place of enforcement. This would mean that a SWF could be precluded from enforcing the award against the assets of the SWF in that State.

However, in *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.[234] This was notwithstanding that the purpose of the KIA was to achieve a long term investment return on the financial reserves of the State.[235]

Enforcement against a SWF for debts of the State

A third option would be for a successful claimant to enforce against a SWF for debts of the State. For example, in *Al-Kharafi v Libyan Investment Authority and Libyan Arab Foreign Investment Company*, the Claimant had attached some assets in enforcement proceedings of an arbitral award against the Libyan Government, the Ministry of Economy, the General Council for Promotion of Investments and Privatisation and the Libyan Ministry of Finance for breach of a contract concerning a large-scale tourism project.[236]

In *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.

The Claimant challenged the attachments before the *Tribunal de Grande Instance* of Paris, which ordered their release on the grounds that Libya had not made an express and special waiver of its immunity from execution.[237] Al-Kharafi appealed this decision to the Paris Court of Appeal, which rendered its decision on 5 September 2019.[238] The Court had to decide whether the LIA and LAFICO qualified as Libyan state entities and whether, accordingly, they were entitled to sovereign immunity from execution.[239] If so, the Court also had to decide whether Libya had waived its immunity and, if not, whether the attached assets were excluded from the benefit of the immunity.[240] The Paris Court of Appeal found in favour of Al-Kharafi, quashing the Judgment of the *Tribunal de Grande Instance* and thereby reviving the attachments.[241] On the first question, the Court held that LAFICO and LIA were akin to State entities.[242] On the second question, the immunity from execution concerning the attached assets was waived because the assets fulfilled a two-fold test: under (i) they were linked with the entity against which the action was brought; and (ii) they were used for other than non-commercial public service purposes.[243]

In England and Wales, the position under the English State Immunities Act 1978 is that State immunity can be claimed by '(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'.[244] However, the notion of 'State' for the purposes of the SIA does not include 'any entity … which is distinct from the executive organs of the government of the State and capable of suing or being sued'.[245]

In the case of *AIG Capital Partners v Republic of Kazakhstan*, the dispute before the English courts concerned an ICSID Award against Kazakhstan, which AIG attempted to enforce against funds and securities of the National Fund of Kazakhstan held by a third party (a financial institution) on behalf of the National Bank of Kazakhstan.[246] Due to the fact the management of the National Fund of Kazakhstan's assets was by the National Bank of Kazakhstan as a 'trust manager', this was sufficient to give the National Bank of Kazakhstan a 'property' interest in the assets within the meaning of section 14(4) of the English State Immunity Act. It followed that the financial institution which held the assets for the National Bank of Kazakhstan (as well as the National Fund of Kazakhstan's assets themselves) were immune from enforcement.

The English High Court concluded in that case that 'property of a State's central bank or other monetary authority' as set out in s 14(4) State Immunity Act meant:

> … any asset in which the central bank has some kind of "property" interest as I have described, which asset is allocated to or held in the name of a central bank, irrespective of the capacity in which the central bank holds it, or the purpose for which the property is held.[247]

However, on 29 June 2021, the Brussels Court of Appeals ruled that the transfer of assets to the National Bank of Kazakhstan constituted a sham transaction incapable of vesting title in the National Bank and that the assets of the National Fund of Kazakhstan were subject to attachment because they were invested to maximize returns, not for sovereign purposes.[248] This judgment may have implications for several SWFs with a similar structure.

Approaches to enforcement against SWFs for the debts of the States differ from one jurisdiction to another. Typically, SWFs without separate legal personality and managed under an investment mandate or similar agreement, they may be able to rely on the State Immunity Act to shield themselves from execution.

What should SWFs expect in a changing world?

RESTRICTIONS IMPOSED ON SWFs' ACTIVITIES

States hosting SWF investments have increasingly met the growing economic power and influence of SWFs with some reluctance as shown by national legislation governing foreign investment screening. According to UNCTAD, 'extending the scope of screening is in part … a reaction to the increasing investment activities of foreign State-owned or -controlled enterprises and sovereign wealth funds'.[249] As a result, some authors have observed an 'increased use of investment screening as a policy tool, particularly in developed economies'.[250]

Where a SWF proposes to acquire majority shareholdings, such a transaction may in some cases be viewed with caution by national screening authorities due to national security considerations.[251] Regulations can depend on the SWF's home State and that of its designated host State.[252] It is normally regulation at host State level that is the subject of focus, including in connection with the issue of national security.

By way of example, States have enacted a number of pieces of legislation on foreign investment screening, such as (to name a few):[253]

- US Foreign Investment and National Security Act 2007;[254]
- Italy's so-called 'Golden Power' legislation including Italian Law Decree No 21 of 15 March 2012 (as subsequently amended) and Italian Law Decree No 105 of 21 September 2019 (as subsequently amended);[255]
- the rules contained in France's Monetary and Financial Code in relation to foreign investment subject to prior authorisation;[256] and
- the UK National and Security Investment Act 2021.[257]

Investment screening mechanisms may consist, for example, of a general prohibition of foreign stake-holdings in domestic companies above a specified threshold percentage or of a specific review of foreign direct investment for national security purposes.

At the EU level, screening of foreign direct investment on the grounds of security or public order within EU Member States is the subject matter of Regulation (EU) 2019/452.[258] The Regulation does not establish a centralised or unified screening procedure for all EU Member States. Rather, it establishes a framework for foreign direct investment screening by Member States.[259] It includes the possibility for the Commission to issue opinions on such investment.[260] However, as clarified in the Regulation, each Member State is free to decide whether or not to screen a particular foreign investment,[261] and 'may' (and is, therefore, under no obligation to) adopt a screening mechanism.[262]

Investment screening instruments may directly affect investments by SWFs. This has prompted some criticism, mainly that 'the question of foreign investment regulation necessitates discussion of the effects of protectionism'.[263] It has also been pointed out that:

> … while transparency and accountability are sound principles in themselves, SWFs should not be subject to additional regulation simply because of their government owned status, when this is not warranted by solid macroeconomic justifications.[264]

Foreign investment screening mechanisms[265] appear to have gained further momentum with the Covid-19 crisis. According to the OECD, 'investment screening was already enjoying a heyday before the COVID-19 crisis–the pandemic is accelerating, rather than triggering this trend'.[266] Within the EU context, the Communication from the European Commission to EU Member States of 25 March 2020 illustrates this point:

> … today more than ever, the EU's openness to foreign investment needs to be balanced by appropriate screening tools. In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment. Vigilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens.[267]

New disputes involving SWFs and investment screening decisions might arise in the future. This might prompt SWFs to review the available domestic and international dispute settlement tools and consider which are the most appropriate to resolve such disputes.

CAN SANCTIONS BE IMPOSED ON SWFs?

Sanctions have a different nature, being usually divided into multilateral sanctions and unilateral sanctions. International or multilateral organisations issue the former to prevent breaches of international law and threats against international peace and / or human rights. Individual States issue unilateral sanctions and are usually driven by geo-political concerns.[268]

Despite their different nature and goals, sanctions impact a variety of business organisations, including SWFs. Direct sanctions on a company can harm business prospects by restricting the ability of the company to deal with its money and assets and cause foreign banks to become less likely to loan or lend credit to the company. Sanctions may also reduce the attractiveness of the company to investors.

Sanctions can also indirectly impact companies – and, therefore, SWFs – as follows:

- sanctions on one company may also impact other companies which own stakes in, or have business arrangements with the affected company; and
- sanctions on a particular country can impact the companies operating within the territory or restrictions in the movement of that country's assets.

How is the National Development Fund of Iran impacted by sanctions?

The National Development Fund of Iran is a SWF established by the government of former Iranian President Mahmoud Ahmadinejad in 2010 succeeded the dissolved Oil Stabilisation Fund. It saves the surplus of annual oil sales with a view to using them in years of low oil revenue or in the general budget in the event of a deficit, and to stimulate the private economic sector and infrastructure sectors and development projects through funding loans and grants.[269]

Iran is under economic sanctions imposed by:

- the US; and
- the UN in response to its nuclear programme.[270]

When the US re-imposed sanctions on Iran's energy sector, it provided six-month waivers to eight countries. However, the waivers required Iran to receive most of its oil revenue in non-convertible currencies – such as the Indian rupee and Turkish lira – and deposit them in escrow accounts, thereby preventing Tehran from allocating them to the National Development Fund.

In early 2019, the Iranian Parliament's Research Centre announced that it would add no new money to the NDF in the next budget year. The budget also reduced the planned allocation of Iran's oil and gas revenues to the National Development Fund from 34 percent of total revenues to 20 percent.[271]

Further, sanctions imposed in September 2019 specifically included the freezing of any assets belonging to three Iranian institutions in the US, and the termination of any financial transactions between these entities and any American citizen, bank or company. Therefore, these limitations and risks are a strong deterrent to do business with Iranian entities, including the National Development Fund.[272]

How is the LIA impacted by sanctions?

The LIA is a SWF established on 28 August 2006 (during the former Gaddafi regime) to manage the surplus of the Libyan oil revenues.[273] It controls a number of entities including LAFICO; the Libyan African Investment Company (LAICO), the Libyan African Investment Portfolio (LAP); the Long-Term Investment Portfolio (LTP); and the Libyan Local Investment and Development Fund (LLIDF) (some of which have been affected by sanctions, as discussed below). LIA's subsidiaries held investments in different western markets and retained a high degree of autonomy in their investment strategies after LIA's establishment.[274]

In 2011, when the Gaddafi regime was still in place, the UN introduced an arms embargo, a travel ban and an assets freeze in connection with the situation in Libya. This was by way of Resolution No 1970 (2011) of the UN Security Council.[275] The travel ban and the assets freeze targeted specific individuals and entities.[276] Resolution No 1970 (2011) was subsequently amended and modified by Resolution No 1973 of 2011 which included the LIA on the list of individuals and entities subject to the asset freeze on the grounds that it was '[u]nder control of Muammar Qadhafi and his family, and potential source of funding for his regime'.[277]

In September 2011, shortly after the fall of the Gaddafi regime and the beginning of a process of democratic transition in Libya, the UN Security Council eased or lifted some of the afore-said measures. However, some of the prior measures remained in place, including the asset freeze in relation to assets held by the LIA outside of Libya.[278] This was done with a view to 'ensur[ing] that assets frozen pursuant to Resolutions 1970 (2011) and 1973 (2011) shall as soon as possible be made available to and for the benefit of the people of Libya'.[279]

Thereafter, a number of new UN Resolutions amended or modified the aforesaid Resolutions.[280] The LIA has since remained on the list of sanctioned entities.[281] Further to the sanctions imposed at the UN Security Council level, sanctions have been imposed on the LIA also by the EU[282] as well as by national Governments, including the UK.[283]

Reportedly, this has in turn, had repercussions on the companies in the LIA's portfolio, including, for instance, UniCredit: at the time, the LIA was a shareholder in UniCredit and, reportedly, as a result of the freezing of the LIA's assets, UniCredit struggled to raise capital.[284]

Subsidiaries of the LIA have also faced sanctions as a result of the sanctions against the LIA.[285] Under Resolution 1970 (2011):

> Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee.[286]

Similar provisions targeting the LIA's subsidiaries have been introduced and applied, for example, at the EU level, with a number of the LIA's subsidiaries being affected by the sanctions.[287]

The legal position regarding entities controlled by LIA remains, however, unclear. In an 'Implementation Assistance Notice' released by the Security Council Committee established pursuant to Resolution No 1970, it is stated that:

> … subsidiaries of the LIA and the LAIP are not subject to the asset freeze measure. Therefore, Member States are not obligated to keep frozen assets of entities owned or controlled, either wholly or partially, by the LIA and the LAIP. The Committee would like to encourage Member States to consult closely with the Libyan authorities to ensure that any previously-frozen assets are unfrozen in a responsible and coordinated manner. … The Committee would like to recall that, at the time of the adoption of resolution 1970 (2011), the Security Council expressed its intent to ensure that frozen assets would be made available at a later stage to and for the benefit of the Libyan people.[288]

The LIA has attempted to get the UN sanctions, at least in part, lifted [289] and challenged their legality in different domestic jurisdictions.[290] The LIA stressed the impact of these sanctions, saying that the sanctions have cost it USD 4.1 billion as of December 2020.[291] Notably as a result of the freezing of its assets under sanction, the LIA has been unable to divest itself of its loss-making assets, a predicament compounded by the COVID-19 pandemic.[292] Sanctions have also prevented competing factions that were aiming to control LIA from accessing LIA assets.[293]

How are Russian SWFs impacted by sanctions?

Various US sanctions targeted Russian SWFs. In 2015, the Russian Direct Investment Fund ('**RDIF**') was placed on a US treasury sanctions list that prevents US individuals and businesses from making loans to or buying equity in the fund.[294] This measure was justified by RDIF's ties to the Russian development bank Vnesheconombank and part of the US response to the annexation of Crimea.

In 2018, when asked about the potential expansion of US sanctions, Mr Kirill Dmitriev (the chief executive of RDIF) was optimistic of the fund's prospects citing 12 new deals including 6 with France and stating:

> As a sovereign wealth fund, sanctioning us strongly would create a precedent for other sovereign wealth funds to really pull their money out of the US economy …
>
> We believe that, frankly, sanctions are just a ridiculous thing to begin with, and business is against sanctions. But regardless of that we'll continue to work with top investors all over the world.[295]

Moreover, in 2017, the RDIF announced it had created a USD 10 billion joint investment fund for investment in infrastructure and development projects.[296]

In April 2021, the US Department of the Treasury's Office of Foreign Assets Control issued a new directive which prohibits US financial institutions, as of 14 June 2021, from either:

- participating in the primary market for 'new' ruble and non-ruble denominated bonds issued by, among others, Russia's NWF (Russia's principal sovereign wealth fund); or
- lending ruble or non-ruble denominated funds to the NWF.[297]

The full impact of these latest sanctions remains to be seen. However, in February and March 2021, the Russian Ministry of Finance changed the structure of the NWF, investing a fifth of the funds in Chinese yuan and Japanese yen. According to the NWF, the shares of the dollar and the euro in the currency structure of the NWF have been reduced from 45% to 35%.[298]

How are SWFs impacted by US sanctions against Chinese firms?

Other than risks and challenges associated with SWFs themselves, SWFs are also susceptible to the effects of sanctions more generally as any other investor. For example, in November 2020, the US announced sanctions against Chinese companies alleged to be supporting the Chinese military.[299] This has had a material downward effect on stock prices of some Chinese companies. Reportedly, this has resulted in corresponding losses for SWFs with stakes in these companies, including:

- Norway's GPFG which owned stakes in China Telecom, China Mobile, Xiaomi, China National Offshore Oil Corporation and China Unicom Hong Kong as part of a broader USD 35 billion Chinese equity portfolio; and
- Singapore's GIC which has a 10% stake in China Telecom's Hong Kong-listed 'H' shares and holds roughly 1.4% of Semiconductor Manufacturing International Corporation in mainland China A- and H-shares.[300]

HOW IS RESPONSIBLE INVESTING AND BUSINESS AND HUMAN RIGHTS RELEVANT TO SWFs?

In recent years, the responsible business conduct and human rights responsibilities of business enterprises have become increasingly important, including for institutional investors such as SWFs. SWFs by their nature act as long-term investors '… with the aim of leaving a legacy and safeguarding national wealth for future generations', and may therefore be expected to direct their investment policy towards more responsible firms which adopt policies aimed at sustainability.[301]

Although the Santiago Principles do not address responsible practices directly, Principle 22 sets out a general requirement that SWFs 'should have a framework that identifies, assesses, and manages the risks of its operations'.[302] A number of initiatives and frameworks have been developed

over the years dealing with corporate social responsibility and business and human rights, which are applicable to SWFs.

A global normative framework was established by the UN to deal with corporate social responsibility, known as the UN Global Compact. It has been defined as '… a strategic policy initiative for businesses that are committed to aligning their operations and strategies with the universally accepted principles in the areas of human rights, labour, environment and anti-corruption'.[303] A few SWFs have joined the UN Global Compact, including the Norwegian GPFG, New Zealand's Superannuation Fund and the National Pension Reserve Fund of Ireland.[304]

In 2006, a group of institutional investors in partnership with the UN Environmental Program Finance Initiative and the UN Global Company published the UN-PRI to help signatories to integrate economic, social and governance ('**ESG**') issues into their strategic decision-making process and investment practices. In particular, Principle 1 of the UN-PRI requires signatories to 'incorporate ESG issues into investment analysis and decision-making processes'. In turn, Principle 2 requires signatories to be 'active owners and incorporate ESG issues into [their] ownership policies and practices'. At least a few SWFs were among the founding signatories of the UN-PRI, namely the Ireland Strategic-Investment Fund, New Zealand's Superannuation Fund, the Caisse des dépôts et consignations of France, the Norwegian GPFG, and the Government Pension Fund of Thailand.[305] The Khazanah Nasional Berhad of Malaysia subsequently joined the group in February 2017.[306]

Since 2011, the UN Guiding Principles serve as a framework which focuses primarily on the impact of companies on human rights through direct investment. According to the UN Guiding Principles, all businesses, including and especially SOEs and SWFs, have a responsibility to respect human rights. The UN Guiding Principles set out three channels for addressing human rights violations: (i) the State's duty to protect human rights;[307] (ii) the corporate responsibility to respect human rights wherever they operate;[308] and (iii) the State's duty to ensure that effective remedies are available for victims of corporate human rights abuses.[309]

Given their significant market power and their influence, it might be argued that SWFs have an additional responsibility under the UN Guiding Principles to prevent or mitigate human rights abuses that may arise through their investments, even where they have not directly contributed to them. To this effect, the Commentary to the UN Guiding Principles, expects that '[i]f the business enterprise has leverage to prevent or mitigate the adverse [human rights] impact, it should exercise it'.[310]

Although the Santiago Principles do not address responsible practices directly, Principle 22 sets out a general requirement that SWFs 'should have a framework that identifies, assesses, and manages the risks of its operations'.

Moreover, if State-owned and controlled, the harm that may be caused whether directly or indirectly by a SWF's investment could even trigger the international responsibility of its home State. The UN Guiding Principles recognise that a State has a duty to 'take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies'.[311] Professor John Ruggie, the Special Representative for Business and Human Rights, emphasised the important role that SoEs, including SWFs, should have in promoting human rights and the potential impact that any human rights harm caused by them may have on the State in question. He noted in this respect:

> In principle, inducing a rights-respecting corporate culture should be easier to achieve in State-owned enterprises (SOEs). Senior management in SOEs is typically appointed by and reports to State entities. Indeed, the State itself may be held responsible under international law for the internationally wrongful acts of its SOEs if they can be considered State organs or are acting on behalf, or under the orders, of the State. Beyond any legal obligations, human rights harm caused by SOEs reflects directly on the State's reputation, providing it with an incentive in the national interest to exercise greater oversight. Much the same is true of sovereign wealth funds and the human rights impacts of their investments.[312]

To promote further responsible investment and human rights by institutional investors such as SWFs, the OCED also published in March 2017 a Guidance on Responsible Business Conduct for Institutional Investors to support them in preventing or addressing 'adverse impacts related to human and labour rights, the environment, and corruption in their investment portfolios'.[313]

Although these frameworks are not binding and may be seen as having limited direct adoption amongst SWFs, some of the largest SWFs have taken positive steps to promote sustainability and responsible investment.

Endorsing the ESG framework, six of the major SWFs established a group known as the 'One Planet Sovereign Wealth Fund Working Group' in December 2017 in order 'to accelerate efforts to integrate financial risks and

opportunities related to climate change in the management of large, long-term asset'.[314] This group of six SWFs collectively govern over USD 2 trillion and are considered to be 'uniquely positioned to promote long-term value creation and sustainable market outcomes'. As a result, they have committed to 'develop an [ESG Framework] to address climate change issues, including methods and indicators that can inform investors' priorities as shareholders and participants in financial markets'.[315]

Indeed, in July 2018, the One Planet Sovereign Wealth Fund Framework articulated the following three core principles:

Alignment building climate change considerations, which are aligned with the SWF's investment horizons, into decision-making;

Ownership encouraging companies to address material climate change issues in their governance, business strategy and planning, risk management and public reporting to promote value creation; and

Integration integrating the consideration of climate change-related risks and opportunities into investment management to improve the resilience of long-term investment portfolios.[316]

Having generated further consensus, another nine members of the international forum of SWFs endorsed the One Planet Sovereign Wealth Fund Framework and its principles in November 2020, allegedly increasing the commitment of SWFs to build climate change into their investment decisions.[317]

Beyond considerations of climate change, some SWFs ave also actively taken actions to ensure compliance more generally with the international standards contained in the above discussed frameworks. In 2020, Global SWF established the GSR Scoreboard, which has become an important tool of analysis of the Governance, Sustainability and Resilience efforts undertaken by State-Owned Investors.[318]

The Norwegian GPFG – the largest SWF in the world – has been a leading influencer of responsible investment, exercising normative pressure on private investors. The GPFG has published statements of its policies embedding its commitment to 'participate in the development of international standards and expect[s] the companies [it] invest[s] in to comply with them'.[319] The Norwegian Parliament and Ministry of Finance have laid down rules for the management of the GPFG and delegated responsibility for its management to Norges Bank. An independent Council on Ethics, which sends its recommendations to Norges Bank, has also been established to perform ethical evaluations of companies in which the GPFG invests.[320] Amongst its goals, the GPFG also promotes respect for children's rights, climate change, water management, human rights, tax and transparency, anti-corruption practices and ocean sustainability and expects companies within their portfolio to address all these global challenges in their corporate governance.[321]

An example of GPFG's implementation of these ethics is the recent blacklisting of shares in a British security company, G4S, due to the risk of human rights violations against the company's workforce. The GPFG's Council of Ethics, which monitors its investments considered there was an 'unacceptable risk of the company contributing to systematic human rights violations'. Although the Council had not officially considered whether G4S used forced labour it considered that 'the company's practice – in the worse cases – could place workers under constraint' particularly due to G4S' use of migrant workers for contracts across countries which had restrictive labour practices.[322]

Australia's SWF Future Fund has similarly endorsed an ESG policy published on its website which is integrated into its investment decision making to effectively manage 'material financial and reputational risks and opportunities related to environmental, social and governance issues'.[323] Its ESG framework also integrates modern slavery 'to guide how these risks are identified and managed across the investment portfolio, including in [its] due diligence activities, external manager monitoring and engagement activities with investee entities'.[324]

The New Zealand Superannuation Fund also has a responsible investment policy framework published on its website, which integrates consideration of ESG issues into its decision-making process. The framework adopts all the principles of the UN Global Compact and other good practice standards, including human rights, labour, environment and anti-corruption.[325]

A number of other SWFs have endorsed ESG and sustainability policies to their long-term investments. By way of example, the Hong Kong Monetary Authority which runs the Hong Kong Monitory Authority Investment Portfolio – the seventh largest SWF – has a responsible investment policy which takes into account the impact of ESG factors on its long-term investment returns and its sustainability and which isalso included in their selection, appointment and monitoring of its external managers.[326] Singapore's GIC has adopted a general sustainability policy and has an established Sustainability Committee to implement the SWF's sustainability framework and to monitor and respond to ESG issues.[327] Temasek, Singapore's second largest SWF, also has a mainstreaming sustainability policy which similarly incorporates ESG considerations into their investment decision-making and management.[328]

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Annex 1

INSTITUTIONAL DEFINITIONS OF SWFs

Institution	Definition	Characteristics
European Union	'Sovereign Wealth Funds (SWFs) are generally defined as state-owned investment vehicles, which manage a diversified portfolio of domestic and international financial assets. … The distinguishing feature of SWFs from other investment vehicles is that they are state-funded. In general, SWFs are funded from accumulated foreign-exchange reserves in their sponsor countries, but are managed separately from the official reserves. Typically, SWFs have a diversified investment strategy, with a higher level of risk accepted in search of higher returns. SWF portfolios include a wider range of financial assets, including fixed-income securities but also equities, real estate and alternative investments'.[329]	• Investment fund • State-owned • Separately managed from official reserves • Higher risk profile • Domestic investment • International investment • Funded from foreign-exchange reserves
International Monetary Fund	'Although there is no universally agreed-upon definition, SWFs can generally be defined as special investment funds created or owned by governments to hold foreign assets for long-term purposes'.[330]	• Investment fund • State-owned • International investment • Long-term outlook
International Forum of Sovereign Wealth Funds (then the International Working Group of Sovereign Wealth Funds)	'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'.[331] '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'.[332]	• Investment fund • State-owned • International investment • Financial objectives • Funded from commodity • Funded from surpluses • Funded from balance surpluses Definition excludes: • Assets managed for the benefit of individuals • Foreign currency reserve assets held by monetary authorities for monetary policy purposes • Government-employee pension funds • Traditional state-owned enterprises
International Forum of Sovereign Wealth Funds	'The definition of a SWF has never been fully agreed by all experts or all institutions involved with them or following them'.[333]	

Institution	Definition	Characteristics
Monitor Company Group and Fondazione Eni Enrico Mattei (FEEM)	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'.[334]	• State-owned • Separately managed • No explicit pension obligations • Diverse asset class • Commercial returns • International investment
OECD working paper	'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: • foreign exchange reserves; • the sale of scarce resources such as oil; or • 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: • to diversify assets; • to get a better return on reserves; • to provide for pensions in the future; • to provide for future generations when natural resources run out; • price stabilisation schemes; • to promote industrialisation; and • to promote strategic and political objectives'.[335]	• Pool of assets • State-owned • Funded by foreign exchange reserves • Funded by natural resources • Funded by taxation and other revenue • Commercial returns • State pension obligations • Promote political objectives

Institution	Definition	Characteristics
Global SFW	A SWF is 'an investment vehicle owned by a national or regional government that buys, holds, and sells securities and/or assets on behalf of its citizenry in pursuit of financial and/or economic returns'.[336] Global SWF further classifies SWFs according to their investment mandates into three different categories: stabilization or 'rainy-day' funds that act as buffer mechanisms, benefitting from fiscal surpluses in good years and covering fiscal deficits in times of uncertainty and market shocks (e.g. Azerbaijan's SOFAZ, Botswana's Pula Fund and Chile's ESSF); savings or future generations funds that have no explicit obligations and are designed to ensure the transfer of wealth in the long term (e.g. Abu Dhabi's ADIA, Norway's NBIM and Singapore's GIC); and strategic or development funds that combine a financial goal with an economic mission, contributing to the development of the domestic economy and/or catalysing foreign capital, (e.g. Ireland's ISIF, Malaysia's Khazanah and Russia's RDIF).[337] Certain funds are actually 'asset managers' that manage capital on behalf of 'asset owners'.[338] Certain SWFs may have more than one mandate, e.g., Nigeria's NSIA is divided into three sub-funds: a stabilization fund, a future generations fund, and an infrastructure development fund.[339]	• State owned • Active investors • Financial returns
SWFI	'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'.[340]	• State owned • Investment fund

Institution	Definition	Characteristics
Global projects center	'What makes SWFs an attractive match for the financing of sustainable development, is their intrinsic long-term and large scale nature. Because of their unique set up, SWFs tend to have longer term or well-defined liabilities, which enable them to invest in more illiquid assets'.[341] 'The term "sovereign wealth fund" is generally known as a pool of state-owned financial assets that are being managed (invested) for specific economic purposes'.[342] 'Generally speaking, SWFs have lower short-term liabilities compared to other institutional investors such as pension funds and endowments'.[343]	• State owned • Long-term outlook • Short-term and well-defined liabilities • Specific economic purposes

Annex 2

TWENTY LARGEST SWFs AS AT 22 AUGUST 2021[344]

#	Name	Total assets in USD billion	Region
1	Norges Bank Investment Management / Government Pension Fund Global (NBIM / GPFG, Norway)[345]	1,365	Europe
2	China Investment Corporation (CIC, China)[346]	1,208	Asia
3	State Administration of Foreign Exchange Investment Company (SAFE IC, China)	817	Asia
4	GIC Private Limited (GIC, Singapore)[347]	744	Asia
5	Kuwait Investment Authority (KIA, Kuwait)[348]	693	Middle East
6	Abu Dhabi Investment Authority (ADIA, UAE)[349]	686	Middle East
7	Hong Kong Monetary Authority Exchange Fund (HKMA EF, Hong Kong)[350]	520	Asia
8	National Council for Social Security Fund (NCSSF, China)[351]	452	Asia
9	Public Investment Fund (PIF, Saudi Arabia)[352]	430	Middle East
10	Qatar Investment Authority (QIF, Qatar)[353]	366	Middle East
11	Investment Corporation of Dubai (ICD, UAE)[354]	302	Middle East
12	Temasek Holdings (Temasek, Singapore)[355]	283	Asia
13	Mubadala Investment Company PJSC (Mubadala, UAE)[356]	243	Middle East
14	National Wealth Fund (NWF, Russian Federation)[357]	186	Europe / Asia
15	Korea Investment Corporation (KIC, Korea)[358]	183	Asia
16	Future Fund Management Agency (Future Fund, Australia)[359]	172	Australia and Pacific
17	Abu Dhabi Developmental Holding Company (ADQ, UAE)[360]	110	Middle East
18	Queensland Investment Corporation (QIC, Australia)[361]	93	Australia and Pacific
19	New South Wales Treasury Corporation (TCorp, Australia)[362]	91	Australia and Pacific
20	Alaska Permanent Fund Corporation (APFC, USA)[363]	81	North America

Annex 3

CORPORATE STRUCTURES OF THE 10 BIGGEST SWFs[364]

Fund#	Zone	Constitution	Subsidairies	SPVs	Govnerance model	Govnerance relations
Norges Bank Investment Management / Government Pension Fund Global (NBIM / GPFG, Norway)	Europe	Fund managed by Norges Bank through Norges Bank Investment Management[357]	Data not publicly available	Data not publicly available	Norges Bank Investment Management, a branch of the Central Bank, manages the fund.[366] **Parliament** has laid down the formal framework for the fund in the Government Pension Fund Act.[367] **Ministry of Finance** has overall responsibility for the fund and issues guidelines for its management.[368] **Executive Board** advises the Ministry on investment strategy for the investment portfolio. Advice shall be provided upon request from the Ministry but can also be provided on the initiative of the Norges Bank.[369] **CEO of Norges Bank** has overall responsibility for implementing requirements defined by the Executive Board. The CEO sets policies and delegates mandates and job descriptions to the leader group of Norges Bank.[370] **Leader group at Norges Bank** sets guidelines and delegates work tasks and investment mandates within their delegated areas of responsibility.[371]	The Ministry of Finance has overall responsibility for the fund and has issued guidelines for its management in the management mandate.[372]
China Investment Corporation (CIC, China)	Asia	Company established as a vehicle to diversify China's foreign exchange holdings and seeks maximum returns for its shareholder within acceptable risk tolerance.[373]	CIC has three subsidiaries: (1) CIC International Co, Ltd (CIC International). The CIC International has two overseas Branches: CIC International (Hong Kong) Co, Ltd and CIC Representative Office in New York. (2) CIC Capital Corporation (CIC Capital); and (3) Central Huijin Investment Ltd. (Central Huijin).[374]	Data not publicly available	**Board of Directors** discharges its responsibilities as specified by China's Company Law, including development strategies, operational guidelines and investment plans; preparing annual budget and accounts; providing coordination and guidance; formulating risk management and internal control policies and supervising their implementation; appointing and removing senior management; and deciding on or authorising the establishment of internal management bodies.[375] **Board of Supervisors** is responsible for monitoring the directors' and executives' business practices and professional ethics to ensure the effectiveness of CIC's supervisory procedures. It is also responsible for conducting internal audits, selecting external auditors, and monitoring the company's accounting and finance.[376] **Executive Committee** is, in association with the previous bodies, responsible for decisions on basic rules, institutional adjustments, operating mechanisms, performance evaluations, and remuneration.[377] **State Council** exercises shareholder's rights on behalf of the State.[378]	CIC is a wholly State-owned company.[379] Articles of Association state that: '[t]he Company shall separate its commercial activities from governmental functions, make its business decisions independently and operate based on commercial grounds'.[380]

Fund#	Zone	Constitution	Subsidairies	SPVs	Govnerance model	Govnerance relations
State Administration of Foreign Exchange Investment Company (SAFE IC, China)	Asia	Data not publicly available	Data not publicly available	Data not publicly available	Data not publicly available	Data not publicly available
GIC Private Limited (Singapore)	Asia	Private company[381]	Data not publicly available	Data not publicly available	**Board of Directors** is responsible for asset allocation and performance of the total portfolio. The Management executes investment strategies and regularly discusses overall portfolio performance with the GIC Board.[382] **International Advisory Board** provides perspectives on geopolitical, economic and market developments and, in particular, the medium- to long-term outlook for investment opportunities around the world.[383] **Board Committees** support the Board in overseeing critical areas including strategic asset allocation, investment process, risk, audit, and human resource and organisational development.[384] **Advisor Emeritus** is composed of experts and industry practitioners.[385]	It is wholly owned by the Singapore government. GIC is directly responsible to the President of Singapore in many key areas.[386] The GIC Board is also accountable to the Government represented by the Ministry of Finance.[387] The GIC Board and the International Advisory Committee are chaired by several ministers.[388] GIC invests funds on behalf of the Government of Singapore and does not own the assets.[389]
Kuwait Investment Authority (KIA, Kuwait)	Middle East	Independent public authority[390]	Data not publicly available	KIA invests mostly through external fund managers and has established a series of specialised stand-alone entities.[391]	**Board of Directors** is composed of the Minister of Finance, as Chairman, the Minister of Oil, the Undersecretary of the Ministry of Finance and the Governor of the Central Bank, as well as five other Kuwaiti members specialized in various fields of investment who are appointed by an Emiri Decree for a four-year term and can be re-appointed. At least three of the members should not hold any public office. The Board has complete independence in its decision-making process and is responsible for long-term asset allocation and overall performance.[392] **Executive management** formulates and executes investment strategies.[393]	Government Ministers and Governor of the Central Bank are part of the Board of Directors. However, KIA is an independent public authority and it complies with the rules and regulations of Kuwait's Civil Services Commission and Ministry of Finance controllers.[394]

Fund#	Zone	Constitution	Subsidairies	SPVs	Govnerance model	Govnerance relations
Abu Dhabi Investment Authority (ADIA, UAE)	Middle East	Independent Government entity and investment institution[395]	Data not publicly available	Data not publicly available	**Board of Directors** responsible for setting ADIA's strategy and risk-return parameters and meets periodically to review its performance.[396] **Managing Directors** has responsibility for implementing ADIA's strategy and its investment and operational activities. [397]	ADIA's Directors are appointed by decree of the Ruler of the Emirate of Abu Dhabi.[398] ADIA's current chair is H.H. Sheikh Khalifa bin Zayed Al Nahyan, the President of the UAE and Emir of Abu Dhabi.[399] However, ADIA conducts its investment activities without reference to the Government of Abu Dhabi and has no visibility on the spending requirements of the Government or the activities of other Abu Dhabi-owned investment entities.[400]
Hong Kong Monetary Authority Exchange Fund (HKMA EF, Hong Kong)	Asia	The Exchange Fund was established as a reserve to back the issue of Hong Kong's banknotes and includes the Investment Portfolio.[401]	Data not publicly available	Data not publicly available	The Exchange Fund is managed by the Monetary Authority, who is appointed by the Financial Secretary.[402]	The Financial Secretary, who appoints the Monetary Authority to manage the Exchange Fund (and, therefore, also the IP) is part of the Government of the Hong Kong Special Administrative Region.[403]
National Council for Social Security Fund (NCSSF, China)	Asia	The National Council for Social Security Fund was established to manage the National Social Security Fund.[404] The NCSSF is a Government agency directly under the State Council of the People's Republic of China.[405]	Data not publicly available	Data not publicly available	**Investment Committee** provides the investment decision-making body. It is composed of permanent members and non-permanent member.[406] **Risk Management Committee** provide the risk management that is accountable to the Chairman.[407] **Expert Appraisal Committee** selects investment managers or custodians. It proposes a list of candidates for investment managers and custodians and submits the list to NCSSF for approval.[408] In addition, there are 11 permanent departments and an 'Administrative Service Center' with its independent accounting unit.[409]	It operates under the supervision of the State Council of the Popular Republic of China.[410]

Fund#	Zone	Constitution	Subsidairies	SPVs	Govnerance model	Govnerance relations
Public Investment Fund (PIF, Saudi Arabia)	Middle East	The PIF has a 'public legal personality'[411]	Data not publicly available	Data not publicly available	A **Board of Directors** supervises the Fund, including its management and affairs, and ensures its objectives are achieved and its powers are exercised.[412] The Board is chaired by the Crown Prince, HRH Prince Mohammed Bin Salman Bin Abdulaziz, and several Ministers are Board members.[413] The main functions or 'themes' of the Board are strategy and planning; governance and oversight; regulation, recruitment and remuneration; reporting and monitoring; and investment.[414] The Board is supported by various committees: an Executive Committee, an Investment Committee, an Audit and Compliance Committee and a Risk Committee.[415]	PIF reports to the Council of Economic and Development Affairs ('**CEDA**').[416] The Crown The Prince is Deputy Prime Minister and Chairman of CEDA, Chairman of Board of Directors. In the Board of Directors there are other Ministers: Tourism, Finance, Commerce, Investment and the Minister of State and member of the Saudi Council of Ministers.[417]
Qatar Investment Authority (QIA, Qatar)	Middle East	QIA is 'a savings fund without pre-defined liabilities and whose objective is investing for the benefit of Qatar's future generations'[418]	QIA has several subsidiaries, including Qatar National Bank[419]	Data not publicly available	A **Board of Directors** manages QIA.[420]	QIA's Board is composed of Government and State officials.[421] Funds are assigned to the Authority by the Supreme Council for Economic Affairs and Investment, and the Ministry of Finance may assign additional funds or surpluses.[422]
Investment Corporation of Dubai (ICD, UAE)	Middle East	Investment Corporation	ICD has 'portfolio companies'[423]	Data not publicly available	**Board of Directors** provides overall the corporate governance affairs and related policies and procedures.[424] **Various Committees:** Investment, Executive; Audit; Remuneration, Management and Risk Management.[425]	ICD is 'the principal investment arm of the Government of Dubai' and the shareholder of ICD is the Government itself.[426] The Chairman of the Board of Directors is the Crown Prince of Dubai and the Vice Chairman is the Deputy Ruler of Dubai.[427]

Annex 4

ANALYSIS OF CASE LAW INVOLVING SWFs

#	Case name, reference and date	Summary
Litigation in England and Wales		
1	*National Bank of Kazakhstan and another v Bank of New York Mellon SA/NV, London Branch and others* [2020] EWHC 916 (Comm)	The case arises out an enforcement action that Anatolie Stati and others (the 'Stati Parties') brought against the Republic of Kazakhstan to enforce the Stati v Kazakhstan SCC Award rendered by an Arbitral Tribunal constituted under the Energy Charter Treaty. A Belgian Court issued an attachment order in favour of the Stati Parties in relation to assets held by Bank of New York Mellon SA/NV ('BNY Mellon')'s London branch under a Global Custody Agreement with the National Bank of Kazakhstan. The assets formed part of the National Fund of Kazakhstan, a SWF. BNY Mellon London froze the assets further to the Belgian Court's Order. The Republic of Kazakhstan challenged this ruling in Belgium. The question that arose was whether the frozen assets belonged to the National Bank of Kazakhstan or the Republic of Kazakhstan (ie the SCC Award debtor). The Belgian Courts 'referred' the matter to the English Courts under their domestic procedural rules. In the ensuing proceedings before the English Courts, Kazakhstan sought a declaration that the funds were owned by its central bank and so should not be released to the Stati Parties. The Court held that, because BNY Mellon held the funds under the Global Custody Agreement with the National Bank of Kazakhstan (not the Republic of Kazakhstan), BNYM London had no obligation to pay any debt due under the GCA to the Republic of Kazakhstan. The underpinning issue of this case was whether the assets of the National Fund of Kazakhstan belonged to the National Bank of Kazakhstan or the Republic of Kazakhstan, not whether these funds were actually owned by the SWF itself (which was not even a party to the proceedings).
2	*The Libyan Investment Authority v JP Morgan Markets Limited* [2019] EWHC 1452 (Comm)	The LIA sued JP Morgan, alleging that a 2007 trade had been procured by fraud. The LIA moved for leave to serve process on two of the Defendants, Walid Mohamed Ali Al-Giahmi and Lands Company Ltd, out of the jurisdiction. The two Defendants moved to set aside the service on the grounds that the actions were barred by the statute of limitations. The Court granted the motion to set aside the service.
3	*Mohamed v Breish and others* [2019] EWHC 306 (Comm) *Mohamed v Breish* [2020] EWCA Civ 637	The case concerns Dr Mohamed's application against various receiverships to seek inter alia a declaration that he had been validly appointed as the Chair of the LIA. In a Judgment on preliminary issues, Mr Justice Andrew Baker found that the applicant's case revolved around two separate questions: who, as a matter of English law, was to be considered 'executive authority and Government of Libya' and if, as a matter of Libyan law, such a body was empowered to appoint the applicant under Article 6 of Law 13 of Libya. Mr Justice Andrew Baker answered the first question in the sense that the executive authority and the Government of Libya were, following the position of Her Majesty's Government (under the 'one voice' principle – a point which was confirmed on appeal), Libya's Presidency Council and the Government of National Accord. It considered that the question of interpretation of Law 13 fell to be dealt with at a subsequent phase of the proceedings.
4	*Libyan Investment Authority & Ors v Warwick Street (KS) LLP & Ors* [2018] EWHC 2877 (Ch)	The underlying dispute concerned a joint venture for the construction of a hotel. The LIA paid a certain amount for a 50% share in a venture for the proposed development of two plots of land. The core of the LIA and the other Claimants' claim is that they were persuaded to part with GBP 10.5 million for a 50% stake in the joint venture (which was worth much less) through a letter, which contained fraudulent misrepresentations. This specific Judgment concerns two application by the Claimants' to re-amend their particulars of claim (which the Court treated as one, referred to as the 'RAPOC' application), and the application by one of the Defendant's to strike out the claim form or the particulars of claim (or the RAPOC). His Honour Judge Simon Barker QC granted the RAPOC application but found that the re-amended claim had no real prospect of success.
5	*Re Maud (No 2) Aabar Block SARL and another v Maud and others* [2018] EWHC 1414 (Ch)	This case concerned a petition for bankruptcy order submitted *inter alia* by Aabar Block Sarl an investment company controlled by the Abu Dhabi SWF. Previously, bankruptcy proceedings were brought against Maud resulting in a bankruptcy order in 2016 (under appeal at the time of this decision). The Court decided not to dismiss the petition or make the bankruptcy order. As the time which had passed between the hearing and the handing down of the Judgment was longer than the adjournment sought, the judge invited the parties to address him as to appropriate directions for the future conduct of the petition.

#	Case name, reference and date	Summary
6	*Dennis v Tag Group Ltd and others* [2017] EWHC 919 (Ch)	The Mumtalakat Holding Company, the Bahraini SWF, was the second Respondent. The case concerned the issue of submission to jurisdiction in the context of injunction proceedings. The Court held that permission for service out of jurisdiction is not required since Article 24 of Brussels I Recast rules apply regardless of domicile of the parties.
7	*The Libyan Investment Authority v Société Générale SA* [2017] EWHC 2631 (Comm)	The case concerned an action bought against Societe Generale SA and its affiliates alleging fraud, bribery and corruption. After a dispute arose over who had authority to act on behalf of the LIA, a receiver was appointed. The proceedings were then settled. The receiver requested the Court's permission to access certain documents produced by the Defendants in the proceedings to investigate whether to apply for permission to use them in separate proceedings. On a construction of the receiver's appointment order, the Court denied permission.
8	*Bouhadi v Breish* [2016] EWHC 602 (Comm)	A dispute arose between the two individuals who had allegedly been appointed as Chairman of the LIA by the two conflicting regimes in Libya. The High Court was therefore called upon to decide which Government was Libya's legitimate Government. Shortly before trial, a letter from the UK Foreign & Commonwealth Office ('**FCO**') was submitted to the Court in which the FCO stated the position Her Majesty's Government had not recognised as the Government of Libya neither the 'Tobruk government' nor the 'Tripoli government', as it recognised States rather than Governments. The FCO also expressed its support to the establishment of a Government of National Accord. In light of this letter and of the changing political situation in Libya, Mr Justice Blair decided to adjourn the proceedings (subject to the parties' right to reactivate them).
9	*The Libyan Investment Authority (incorporated under the laws of the State of Libya) v Goldman Sachs International* [2016] EWHC 2530 (Ch)	The LIA claimed that Goldman Sachs had unduly influenced it to enter into certain financial transactions, that Goldman Sachs had created a protected relationship of trust and confidence, and that the afore-said transactions amounted to unconscionable bargains. On the facts of the case, the Court rejected the claims. In relation to the undue influence point, it found that Goldman Sachs' offer of an internship position to the younger brother of one of the LIA's Deputy Chair was motivated by the belief that he would then be tasked with managing the LIA's new London office, and that it would be beneficial for the bank's future business prospects with the Claimant for it to establish a good working relationship with him at an early stage. The Court then found that there was no protected relationship of trust and confidence between the parties, whose relationship did not go beyond the normal cordial and mutually beneficial banker-customer relationship. It also found that the subjects who made the relevant investment choices on behalf of the LIA were not as inexperienced as purported by the LIA. The Court also considered that the transactions were not unconscionable.
10	*Ras Al Khaimah Investment Authority and others v Bestford Development Llp and others* [2015] EWHC 3383 (Ch) *Ras Al Khaimah Investment Authority and others v Bestfort Development LLP and others* [2017] EWCA Civ 1014	The Claimants were in charge of investing the sovereign wealth of a UAE emirate in various projects in Georgia. The Claimants considered they had been defrauded by a partner they had relied on to make the investments and brought proceedings in Georgia and the UAE against him and several partnerships which he beneficially owned. Against this background, the Claimants applied to the English Courts for a worldwide freezing order against a number of partnerships related to the individual they were pursuing. The High Court denied the application on the ground that the Claimants had failed to show the Defendants had assets that would be caught by the injunction. The Claimants appealed and the English Court of Appeal partly reversed the underlying decision, granting in part the relief sought by the Claimants. The appeal revolved around the Claimants' burden on proof, and, in particular, whether an applicant for a worldwide freezing order has to show that (i) it is likely that a defendant has assets that will be caught by the order or (ii) a good arguable case that a defendant has such assets or (iii) grounds for believing that a defendant has (or is likely to have) such assets or (iv) merely that the defendant is wealthy and must therefore have assets somewhere. In the Court of Appeal's view the proper test was the existence of 'grounds for belief'. The Court went on to find that it was appropriate to grant a freezing order in respect of some of the Defendants, although not in relation to the assets they held in Georgia (as it appeared the Georgian Courts had already granted some injunctive relief). This case does not involve a SWF directly as claimant. It involves claims by subjects in charge of managing a SWF.

#	Case name, reference and date	Summary
11	*Libyan Investment Authority v Maud* [2015] EWHC 1625 (Ch) *Libyan Investment Authority v Maud* [2016] EWCA Civ 788	Maud submitted an application to set aside a statutory demand by the LIA in relation to a debt owed under a guarantee that became payable before the LIA became the subject of UN and EU assets freezing measures. The case concerned the interplay between UN and EU financial sanctions regimes and English insolvency law. It also considered the issue of immunity from civil claims under Council Regulation (EU) No 204/2011. The Court held that a guarantee was located outside Libya, which was caught by the sanctions. Moreover, the burden was upon the creditor (and not upon the debtor) to show that a licence could be obtained and that there was no impediment to payment. Eventually, the High Court set aside the LIA's statutory demand on the ground that payment to the LIA would contravene Council Regulation (EU) No 204/2011. The LIA appealed. The Court of Appeal allowed the appeal against the order setting aside the demand. It interpreted the EU legal framework in light of UNSC Res 1970 (2011) and held that payment of a debt by Mr Maud under a guarantee would not involve dealing with funds or instruments subject to the sanctions regime. Paying the debt was not dealing but simply performing the obligation to which it gave rise.
12	*CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch)	The Claimant, CPC Group Ltd ('**CPC**') entered into a joint venture with the Respondent, Qatari Diar Real Estate Investment Company ('**QD**'), a subsidiary of the QIA. The joint venture concerned the redevelopment of the Chelsea Barracks site in Westminster. An indirect subsidiary of CPC acquired the site. CPC sold its interest in the subsidiary holding shares in the afore-said indirect subsidiary to QD in exchange for a deferred consideration. The deferred consideration depended mainly on future progress being made by QD in obtaining permission to redevelop the Chelsea Barracks site. In this respect, QD owed CPC an obligation to use 'all reasonable but commercially prudent endeavours'. The designs for the proposed redevelopment project met the opposition of the Prince of Wales, the Mayor of London and members of the public in the affected areas. Against this background, QD withdrew its planning application triggering the dispute with CPC. According to CPC, the withdrawal was 'precipitated' by certain declarations allegedly made by the Emir of Qatar to the Prince of Wales and this constituted a breach of the joint venture agreements. The Court found in favour of QD, considering that it had acted as best it could in the circumstances and was not in breach of its duties of utmost good faith.
13	*AIG Capital Partners Inc v Kazakhstan* [2005] EWHC 2239 (Comm)	The dispute concerned an ICSID Award against Kazakhstan [the Award in *AIG Capital Partners, Inc and CJSC Tema Real Estate Company Ltd v The Republic of Kazakhstan*, ICSID Case No ARB/01/6]. AIG attempted to enforce the Award against funds and securities of the National Fund of Kazakhstan that a third-party financial institution held under a 'Global Custody Agreement' on behalf of the National Bank of Kazakhstan. The National Bank of Kazakhstan managed the National Fund of Kazakhstan's assets as a 'trust manager'. This was sufficient to give the National Bank of Kazakhstan a 'property' interest in the assets within the meaning of section 14(4) of the State Immunity Act 1978. This rendered the third party which held the assets (as well as the National Fund of Kazakhstan's assets themselves) immune from enforcement. The High Court concluded that 'property of a State's central bank or other monetary authority' as set out in s 14(4) State Immunity Act meant 'any asset in which the central bank has some kind of 'property' interest as I have described, which asset is allocated to or held in the name of a central bank, irrespective of the capacity in which the central bank holds it, or the purpose for which the property is held'.
14	*Sarrio SA v Kuwait Investment Authority* [1997] CLC 280 *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32	Appeal brought by Sarrio SA against an English High Court Judgment whereby Sarrio SA's damages action against the KIA had been stayed under Article 22 of the Brussels Convention 1968 because of the existence of a related proceeding in Spain. Sarrio SA's claim in the English Courts concerned damages for alleged misrepresentations. The English Court of Appeal allowed SA's appeal on the basis that the Spanish case concerned the KIA's contractual responsibility, not misrepresentations. Therefore, there was no *lis pendens* between the Spanish and the English court proceedings. Notably, the Court of Appeal also ascertained that the KIA could be deemed 'a body corporate' for the purpose of the rules on service of process (O 65, r 3(1)). Subsequently, the English House of Lords (now English Supreme Court) reversed the Court of Appeal's findings on *lis pendens*. Nevertheless, as a result of a change in position by Sarrio SA during the proceedings before it, the House of Lords considered that the most appropriate course of action was to decline jurisdiction over Sarrio SA's claim (instead of staying the proceedings).

#	Case name, reference and date	Summary
Litigation in the United States		
15	*Abu Dhabi Investment Authority v Mylan NV and Mylan Inc, Southern* District of New York, Case No 1:20-01342-JPO	The ADIA filed an action against the Mylan Defendants alleging securities violations relating to a series of false or misleading statements in filings with the US Securities and Exchange Commission, press releases, and other public documents. The District Court granted the Defendants' motion to dismiss claims since they were barred by the Securities Exchange Act's statute of repose (meaning that the claim was time-barred). The case proceeded with respect to claims occurring after 14 February 2015 and is currently pending and in the discovery phase.[428] A motion to dismiss was partially granted in Mylan's favor on 10 February 2021.The case is still pending, but currently stayed pending the Court's ruling on the forthcoming motion for summary judgment in the Class Action by order of the Court on 23 August 2021.
16	*Janvey v Libyan Investment Authority,* Northern District of Texas, Case No 3:11-CV-1177-N	The Plaintiff receiver for Stanford International Bank brought an action against the bank's principals, the LIA and LAFICO, to recover sums paid to investors in an alleged Ponzi scheme. The district court dismissed the LIA from the action because it had immunity from suit under the FSIA but found that the case against LAFICO could proceed. The Fifth Circuit Court of Appeals affirmed that there was no jurisdiction over the LIA due to immunity under the FSIA since the SWF was owned solely by the Libyan government and was thus an 'agency or instrumentality' of a foreign State. The parties reached settlement in 2016 and an agreed motion to dismiss with prejudice was granted by the Court on 10 April 2017.
17	*Atlantica Holdings Inc and others v Sovereign Wealth Fund Samruk-Kazyna,* Southern District of New York, Case No 1:12-cv-08552-JMF, 5 August 2020	A group of US investors brought securities fraud action under Securities Exchange Act in New York Federal Court against Samruk-Kazyna JSC of Kazakhstan arising out of investments in the subordinated debt securities of Kazakhstani BTA Bank (in which the SWF held a 75% stake). The SWF filed a motion to dismiss with the District Court, which was only partially granted. The SWF appealed this decision to the Second Circuit Court of Appeals which determined that the SWF was not immune under the FSIA from litigation involving securities fraud claims over alleged misrepresentations where 'losses suffered by United States investors … as a result of [fund's] alleged misrepresentations about those securities' value qualify as a "direct effect" in this country'. On 5 August 2020, the District Court granted summary judgment on the merits in the SWF's and the Bank's favour, thus dismissing the case. An appeal of that dismissal is currently pending before the Second Circuit Court of Appeals.
18	*Abu Dhabi Investment Authority v Petroleo Brasileiro SA-Petrobras and others,* Southern District of New York, case No 1:17-cv-01821-JSR, 23 October 2019	The ADIA filed its claim on 10 March 2017. The claim was founded on the US Securities Exchange Act of 1934 and the Securities Act of 1933. In its complaint, ADIA alleged that it had purchased securities issued by Petrobras; that 'Petrobras was at the center of a massive bribery and kickback scheme in which it has been reported that Petrobras executives pocketed approximately $800 million'; that, as a result, the stated financial situation of the company did not correspond to its real financial situation; and that, when the bribery and kickback scheme began to emerge, the prices of Petrobras' securities dropped. On 23 March 2017, the Court stayed the case pending the outcome of a related ongoing class action (*In re Petrobras Securities Litigation*, No 14-cv-9662). Ultimately, ADIA voluntarily dismissed the case with prejudice on 30 October 2019 before any judgment was rendered.

#	Case name, reference and date	Summary
19	*Irving H Picard v Abu Dhabi Investment Authority*, Southern District of New York, Case No 1:12-cv-02616-JSR, 28 April 2014	In bankruptcy proceedings related to the Bernie Madoff fraud, the bankruptcy trustee filed this adversary proceeding on 11 August 2011, seeking relief under the Securities Investor Protection Act, 15 U.S.C. §§ 78 *et seq* ('**SIPA**'), and 11 USC §§ 550 and 551 against the Abu Dhabi Investment Authority. The Trustee requested recovery of USD 300 million that Bernard L Madoff Investment Securities LLC ('**BLMIS**') allegedly transferred to a British Virgin Islands entity Fairfield Sentry, an alleged 'feeder fund' from which the Abu Dhabi Investment Authority redeemed its shares. The Abu Dhabi Investment Authority argued that it was immune from suit since it was wholly owned by the Emirate of Abu Dhabi and that the claims fail as a matter of law. On 7 July 2014, the Court found that the provision of the Bankruptcy Code does not apply extraterritorially and cannot be used to recover purely foreign assets. The Court referred adversary proceedings back to Bankruptcy Court for further proceedings consistent with this order. On 22 November 2016, the Bankruptcy Court dismissed all of the trustee's claims against the Abu Dhabi Investment Authority based on extraterritoriality since the trustee of a domestic debtor cannot rely on the particular bankruptcy provision (11 USC § 550 and 551) to recover assets received by a foreign feeder funds and then subsequently transferred to another foreign entity, like the Abu Dhabi Investment Authority. The Trustee appealed and on 1 June 2020, the Second Circuit Court of Appeals vacated the Bankruptcy Court dismissal because it found that the bankruptcy provision involved domestic and not extraterritorial application (since funds were fraudulently transferred to feeder funds from a U.S. bank account). The case has been reopened and is pending further proceedings.
20	*Norges Bank v Citigroup, Inc and others,* Southern District of New York, Case No 1:10-cv-07202-SHS, 31 May 2013	Norges Bank commenced a lawsuit in New York Federal Court against Citigroup, Inc. and others for a purported loss of USD 835 million based on Citigroup's misstatements and omissions as to the bank's finances before the 2008 financial crisis. Norges Bank invested approximately USD 440 billion of its oil fund with Citigroup. This case was consolidated with three other cases brought by other European entities. The Court dismissed New York common law claims asserted by Norges Bank (including for fraud, conspiracy to commit fraud, and negligent misrepresentation) and UK law claims for Misrepresentation Act of 1967 and common law deceit but did not dismiss certain securities-related federal claims. Ultimately, the entire case was dismissed on 31 May 2013.[429]
21	*Deutsche Bank Trust Company Americas et al v Abu Dhabi Investment Authority and others*, Southern District of New York, Case No 1:11-cv-04522-DLC, 27 September 2013	The case was filed on 1 July 2011. It was closed on 27 September 2013, with Defendant Abu Dhabi Investment Authority having been dismissed from the case based on Plaintiffs' lack of standing to sue in respect of certain claims. The case arises out of the failed leveraged buyout of a company called 'Tribune Company' ('**Tribune**'). The Plaintiffs asserted they held claims in respect of debt securities issued by Tribune. It is the Plaintiffs' case that the leveraged buyout enriched Tribune's former shareholders at the expense of Tribune's creditors, and led Tribune to go bankrupt shortly thereafter. The Plaintiffs pursued the action in their capacity as the holders of claims under certain debt securities issued by Tribune. This case was consolidated with several others into multidistrict litigation *In Re: Tribune Company Fraudulent Conveyance Litigation*, case No 1:11-md-02296-DLC.
22	*Liu v Morgan Stanley and others*, Southern District of New York, Case No 1:12-cv-01583-JPO, 14 November 2012	Plaintiff Gang Liu filed an action on 5 March 2012 against Defendants Morgan Stanley and SWF China Investment Corporation. Liu, a political dissident and asylee in the United States (having spent years in jail in China for his pro-democracy activities), worked at Morgan Stanley and alleged that Morgan Stanley fired him after China Investment Corp. pressured it to do so. Liu's complaint alleged that Defendants conspired to fire him based on his political affiliation in violation of 42 U.S.C. § 1985(3) and fired him based on his political activities in violation of New York's labor law, NY Lab Law § 201-d. On 13 November 2012, the Court dismissed the case, finding that Liu did not state a claim under the federal statute and that the Court could not exercise supplemental jurisdiction over the New York statutory claim. The case was closed on 14 November 2012. Defendant SWF China Investment Corporation did not appear in the case.

#	Case name, reference and date	Summary
23	*Squire v GAPCO and others,* Southern District of New York, Case No 1:07-cv-00912-AKH, 31 July 2007	Plaintiff John Squire originally commenced this action in New York State Court for breach of contract. Defendants Global Alumina International, Ltd and Guinea Aluminium Products Corp ('**GAPCO**') removed to federal court. SWF Mubadala was also named as a Defendant. Squire alleged that Defendant GAPCO asked Squire to raise funds for GAPCO's operations through a private placement of GAPCO equity and agreed to pay Plaintiff 1.5% fee of the cash raised by investment bank, IBK Capital Corp. However, Squire alleged that GAPCO did not sufficiently compensate him as required by the contract. On 30 July 2007, the Court found that Defendant GAPCO satisfied its payment obligations to Squire and dismissed claims against all Defendants, including SWF Mubadala Development Company. Mubadala Development Company did not appear in the action.
24	*Zappia Middle East v Emirates of Abu Dhabi and others,* Southern District of New York, Case No 1:94-cv-01942-KMW-JCF, 12 June 2000	The Plaintiff government contractor sued the Emirate of Abu Dhabi, the ADIA and the Abu Dhabi Commercial Bank for an alleged expropriation of his property in violation of international law. The District Court dismissed the case for lack of subject matter jurisdiction because the Plaintiff failed to establish facts sufficient to bring the action within the FSIA expropriation exception. The Plaintiff appealed but the Second Circuit Court of Appeals affirmed the District Court decision.
Litigation in Italy		
25	*LAFICO v Public Prosecutor,* Italian Court of Cassation, Criminal Division, Judgment No 40093 of 11 October 2012 (hearing of 3 October 2012)	The case originates from an asset freeze imposed on LAFICO's assets by the Italian Court of Appeal pursuant to a request for judicial assistance issued by the International Criminal Court in relation to criminal proceedings launched against an individual. LAFICO challenged the measure before the Italian Courts pursuant to Article 324 of the Italian Criminal Code. The case went all the way up to the Italian Cassation Court, when, LAFICO dropped the challenge (for reasons that are not specified in the Court Judgment). Accordingly, the Italian Cassation Court took note of the discontinuance of the proceedings.
Litigation in France		
26	*Société Mohamed Abdel Moshen Al-Kharafi et Fils v Société Libyan Investment Authority and Société Libyan Arab Foreign Investment Company*, Paris Court of Appeal, 18/17592, 5 September 2019	This case concerned an Arbitral Award valued at almost USD 1 billion rendered against the Libyan Government, the Ministry of Economy, the General Council for Promotion of Investments and Privatisation and the Libyan Ministry of Finances for breach of a contract concerning a large-scale tourism project. The Claimant, Al-Kharafi, sought to carry out an attachment of partnership rights and securities at a wholly owned subsidiary of the LIA, LAFICO. The attachments were challenged before the *Tribunal de Grande Instance* of Paris, which ordered their release on the grounds that Libya had not made an express and special waiver of its immunity from execution. Al-Kharafi appealed this decision to the Paris Court of Appeal, which rendered its decision on 5 September 2019. The Court was thus called to decide whether LIA and LAFICO qualified as the Libyan state entities and whether, accordingly, they were entitled to sovereign immunity from execution. If so, the Court also had to decide whether Libya had waived its immunity and, if not, whether the attached assets were excluded from the benefit of the immunity. The Paris Court of Appeal found in favour of Al-Kharafi, quashing the Judgment of the *Tribunal de Grande Instance* and thereby reviving the attachments. On the first question, the Court held that LAFICO and LIA were akin to State entities but, on the second question, the immunity from execution concerning the attached assets was waived because the assets fulfilled a two-fold test: (1) they were linked with the entity against which the action was brought; and (2) they were used for other than for non-commercial public service purposes. The case is now being heard on cassation after Egyptian Courts have set aside the original Arbitral Award.

#	Case name, reference and date	Summary
Litigation in Belgium		
27	*Stati v Kazakhstan*, Cases Nos 2018/AR/1209 and 2018/AR/1214, Judgment of the Brussels Court of Appeal, 29 June 2021	This case concerns two appeals brought against a 25 May 2018 Judgment of the Brussels' First Instance Court. The Judgment concerns a third-party challenge brought by the Republic of Kazakhstan against an 11 October 2017 Order. The Order concerned the attachment of assets held by the Bank of New York Mellon NV that formed part of the National Fund of Kazakhstan (and were managed by the National Bank of Kazakhstan). Kazakhstan sought the revocation of the Order. The First Instance Court confirmed the Order. In the Appeal Decision, the Court *inter alia* confirmed the underlying Court's finding that the assets of the National Fund of Kazakhstan were to be regarded as belonging to Kazakhstan.
Litigation in Germany		
28	*Norges Bank Investment Management v Volkswagen Group, Braunschweig District Court,* case number unknown	In a June 2016 press release, NBIM (the entity that manages Norway's GPFG) stated it had filed a complaint against the Volkswagen Group.[430] Reportedly, the complaint is part of a joint legal action commenced by Volkswagen's institutional investors that sustained financial losses as a result of the Volkswagen Group's emissions scandal.[431] According to news reports, Norges Bank Investment Management sought damages of EUR 680m.[432] It is not known how the case unfolded.
Litigation in Switzerland		
29	*Kuwait v Sarrio SA*, Swiss Federal Tribunal, 24 January 1994, B5/1994	This case arises out of freezing Order obtained by Sarrio SA against the assets of the KIA in Switzerland. The State of Kuwait challenged the Order before the Swiss Federal Tribunal on various procedural grounds. The Swiss Federal Tribunal set aside the Order *inter alia* as it constituted manifest abuse of right (as Sarrio SA had obtained other freezing orders against the KIA in respect of the same claim). Interestingly, the Swiss Federal Tribunal did not take issue with the State of Kuwait's standing to challenge the freezing Order (which concerned the assets of the KIA).
Litigation in South Africa		
30	*Pembani Group Proprietary v Shanduka Group Proprietary Limited* (LM041Jun15) [2015] ZACT 126, 18 September 2015	The Competition Tribunal approved the merger between the two companies. The UBO of Pembani was acquiring a number of firms in the transaction, including Jadeite (Pty) Ltd, which is a subsidiary of the Chinese Investment Corporation, a SWF of the People's Republic of China.
Litigation in China		
31	*China-Africa Development Fund v Wang Wei,* Execution Judgment of the People's Court of Xicheng District, Beijing, 4 December 2020	CADF had brought proceedings against the Defendants, Wang Wei, Liu Qian and An Yuanyuan over a dispute regarding a guarantee contract. The dispute was resolved via mediation and a document recording the settlement was issued by the Beijing People's Court. CADF subsequently brought execution proceedings against the Defendants on the basis of this document for enforcement CADF applied to the Court to enforce an order issued by the Court in the amount of RMB 26,132,824, plus interest and other payments. In the execution proceedings, the Court froze RMB 84935.81 in the Defendant's bank account and ordered that this amount be paid to the plaintiff. It was also found that apart from these monies, no other property was available for execution and as such, the Court decided that the execution proceedings be terminated.
32	*China-Africa Development Fund Co, Ltd v Xinxiang Kuroda Mingliang Tannery Co, Ltd,* Execution Judgment of the People's Court of Haidian District, Beijing, 27 April 2020	CADF filed execution proceedings against Xinxiang Kuroda Mingliang Tannery Co Ltd and Beijing Yuhui Xinye Trading Co Ltd. A search was conducted through the Court property investigation system but it was found that no property was available for execution and as such, the Court decided that the execution proceedings be terminated.

#	Case name, reference and date	Summary
33	*China-Africa Development Fund Co, Ltd v Wang Wei,* Execution Judgment of the People's Court of Xicheng District, Beijing, 9 April 2020	CADF had brought proceedings against the Defendants, Wang Wei, Liu Qian and An Yuanyuan over a dispute regarding a guarantee contract. The dispute was resolved via mediation and a document recording the settlement was issued by the Beijing People's Court. CADF subsequently brought execution proceedings against the Defendants on the basis of this document. A search was conducted through the Court property investigation system but it was found that no property was available for execution and as such, the Court decided that the execution proceedings be terminated.
34	*China-Africa Development Fund Co, Ltd v Wang Wei,* Execution Judgment of the People's Court of Xicheng District, Beijing, 7 January 2020	CADF had brought proceedings against the Defendants, Wang Wei, Liu Qian and An Yuanyuan over a dispute regarding a guarantee contract. The dispute was resolved via mediation and a document recording the settlement was issued by the Beijing People's Court. CADF subsequently brought execution proceedings against the Defendants on the basis of this document. The Court ordered that An Yuanyuan's property on Xuanwu Road, Weiyang District, Xi'an City and Wang Wei's property on Jiandong Street, Beilin District, Xi'an City be auctioned. The properties were bought by one Mr Hao Xiaolong for RMB 92,460 and one Ms Liu Yuqin for RMB 1.12 million respectively. These amounts were paid into Court.
35	*Bank of Communications Co, Ltd Beijing Jianguo Road Sub-branch v China-Africa Development Fund,* Civil Judgment of the Second Instance of the Beijing Third Intermediate People's Court, 11 September 2019	Civil proceedings were brought by CADF against the Bank of Communications to recover money which was misappropriated from its bank account. Previously, it had been determined in criminal proceedings that the corporate account manager at the bank had been misappropriating monies from CADF's account. The lower Court ordered that the bank pay the monies missing in CADF's bank account plus interest. The bank appealed the lower Court's decision on grounds that CADF was also to blame for the loss it had suffered. However, the Court rejected the bank's arguments on appeal and upheld the decision of the lower Court.
36	*Yuan Ning v China Investment Corporation,* Civil Judgment of the First Instance of the People's Court of Dongcheng District, Beijing, 20 June 2019; Civil Judgment of the Second Instance of the Beijing Second Intermediate People's Court, 1 August 2019	The Defendant had given the Plaintiff notice of a change in his job description, ie. from administrative secretary to a document management post. The Plaintiff applied to the Court for a declaration that this notice was ineffective and that he continues to hold the position of administrative secretary. The Court disagreed with the plaintiff and dismissed his claims. The plaintiff appealed the decision. However, in the course of the appeal, Yuan Ning voluntarily applied for withdrawal of the appeal, which was granted.
37	*China-Africa Xiangyun Investment Co, Ltd v Tong Taixing Development (Hong Kong) Co, Ltd,* Execution Judgment of the Intermediate People's Court of Tai'an City, Shandong Province, 29 July 2019	China-Africa Xiangyun Investment Co Ltd, China-Africa Manufacturing Investment Co Ltd and CADF filed execution proceedings against Tong Taixing Development (Hong Kong) Co Ltd, Shandong Shankou Steel Pipe Group Co Ltd, Taian Kono Steel Co Ltd and Qian Zhanxu pursuant to a CIETAC Award granted in their favour. In these court proceedings, the Court determined that no property could be found that would be available for execution and so ordered that the execution proceedings be terminated.
38	*China-Africa Development Fund Co, Ltd v Jiangsu Qiyuan Group Co, Ltd,* Civil Judgment of the Intermediate People's Court of Suzhou City, Jiangsu Province, 28 May 2018	CADF had commenced CIETAC arbitration against the Defendants and applied to CIETAC for the assets of the Defendants to be preserved. The property preservation application was forwarded by CIETAC to the Court for consideration. The Court granted CADF's application and ordered that the bank accounts of the Defendants or other properties of corresponding value be frozen.

#	Case name, reference and date	Summary
39	*China-Africa Development Fund v Xinxiang Kuroda Mingliang Tannery Co, Ltd,* Civil Judgment of the First Instance of the Beijing Higher People's Court, 29 December 2017	CADF and Xinxiang Kuroda Mingliang Tannery Co Ltd ('**XKMT**') signed an investment agreement which agreed to jointly fund the establishment and operation of China-Africa Leather Industry Co Ltd in Ethiopia. Under the agreement, XKMT guaranteed that CADF would receive a fixed return equal to 20% of CADF's actual contribution to the company each year, for three years, and that if the fixed return earned amounts to less than this figure, XKMT would make up the return due with its own funds. In 2011, CADF received less than was due under the agreement and XKMT failed to make full payment. CADF started court proceedings. XKMT argued that the agreement was invalid. However, the Court upheld the validity of the agreement and ruled that XKMT was in breach of contract and should pay a fixed return compensation.
40	*China-Africa Development Fund Co, Ltd v Jinan Yuxiao Group Co, Ltd*, Decision on Setting Aside of Arbitration Award, Beijing Fourth Intermediate People's Court, 13 September 2017	CADF applied to the Court to set aside a CIETAC Arbitral Award made in favour of Jinan Yuxiao on 24 February 2017 against CADF and China Hydropower. Under the arbitration Award, CADF and China Hydropower were to pay compensation of RMB 11 million. In the court proceedings, CADF alleged that (i) the dispute fell outside the scope of the arbitration agreement, (ii) the dispute concerned matters that were non-arbitrable and (iii) that there were serious procedural irregularities vis-à-vis the reappointment of the presiding arbitrator in the arbitration and the time within which the Award was made. The Court disagreed with all of CADF's arguments and declined to set aside the Award.
41	*China-Africa Development Fund Co, Ltd v Wang Wei*, Review Judgment of the People's Court of Xicheng District, Beijing, 6 June 2016	As a result of underlying court proceedings regarding a dispute over a guarantee contract, CADF filed a pre-litigation property preservation application with the Chinese Court, requesting the seizure and freezing of the property of the Respondents, Wang Wei, An Yuanyuan and Liu Qian in the amount of RMB 31,585,389. The Court granted CADF's application and ordered the seizure and freezing of the requested amount.
42	*Temasek Holdings v Trademark Review and Adjudication Board of the State Administration for Industry and Commerce of the People's Republic of China,* Administrative Judgment of the First Instance of the Beijing No 1 Intermediate People's Court, 30 April 2014; Administrative Judgment of the First Instance of the Beijing No 1 Intermediate People's Court, 30 April 2014; Administrative Judgment of the First Instance of the Beijing No 1 Intermediate People's Court, 30 April 2014; Appeal Decision of the Beijing Higher People's Court, 11 May 2015; Appeal Decision of the Beijing Higher People's Court, 19 January 2015	Temasek had applied to the Trademark Review and Adjudication Board for registration of trademarks. However, this application was refused. Temasek applied to the Court for the board's decision to be overturned. The Court upheld the decision of the board, thereby rejecting the registration of the trademark.

#	Case name, reference and date	Summary
Commercial arbitrations		
43	*Newcastle United FC Limited v Football Association Premier League Limited*, arbitration under the arbitration provisions of the Premier League Limited Rules, case number unknown *Newcastle United Football Co Ltd v Football Association Premier League Ltd* [2021] EWHC 349 (Comm)	The existence of this case (which is not public) is revealed by a related English High Court Judgment. It is an arbitration between Newcastle United FC Limited ('**NUFC**') and Football Association Premier League Limited ('**PLL**'). The arbitration relates to the current owners of the shares in NUFC's decision to sell their shares to PZ Newco Limited, a company ultimately owned by Saudi Arabia's PIF. According to PLL, PIF was controlled by the Government of the Kingdom of Saudi Arabia ('**KSA**') (a point disputed by NUFC). As a result, also in PLL's view, upon PZ Newco Limited's acquisition of NUFC, KSA would become a 'director' of NUFC as defined in PLL's Rules, which entailed certain consequences under the Rules. PLL issued a decision to that extent and NUFC challenged the decision in arbitration. An Arbitral Tribunal was constituted. It is not known how the arbitral proceedings unfolded. The related English High Court Judgment stems from an application by NUFC under s 24(1)(a) of the English Arbitration Act for the removal of one of the arbitrators appointed in the case. NUFC also requested that the application be heard in public. The reason for the s 24(1)(a) application is that the arbitrator in question had rendered an opinion to PSA on a related Rule of the PSA Rules, other than that in dispute in the arbitration. The High Court found that this did not give rise to any appearance of bias so as to warrant the removal of the arbitrator.
44	*International Petroleum Investment Company and Aabar Investments v 1MDB* (case details unknown) *Minister of Finance v IPIC* [2019] EWCA Civ 2080	The International Petroleum Investment Company ('**IPIC**') and its subsidiary Aabar Investments launched a London Court of International Arbitration claim against 1MDB, a Malaysian SWF. The dispute arose out of a deal wherein IPIC agreed to guarantee two sets of bonds worth USD 3.5 billion that 1MDB issued to finance the purchase of power plants. After 1MDB struggled to honour its debts, the parties signed a bailout agreement, in which IPIC agreed to provide 1MDB with an immediate USD 1 billion cash loan and temporarily assume its obligations to pay interest on the bonds. In April 2016, 1MDB had repeatedly defaulted on interest payments under the bonds and IPIC commenced the arbitration proceedings against 1MBD in June 2016. The parties concluded a settlement agreement. However, 1MDB issued English court proceedings in November 2018 to set aside the Consent Award of the LCIA Tribunal on the grounds that it was procured by fraud on the part of the then Malaysian Prime Minister and former senior officers. In the meantime, IPIC sought to commence a second arbitration case in November 2018 and obtained a stay of the Respondents' English court proceedings. Upon appeal, the English Court removed the stay and granted an injunction to restrain the pursuit of the second arbitration proceedings.
45	*Djibouti v DCT; DP World v Djibouti, DP World v PDSA*, LCIA, case numbers unknown	Reportedly,[433] three related arbitrations were brought before LCIA Tribunals in relation to a dispute between DP World and the State of Djibouti relating to the operation of a port container terminal. The first arbitration was lodged by Djibouti against Doraleh Container Terminal SA (DCT). Djibouti requested the Arbitral Tribunal to rescind the port concession agreement on grounds of corruption. The Tribunal, though, upheld the agreement in a 2017 Award. It appears that a second Award on counter-claims was rendered in the same case in 2019. Djibouti proceeded to rescind the port concession agreement by decree. This triggered the second LCIA arbitration, filed by DP World against Djibouti in early 2018. The Sole Arbitrator is reported to have ruled (presumably in an Interim or Partial Award) that Djibouti should restore DP World's rights under the concession agreement, or pay damages. It is not known how the case unfolded thereafter. The third arbitration was initiated by DP World against Port de Djibouti SA under the joint-venture agreement between the parties for the operation of the port container terminal. DP World had previously obtained an injunction from the English Courts enjoining Port de Djibouti SA from terminating the joint-venture agreement. In a recent confidential Partial Award (issued on 7 July 2021), the sole arbitrator is reported to have found inter alia that Port de Djibouti SA had breached the joint-venture agreement by attempting to terminate it.

#	Case name, reference and date	Summary
46	*Abu Dhabi Investment Authority v Citigroup* [II], ICDR Case No 50 2013 000782, Decision on Preliminary Objections, 2 October 2015 and Final Award, 12 December 2016	Following dismissal of its first claim, ADIA initiated this second arbitration against Citigroup before a different Tribunal, alleging that Citigroup had breached their investment agreement and an implied covenant of good faith. In this respect, ADIA complained *inter alia* that they failed to manage its business in a 'commercially reasonable manner'. In its 2015 Decision, the Tribunal dismissed the Respondents' *res judicata* and abuse of process objections, relating to the prior arbitration brought by the Claimant. Thereafter, in its 2016 Final Award, the Tribunal dismissed the claims on the merits, finding that the agreement did not require Citigroup to operate its business so as to maximise ADIA's return, and rejecting allegations that Citigroup's acts had been commercially unreasonable.
47	*Mohamed Abdulmohsen Al-Kharafi & Sons Co v the Government of the State of Libya and others,* CRCICA, Final Arbitral Award, 22 March 2013 Paris Court of Appeal, Judgment, 28 October 2014	The case was brought by Al-Kharafi within the framework of the Unified Agreement for Investment of Arab Capital in the Arab States and the rules of the Cairo Regional Center for International Commercial Arbitration. The original Respondents were the Government of the State of Libya, the Ministry of Economy of Libya, the General Authority for Investment Promotion and Privatization Matters. The dispute arose out of a contract for the lease and development of a parcel of land in Libya entered into between Kharafi, a Kuwaiti company, and the Libyan Tourism Development Authority. At the origins of the dispute were certain alleged interferences with Kharafi's operations to implement the project on the designated site, including, most notably, the failure to deliver the land free of occupancies and persons as well as attacks carried out by police forces against Kharafi's workers. Ultimately, the Tourism Development Authority requested that Kharafi stop the works and remove their equipment from the site until the matter was permanently resolved, thereby triggering the arbitration claim. The Claimant asserted claims for breaches of contract, breaches of statutory provisions and breaches of provisions of the Unified Agreement. In the course of the proceedings the Tribunal granted a request of the Claimant to join the Libyan Ministry of Finance. Conversely, it denied a request for joinder of the LIA. The Claimant requested the joinder of the LIA so as to be able to enforce the ensuing Arbitral Award against it, and submitted that the LIA was part of Libya's governmental entities and bodies and was funded by the State's budget. The LIA countered inter alia that it had separate legal personality and was not a party to the arbitration agreement. The Tribunal considered, instead, that the LIA was 'in no way related' to the arbitral proceedings. However, it went on to find that '… the Libyan Investment Authority, regardless of the location of its investments, whether inside or outside Libya, remains an integral part of the State of Libya to which applies the arbitral award as well as to all its entities and bodies, even though they were not joined to the present arbitration case'. On the merits, the arbitral Tribunal found in favour of the Claimant awarding approximately USD 930 million in damages. After the Award, follow-up enforcement proceedings were brought in the French Courts. Al-Kharafi obtained an order of exequatur of the Award in France. Both the LIA and the other Respondents in the arbitration challenged the exequatur before the French Courts by way of two separate applications (heard by the Paris Court of Appeal in a single Judgment). What is most relevant here is the challenge filed by the LIA. The LIA challenged the exequatur on the basis that the Tribunal that rendered the underlying Award had been improperly constituted and that it had found *ultra petita* on the status of the LIA within the Libyan state (in the afore-cited passage). In relation to the first point, the Paris Court of appeal found that the LIA had waived such a ground for challenging the enforcement of the Award as it had not raised it before the Arbitral Tribunal when it made submissions concerning the Claimant's request for joinder. In relation to the *ultra petita* point, the Paris Court of Appeal considered that the Arbitral Tribunal's finding complained of by the LIA were essentially *obiter dicta*, so there was no *ultra petita*. The Paris Court of Appeal also dismissed the exequatur challenge filed by the other Respondents in the underlying arbitration.

#	Case name, reference and date	Summary
48	*Abu Dhabi Investment Authority v Citigroup* [I], ICDR Case No 50-148-T-00650-09, Award and Statement of Reasons, 14 October 2011	This case was filed by ADIA and submitted to arbitration before an ICDR Tribunal. ADIA sought (i) rescission of its investment that it was allegedly induced to make in Citigroup based on fraudulent misrepresentations; or (ii) an award of damages caused by Citigroup's misconduct. ADIA claimed that Citigroup had issued preferred shares to other investors thereby diluting the value of the shares ADIA had purchased. The Tribunal dismissed ADIA's claims. The Tribunal considered the Claimant had failed to meet its burden of proof and that, even if the claims had not been time-barred, Citigroup was not in breach of the terms of the investment agreement.
49	*Hyundai Heavy Industries Co v International Petroleum Investment Company*, ICC, case number unknown *Hyundai Heavy Industries Co Ltd, and 11 others v International Petroleum Investment Company International, Hanocal Holdings*, Seoul Central District Court, 2009Gahap136849, 9 July 2010	Reportedly,[434] the dispute arose out of a shareholders' agreement for the ownership of Hyundai Oilbank, entered into between Hyundai Heavy Industries, a Korean company, and the IPIC (as defined above). The agreement provided that in the event a material breach occurred, the defaulting party would sell its shares to the other party at a fair price. Hyundai Heavy alleged that the target company's distribution of dividends to an amount that was less than 50% of the amount envisaged in the contract constituted a material breach and entailed it to acquire IPIC's shares of Hyundai Oilbank. On this basis it filed for ICC arbitration. In the arbitration, IPIC submitted that the dividend distribution provision was in breach of Korean law. It appears that the Arbitral Tribunal upheld the agreement (and rejected IPIC's defence) as it ruled in favour of Hyundai. IPIC resisted enforcement before the Korean Courts, alleging *inter alia* that the Award was in violation of public policy as it contravened the provisions of Korean law it invoked in the arbitration to challenge the validity of the agreement with Hyundai Heavy. The Seoul District Court refused IPIC's challenge. It found that the agreement did not violate Korean law. The Court also noted that, in any event, the application of law which contravenes Korean law, would not, in itself constitute grounds to set aside a foreign arbitral award under the public policy exception.
State-to-State arbitration		
50	*Railway Land Arbitration (Malaysia/ Singapore)*, PCA Case No 2012-01, Award, 30 October 2014	The case concerned the interpretation of an agreement between the Government of Malaysia and the Government of Singapore called 'Points of Agreement on Malayan Railway Land in Singapore' ('**POA**'). Under the POA Malaysia agreed to return to Singapore lands that it held in Singapore (the 'railway lands') in exchange for options. One of these options entailed that, upon Malaysia's exercise of the option, three parcels of the railway lands would be vested in a company to be jointly owned by the Parties to be called M-S Pte Ltd ('**M-S**') for the purpose of commercial development. Ultimately, Malaysia did not exercise this option. It exercised another option according to which the joint company would receive for development some parcels of land reclaimed from the sea by Singapore. M-S was incorporated under the laws of Singapore. 60% of its shares were acquired by Malaysia through a wholly-owned State company called Khazanah Nasional Berhad and the remaining 40% by Singapore through Temasek Holdings (Private) Limited (Singapore's SWF). The dispute revolved around whether, as a matter of interpretation of the POA, had Malaysia exercised the option for the railway lands and had it proceeded to develop those lands, M-S would have had to bear a particular tax / charge provided by the law of Singapore called 'development charge' ('**DC**'). The dispute was submitted to arbitration under the Rules of the Permanent Court of Arbitration under a submission agreement. On the interpretation of the POA, the Tribunal found that DC would not have been due. The arbitration centred on the provisions of the POA. There was no dispute or substantive discussion regarding the position of Temasek. However, the role assumed by Temasek in the case is of some relevance. Temasek acted as an instrument of the Government of Singapore, which used it to enter into a joint venture with the Government of Malaysia under the framework of the POA.

#	Case name, reference and date	Summary
Investment treaty arbitration		
51	*Öztaş Construction, Construction Materials Trading Inc v Libyan Investment Development Company and Libya*, ICC Arbitration No 21603/ ZF/AYZ, Award, 14 June 2018	The Claimant had a contract with the Libyan Development Investment Company ('**LIDCO**'). In the aftermath of the Libyan revolution of 2011, LIDCO terminated the contract. It promised to pay compensation but then failed to do so. The Claimant commenced proceedings against LIDCO and Libya under the Turkey-Libya BIT and the ICC Rules seeking compensation. In particular, the Claimant challenged two categories of acts: acts carried out by Libya through LIDCO (which, according to the Claimant, were attributable to Libya) and acts carried out by Libya directly. On jurisdiction, the Tribunal quickly declined jurisdiction over LIDCO (as the BIT dispute resolution provisions only applied to dispute between an investor and the State), whilst it affirmed jurisdiction over Libya. The Tribunal went on to examine the merits of the Claimant's claims. Relevant here are the Tribunal's findings on Libya's alleged responsibility for LIDCO's acts. The Claimant in this respect submitted *inter alia* that LIDCO was owned by Libya's Economic and Social Development Fund, which in turn was owned by the LIA. The Claimant further submitted that LIA '… was established by the General People's Committee in order to control assets of the State of Libya and whose Board of Trustees includes the Prime Minister and other government ministers'. The Arbitral Tribunal sidestepped the question of attribution of LIDCO's acts (which would have involved, to some extent, deciding on the attribution of LIA's acts). It found that, in any event, LIDCO's acts were contractual breaches which did not amount to breaches of the BIT.
52	*Ras al-Khaimah Investment Authority v India*, UNCITRAL / PCA (pending)	The case (which is still pending) reportedly concerns BIT claims arising out of the cancellation of a 2007 Memorandum of Understanding between the Government of the Indian State of Andhra Pradesh and the Claimant.[435] The Memorandum concerned a smelter and refinery project to be developed by the Claimant through a locally-incorporated company in collaboration with the State Government (which had agreed to supply bauxite to the Claimant's company through an SOE owned by the State Government).
53	*State General Reserve Fund of the Sultanate of Oman v Republic of Bulgaria,* ICSID Case No ARB/15/43, Award (excerpts), 13 August 2019	BIT claim brought by Oman's State General Reserve Fund against Bulgaria. Reportedly, the claim concerned the SWF's shareholding in a Bulgarian bank called Corporate Commercial Bank which collapsed in 2014.[436] According to the available excerpts of the 13 August 2019 Award, the SWF withdrew its main claims with prejudice. As a result, the Tribunal issued an Award formally dismissing the Claimant's claims. Interestingly, before doing so, the Tribunal found that it had jurisdiction over the dispute (although it did not specify on what bases).
54	*Masdar Solar v Spain,* ICSID Case No ARB/14/1, Award, 16 May 2018	The Claimant in this case was a Dutch company owned and controlled by ADFEC, a company that was wholly controlled by Mubadala, which was in turn owned by the government of Abu Dhabi. Spain objected to the jurisdiction of the ICSID Arbitral Tribunal and relied on Articles 5 and 8 ARSIWA and the links between the Claimant and the government of Abu Dhabi to argue that the dispute was essentially one between two States. The Tribunal applied the reasoning adopted in *CSOB v Slovakia* and found that the Claimant could be disqualified as it was not 'acting as an agent for the government or is discharging an essentially government function'. Furthermore, the Respondent did not establish that the Claimant exercised any public function prerogative or that the government of Abu Dhabi exercised general control over the Claimant and a control on its investment decisions.

#	Case name, reference and date	Summary
55	*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*, SCC Case No V 116/2010, Award, 19 December 2013	The arbitration, conducted under the Energy Charter Treaty ('**ECT**') and the Arbitration Rules of the Stockholm Chamber of Commerce ('**SCC**'), concerned claims relating to an oil and gas investment of the Claimants in Kazakhstan, which entailed the construction of an LPG plant. The Claimants alleged that Kazakhstan started an intimidation and harassment campaign in an effort to force them to sell their investment to Kazakhstan's State-owned oil company at a low price, and that, ultimately, Kazakhstan cancelled the oil and gas exploration contracts held by Claimants' local companies and seized their assets. The Claimants claimed breaches of the ECT 'fair and equitable' standard, direct and indirect expropriation as well as breaches of the 'most constant protection and security' standard, the prohibition against unreasonable and discriminatory measures and the ECT 'umbrella' clause. The Tribunal sided with the Claimants, finding Kazakhstan liable of breaching the FET standard and awarding the Claimants around USD 500 million in damages. It the Tribunal's view the Claimants had been victims of a pattern of harassment by various Kazakh institutions. The dispute involved (albeit to a limited extent) also Kazakhstan's SWF Samruk-Kazyna. As part of the difficulties allegedly faced by the Claimants, there was the failure of Kemikal (the largest non-local customer of one of the Claimants' companies) to post some bank guarantees and pay its dues. Kazakhstan submitted that the acts of Kemikal could not be attributed to Kazakhstan. The Arbitral Tribunal considered otherwise. It observed that 'Kemikal was managed by Samruk-Kazyna, which is the Kazakh state welfare fund and is 100% owned and controlled by Kazakhstan' and that the former deputy manager of Samruk-Kazyna had close family ties with Kazakhstan's President. A number of follow-up proceedings before national courts arose from this case in relation to the enforcement of the Award.[437]

Endnotes

1 International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA), published along with the ILC's accompanying Commentary (the 'ARSIWA Commentary') in ILC, 'Report of the International Law Commission on the Work of its Fifty-third Session' UN Doc A/56/10, reproduced in ILC YB 2001, vol II/2, 31.

2 Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex II of the WTO Agreement) (15 April 1994) https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed 3 September 2021.

3 General Agreement on Trade in Services (15 April 1994) https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#mAgreement accessed 3 September 2021.

4 General Agreement on Tariffs and Trade (30 October 1947) https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm accessed 3 September 2021.

5 Global SWF, '2021 Annual Report, State-Owned Investors in a post-pandemic age' (1 January 2021) https://drive.google.com/file/d/1-s2mYtzQEVWCNXO78nNciAO4Ul2j4nic/view accessed 3 September 2021

6 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)

7 IWG, 'Sovereign Wealth Funds, Generally Accepted Principles and Practices, "Santiago Principles"' (October 2008) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed 3 September 2021.

8 Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm accessed 3 September 2021.

9 UN Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not in force) A/RES/59/38.

10 UN, 'Guiding Principles on Business and Human Rights' (2011) Available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed 3 September 2021.

11 UN, 'Principles for Responsible Investment' (April 2006) https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment accessed 3 September 2021.

12 Cf Global SWF, 'Top 100' https://globalswf.com/top-100 accessed 3 September 2021. The aggregate amount of assets under management of the SWFs listed in Global SWF's 'Top 100' rankings add up to around USD 10.02 trillion.

13 Unpublished data supplied by Global SWF for this Report.

14 This data can be extrapolated from Global SWF, 'Top 100' https://globalswf.com/top-100 accessed 3 September 2021. According to Global SWF's statistics, the 20 largest SWFs hold USD 9,053 worth of assets under management, which corresponds to around 89% of the total assets under management from SWFs.

15 Santiago Principles, 4.

16 Cf UN Convention on State Immunity, Article 10. Cf also James Crawford, *Brownlie's Principles of International Law (OUP 2019), 480, according to which 'the "most significant" exception to State immunity from jurisdiction concerns "commercial transactions" or "commercial activity"' (footnotes omitted).*

17 UNCTAD, 'World Investment Report 2008, Transnational Corporations and Investment Challenge' (2008) E.08. II.D.23 https://unctad.org/system/files/official-document/wir2008_en.pdf accessed 3 September 2021, 21: '… growth of FDI by SWFs during the period 2005–2007, the majority originating in the United Arab Emirates, was dramatic. Of the $39 billion of FDI invested by SWFs during the past two decades, as much as $31 billion was committed in the past three years'.

18 Cf OECD, 'The Role of Sovereign and Investment Funds in the Low-carbon Transition' (2020) https://www.oecd-ilibrary.org/sites/ddfd6a9f-en/1/2/1/index.html?itemId=/content/publication/ddfd6a9f-en&_csp_=7075e316988f49f0fe40465b1becdd08&itemIGO=oecd&itemContentType=book accessed 3 September 2021; IFSWF, 'Continuity in the Face of Upheaval, ISFWF Annual Review 2020' (11 May 2020) https://www.ifswfreview.org/ accessed 3 September 2021, s 'Climate Opportunities'.

19 Cf UNCTAD, 'World Investment Report 2021, Investing in Sustainable Recovery' (2021) Doc UNCTAD/WIR/2021 https://unctad.org/system/files/official-document/wir2021_en.pdf accessed 3 September 2021, 219-220; IWG, 'Sovereign Wealth Funds, Generally Accepted Principles and Practices, "Santiago Principles"' (October 2008) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed 3 September 2021 noting that '[s]ome sovereign wealth funds set up for strategic purposes have been more directly involved in their government's policy response during the pandemic, with specific funds allocated to support the local economy, but without veering away from the sovereign wealth funds' main purpose'; Bernardo Bortolotti, 'Sovereign Wealth Funds and the COVID-19 shock: Economic and Financial Resilience in Resource-Rich Countries' (August 2020) Working Paper No 147 – Bocconi University, 3-5; ICEX-Invest in Spain – IE Business School, 'Sovereign Wealth Funds 2020, The Covid-19: Challenges and opportunities for long-term investors' https://www.investinspain.org/en/publications/sovereign-wealth-funds-2020 accessed 3 September 2021, 4: 'SWFs have been instrumental during the pandemic supporting some of the large-scale vaccine development programs, procuring medical equipment, or contributing to national economic and social emergency plans'.

20 A compendium of institutional definitions of SWFs is set out in *Annex 1*.

21 IFSWF, 'The origin of the Santiago Principles. Experiences from the past; guidance for the future' https://www.ifswf.org/sites/default/files/IFSWF_Santiago_Principles_book.pdf accessed 3 September 2021, 47.

22 Andrew Rozanov, 'Definitional challenges of dealing with sovereign wealth funds' (2011) 1 Asian Journal of International Law 249, 251.

23 Santiago Principles, 27 (Appendix I).

24 Adrian Blundell-Wignall, Yu-Wei Hu and Juan Yermo, 'Sovereign Wealth and Pension Fund Issues' (January 2008) OECD Working Papers on Insurance and Private Pensions No 14 https://www.oecd.org/finance/private-pensions/40345767.pdf accessed 3 September 2021, 4.

25 EU Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A common European approach to Sovereign Wealth Funds' (2008) Doc COM/2008/0115 final https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0115&from=EN accessed 3 September 2021.

26 Global SWF, 'Frequently Asked Questions (FAQs)' https://bit.ly/globalswffaqs accessed 3 September 2021, 'What is a Sovereign Wealth Fund?'

27 According to Global SWF, Public Pension Funds (or PPFs) '… have gained in significance and activity to such an extent that they are today similar in behaviour to SWFs and to Savings Funds in particular, despite the obvious differences in liability profile. Both groups keep alike investment strategies and asset allocations and can be seen competing for the same stakes in public auctions and private placements around the world' (Global SWF 2021 Annual Report, 7).

28 Santiago Principles, 27 (Appendix I).

29 Cf Larry Cata Backer, 'Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience' (2010) 19 Transnat'l L & Contemp Probs 3, 13 and n 32, pointing out that SWFs and SOEs can easily be mistaken and that SOEs have even been regarded by some authors as a form of SWFs.

30 Fabio Bassan, *The Law of Sovereign Wealth Funds (Edward Elgar 2011), 22.*

31 Ibid.

32 Cf Muhammad Ussama, 'Sovereign Wealth Fund and Investor-State Dispute Settlement: Examining Questions of ICSID's Jurisdiction and the Impact of Investment Treaty Arbitration' https://digitalcommons.wcl.american.edu/ab/vol7/iss1/2/ accessed 3 September 2021, 20, noting that 'resource-rich economies have grown to believe in the importance of SWFs as a tool for combating the uncertainty of continued rates of income and revenue and the severe economic, financial, and even societal repercussions associated with turbulent revenue windfalls'.

33 Unpublished data supplied by Global SWF for this Report.

34 Data taken from Global SWF, 'Top 100' https://globalswf.com/top-100 accessed 22 August 2021.

35 'Sovereign Wealth Funds: Their Role and Significance - A Speech By John Lipsky, First Deputy Managing Director, International Monetary Fund' (3 September 2008) https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp090308 accessed 3 September 2021. Cf also Christopher Beus, 'Sovereign wealth funds in the ICSID – a new approach to standing' (2014) 1 Indonesia Journal of International and Comparative Law 543, 543.

36 Global SWF, 'Top 100' https://globalswf.com/top-100 accessed 3 September 2021.

37 'Top 1000 funds / Government Pension Fund Global / Norges Bank Investment Management' https://www.top-1000funds.com/asset_owner/government-pension-fund-global-norges-bank-investment-management/ accessed 3 September 2021.

38 PWC, 'Sovereign Investors 2020, a Growing Force' (2020) https://www.pwc.com/gx/en/sovereign-wealth-investment-funds/publications/assets/sovereign-investors-2020.pdf accessed 3 September 2021, 24, 32.

39 Cf graph below 'SWFs Investments by Region'. The graph and underlying data have been supplied by Global SWF for this Report.

40 Ibid.

41 Ibid.

42 ibid.

43 PWC, 'Sovereign Investors 2020, a Growing Force' (2020) https://www.pwc.com/gx/en/sovereign-wealth-investment-funds/publications/assets/sovereign-investors-2020.pdf accessed 3 September 2021, 27, noting that 'Sovereign Investors have already emerged as important drivers of investment and development within Real Estate'. Cf also Global SWF 2021 Annual Report, 12.

44 Cf graph 'Infrastructure Investment by Segment'. The graph and underlying data have been supplied by Global SWF for this Report.

45 Cf graphs 'SWFs Investments by Industry' and 'Infrastructure Investments by Segment'. These graphs have been supplied by Global SWF for this Report. On 'green investment' by SWFs, cf OECD, 'The Role of Sovereign and Investment Funds in the Low-carbon Transition' (2020) https://www.oecd-ilibrary.org/sites/ddfd6a9f-en/1/2/1/index.html?itemId=/content/publication/ddfd6a9f-en&_csp_=7075e316988f49f0fe40465b1becdd08&itemIGO=oecd&itemContentType=book accessed 3 September 2021.

46 Cf graphs 'SWFs Investments by Industry' and 'Infrastructure Investments by Segment'. Cf also graph 'SWF Investments in Real Assets', also supplied by Global SWF for this Report.

47 Ibid.

48 Cf graph, 'SWFs Investments by Industry' and Global SWF 2021 Annual Report, 13.

49 Cf ibid and Global SWF 2021 Annual Report, 12.

50 Cf graph SWFs Investment Activity, supplied by Global SWF for this Report.

51 See *Annex 3.*

52 See *Annex 3*.

53 See *Annex 3*.

54 ADIA, 'Governance' https://www.adia.ae/en/investments/governance accessed 3 September 2021.

55 An abstract of the CIC's Articles of Association is available on the CIC website, at http://www.china-inv.cn/china-inven/Governance/Articles_of_Association.shtml accessed 3 September 2021.

56 Cf *National Bank of Kazakhstan and another v Bank of New York Mellon SA/NV, London Branch and others* [2020] EWHC 916 (Comm); *Ras Al Khaimah Investment Authority and others v Bestford Development Llp and others* [2015] EWHC 3383 (Ch); *Ras Al Khaimah Investment Authority and others v Bestfort Development LLP and others* [2017] EWCA Civ 1014 (discussed in *Annex 4*).

57 *Pembani Group Proprietary v Shanduka Group Proprietary Limited* (LM041Jun15) [2015] ZACT 126, 18 September 2015, analysed in *Annex 4*.

58 Alessandra Puato, *'Fondi sovrani, zero soldi all'Italia nell'ultimo anno.* «Non attira più»' (18 February 2019) *Corriere della Sera* https://www.corriere.it/economia/leconomia/19_febbraio_18/fondi-sovrani-grande-gelo-sovereign-investment-lab-bocconi-investimenti-qatar-0fc92eb2-335a-11e9-8ba2-1cae66b0283a.shtml accessed 3 September 2021.

59 *LAFICO v Public Prosecutor*, Italian Court of Cassation, Criminal Division, Judgment, 11 October 2012, No 40093, illustrated in *Annex 4*.

60 Cf NBIM, 'Volkswagen complaint filed' (24 June 2016) https://www.nbim.no/en/the-fund/news-list/2016/volkswagen-complaint-filed/ accessed 3 September 2021.

61 Ibid.

62 *'Norwegischer Staatsfonds klagt gegen VW'* (24 June 2016) *WirtschaftsWoche,* https://www.wiwo.de/unternehmen/industrie/schadenersatz-fuer-dieselskandal-norwegischer-staatsfonds-klagt-gegen-vw/13786306.html accessed 17 August 2021; *'Abgasskandal: Norwegens Staatsfonds klagt gegen Volkswagen'* (28 June 2016) *Industrie Magazin* https://industriemagazin.at/a/abgasskandal-norwegens-staatsfonds-klagt-gegen-volkswagen accessed 17 August 2021.

63 Cf *Annex 4*.

64 Cf ibid.

65 Cf ibid.

66 *Mohamed Abdulmohsen Al-Kharafi & Sons Co v the Government of the State of Libya and others*, CRCICA, Final Arbitral Award, 22 March 2013, analysed in *Annex 4*.

67 See graph 'SWFs Investments by Region'.

68 See graph 'SWFs Investments by Industry'.

69 *Asian Agricultural Products Ltd v Republic of Sri Lanka, ICSID Case No ARB/87/3.* This data is taken from an early UNCTAD report (UNCTAD, 'Investor-State Disputes Arising from Investment Treaties: A Review' (February 2006) Doc UNCTAD/ITE/IIT/2005/4 https://unctad.org/webflyer/investor-state-disputes-arising-investment-treaties-review accessed 3 September 2021, Annex 2 ('List of cases reviewed'). The year ICSID registered the *AAPL v Sri Lanka* case can be found on the ICSID website' (ICSID, 'Cases database' https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/87/3 accessed 3 September 2021). There are earlier investor-State cases under contracts / host State's legislation such as, for example, *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3.

70 *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan, SCC Case No V 116/2010. This data is based on our own review of case law set out in Annex 4.*

71 Cf IFSWF, 'Oman Investment Authority' https://www.ifswf.org/member-profiles/state-general-reserve-fund accessed 3 September 2021; cf also OIA, 'About OIA' https://oia.gov.om/Index.php?r=en%2Fsite%2Fabout&csrt=7545915728545163519 accessed 3 September 2021.

72 *State General Reserve Fund of the Sultanate of Oman v Republic of Bulgaria*, ICSID Case No ARB/15/43; Luke E 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' *IA Reporter* (23 October 2015) 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/ (subscription required) accessed 3 September 2021; Lisa Bohner, 'Arbitrators render final award, months after Bulgaria announced end of claim by Oman's sovereign wealth fund' *IA Reporter* (19 August 2019) https://www.iareporter.com/articles/arbitrators-render-final-award-months-after-bulgaria-announced-end-of-claim-by-omans-sovereign-wealth-fund/ (subscription required) accessed 3 September 2021.

73 *State General Reserve Fund of the Sultanate of Oman v Republic of Bulgaria*, ICSID Case No ARB/15/43, Award (excerpts), 13 August 2019, para 38.

74 Cf Zoe Williams, 'Emirati investor files UNCITRAL BIT arbitration against India', *IA Reporter* (12 January 2017) https://www.iareporter.com/articles/emirati-investor-files-uncitral-bit-arbitration-against-india/ (subscription required) accessed 3 September 2021; 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' *IA Reporter* (21 March 2018) https://www.iareporter.com/articles/india-round-up-updates-on-five-pending-investment-treaty-arbitrations-including-rulings-tribunals-and-anti-suit-injunctions/ (subscription required) accessed 3 September 2021.

75 Jarrod Hepburn, 'India round-up: Update on seven investment treaty cases against the State' *IA Reporter* (11 June 2020) https://www.iareporter.com/articles/india-round-up-an-update-on-seven-investment-treaty-cases-against-the-state/ (subscription required) accessed 3 September 2021.

76 I-Arb Africa, 'Zambia pays first installation of 380 million USD award' (2 June 2017) https://www.iarbafrica.com/en/news-list/17-news/544-zambia-pays-first-installation-of-380-million-usd-award?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly-2018-5 accessed 3 September 2021.

77 Ibid.

78 Ibid.

79 Cf ADIA, 'Governance' https://www.adia.ae/en/investments/governance accessed 3 September 2021 and CIC's Articles of Association (CIC, 'Governance' http://www.china-inv.cn/chinainven/Governance/Articles_of_Association.shtml accessed 3 September 2021).

80 United States – Singapore Free Trade Agreement (signed 6 May 2003, entered into force 1 January 2004).

81 Ibid, Article 15.1.7.

82 Ibid, Article 15.1.17.

83 Ibid, Article 12.8.1(d) and (e).

84 Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed 19 January 2016, entered into force 30 August 2017) (emphasis on 'sovereign wealth funds' added). Cf also, in similar terms, Article 1(3)(b) of the 2016 Slovakia-United Arab Emirates BIT (Agreement between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investment (signed 22 September 2016, entered into force 5 February 2018)). These provisions bear some similarity to Article 1(3)(b) of the Slovakia model BIT 2019 (available at UNCTAD, 'Model Agreements' https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements accessed 3 September 2021), whose formulation is, however, somewhat ambiguous as it reads: '… an enterprise other than a branch and a representative office or a sovereign wealth fund] …'. It is not entirely clear whether it purports to include or exclude SWFs.

85 Agreement between the Republic of Rwanda and the United Arab Emirates for the Promotion and Reciprocal Protection of Investment (signed 1 November 2017, not in force), Article 1(1)(b) and (c) (emphasis added).

86 Ibid, Article 8(7).

87 Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part (signed 15 October 2018, not in force), Article 4.8.

88 Cf Walid Ben Hamida, 'Sovereign FDI and international investment agreements: questions relating to the qualification of sovereign entities and the admission of their investments under investment agreements' (2010) 9 Law & Practice of International Courts and Tribunals 17, 22. Where a treaty contains a definition that excludes SOEs, a claimant SWF could potentially try to use the principles of most-favoured nation treatment to by-pass a restrictive definition of 'investor'. However this approach is subject to different interpretations by investor-State tribunals.

89 North American Free Trade Agreement (NAFTA) (signed 17 December 1992, entered into in force 1 January 1994), Articles 201(1) and 1139.

90 Treaty between the Government of the United States of America and the Government of the State of Bahrein concerning the Encouragement and Reciprocal Protection of Investment (signed 29 September 1999, entered into force 30 May 2001) (the 'US-Bahrain BIT'), Article 1(a). Cf also, Agreement between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment (signed 14 November 2003, entered into force 19 December 2004), Article 1(1)(b).

91 US-Bahrain BIT, Article 1(b).

92 Cf Agreement between the People's Republic of China and the Government of the Republic of Ghana concerning the Encouragement and Reciprocal Protection of Investment (signed 12 October 1989, entered into force 22 November 1990), Article 1(b).

93 Agreement between the Government of the Republic of India and the Government of Turkmenistan for the Promotion and Protection of Investments (signed 20 September 1995, entered into 27 February 2006, terminated 22 March 2017), Article 1(a).

94 Cf, for example (to name a few), Agreement between the Government of the Republic of Korea and the Government of the Republic of Kazakhstan for the Promotion and Reciprocal Protection of Investments (signed 20 March 1996, entered into force 26 December 1996), Article 1(2)(b); Agreement between Japan and the Islamic Republic of Pakistan concerning the Promotion and Protection of Investment (signed 10 March 1998, entered into force 29 May 2002), Article 1(4) and (5); Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments (signed 20 April 2005, entered into force 12 October 2007), Article 1(3)(a) and (b); Agreement between the Government of the Republic of Bulgaria and the Government of the Republic of Albania on Mutual Promotion and Protection of Investments (signed 27 April 1994, entered into force 28 January 1996), Article 1(3); Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the People's Democratic Republic of Algeria on the Reciprocal Encouragement and Protection of Investments (signed 1 August 1996, entered into force 5 June 1997), Article 1(2); Agreement between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment (signed 5 November 1991, entered into force 29 April 1993), Article I(b)(ii) and (iii); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (signed 11 November 1990, entered into force 19 February 1993), Article 1(c); Agreement on the Promotion and Protection of Investments between the Government of the Republic of Finland and the Government of the Republic of Armenia (signed 5 October 2004, entered into force 20 March 2007), Article 1(3)(b); Agreement between the Government of the State of Israel and the Government of the Republic of Azerbaijan for the Reciprocal Promotion and Protection of Investments (signed 20 February 2007, entered into force 16 January 2009), Article 1(1)(d)(2); Agreement between the Government of the People's Republic of China the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment (signed 17 June 1999, entered into force 27 April 2000), Article 1(b).

95 Cf Grant Hanessian and Kabir Duggal, 'The Role of Sovereign Wealth Funds and National Oil Companies in Investment Arbitrations' *GAR* (5 June 2017) https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/2nd-edition/article/the-role-of-sovereign-wealth-funds-and-national-oil-companies-in-investment-arbitrations#_ftnref22 (subscription required) accessed 3 September 2021. In a non-public award concerning a case between the Kaliningrad Region and Lithuania, the under the Russia-Lithuania BIT included the Regional Government of Kaliningrad under the definition of 'investor' (cf Claudia Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10(3) CJIL 531, para 9).

96 Global a SWF defines SWFs as an 'investment vehicle owned by a national or regional government that buys, holds, and sells securities and/or assets on behalf of its citizenry in pursuit of financial and/or economic returns' (cf Global SWF, 'Frequently Asked Questions (FAQs)' https://globalswf.com/faqs accessed 3 September 2021, 'What is a Sovereign Wealth Fund?').

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.

98 *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v Government of India*, PCA Case No 2016-7 , Final Award, 21 December 2020, para 718; *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, ICSID, Award, 28 March 2011, para 39.

99 Cf, for example, *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, para 259; *Blue Bank v Venezuela*, ICSID Case No ARB/12/20, Award, 26 April 2017, para 172. Cf also *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; *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S*àrl v Kingdom of Spain, ICSID Case No ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras 150 and 157; *Yukos Universal Limited (Isle of Man) v The Russian Federation,* PCA Case No 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 430; *Veteran Petroleum Limited (Cyprus) v The Russian Federation,* PCA Case No 2005-05/AA228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 477; *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; *Flemingo DutyFree Shop Private Limited v The Republic of Poland*, UNCITRAL, Award, 12 August 2016, para 331.

100 Cf ibid.

101 To meet the ICSID jurisdictional requirements, the SWF must show that: a 'legal dispute arising directly out of an investment' exists; the legal dispute is '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'; and 'the parties to the dispute consent in writing to submit [the dispute] to the Centre' (ICSID Convention, Article 25(1)).

102 ICSID Convention, Article 25(1).

103 Cf Csaba Kovacs, *Attribution in International Investment Law* (Kluwer Law International 2018), 269.

104 ICSID Convention, Preamble: '**Considering** the need for international cooperation for economic development, and the role of **private** international investment therein' (emphasis on the word 'private' added).

105 Cf Csaba Kovacs, *Attribution in International Investment Law* (Kluwer Law International 2018), 269.

106 Aron Broches, 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1972) Collected Courses of the Hague Academy of International Law 331, 354.

107 *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v The Slovak Republic*, ICSID Case No ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para 17.

108 Ibid, para 20.

109 *CDC Group plc v Republic of the Seychelles, ICSID Case No ARB/02/14, Award, 17 December 2003, para 17, and Decision on Annulment, 29 June 2005, para 2.*

110 *CDC Group plc v Republic of the Seychelles,* ICSID Case No ARB/02/14, Award, 17 December 2003, para 17.

111 *CDC Group plc v Republic of the Seychelles,* ICSID Case No ARB/02/14, Decision on Annulment, 29 June 2005, para 2.

112 *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction, 31 May 2017.

113 Ibid, para 25.

114 Ibid, para 29.

115 Ibid, para 30.

116 Ibid, para 39.

117 Ibid.

118 Ibid, para 35.

119 Ibid, para 40.

120 Ibid, para 41.

121 Ibid, para 43.

122 Ibid, para 44.

123 *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain,* ICSID Case No ARB/14/1, Award, 16 May 2018, paras 82-3.

124 Meaning jurisdiction *ratione personae*, under Article 26 of the Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) and Article 25 of the ICSID Convention. Cf *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award, 16 May 2018, paras 145-6.

125 Ibid, para 147.

126 Ibid, para 166.

127 Ibid, para 170.

128 'The overwhelming majority of [treaties] (more than 90%) define investment by a non-exhaustive list of protected "assets" (asset-based definition), including movable and immovable property, shares, intellectual property rights, claims to money, etc. … more rarely, contain an exhaustive list of protected assets' (Dafina Atasanova, 'Definition of Investment' *Jus Mundi* (20 July 2019) https://jusmundi.com/en/document/wiki/en-definition-of-investment accessed 3 September 2021). A SWF's protected investment may also include IP rights, contracts, concessions, bonds, securities, etc.

129 Cf, for example, *Mohamed Abdel Raouf Bahgat v Egypt*, PCA Case No 2012-07, Final Award, 23 December 2019, paras 195-6; *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/14/1, Award, 18 January 2019, para 205; *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 124.

130 Cf PWC, 'Sovereign Investors 2020, a Growing Force' (2020) https://www.pwc.com/gx/en/sovereign-wealth-investment-funds/publications/assets/sovereign-investors-2020.pdf accessed 3 September 2021, 24: '[d]epending on their sophistication level and capabilities, Sovereign Investors invest in PE in a variety of ways: as passive LPs, through separate accounts managed by GPs, either as co-investors along with the GP, or directly in the target'.

131 David Gaukrodger, 'Investment Treaties and Shareholder Claims: Analysis of Treaty Practice' (2014) OECD Working Papers on International Investment 2014/03 https://uncitral.un.org/sites/uncitral.un.org/files/2014_investment_treaties_and_shareholder_claims_-_treaty_practice_-_final_website_version.pdf accessed 3 September 2021, 18-19.

132 Cf *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965), para 27: '[n]o attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))'.

133 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52.

134 Cf, for example, *Sistem Muhendislik Insaat Sanayi ve Ticaret AS v Kyrgyz Republic*, ICSID Case No ARB(AF)/06/1, Decision on Jurisdiction, 13 September 2007, para 96; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award, 31 October 2012, para 297; *Luigiterzo Bosca v Republic of Lithuania*, PCA Case No 2011-04, Award, 17 May 2013, para 168; *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius,* PCA Case No 2018-37, Award on Jurisdiction, 23 August 2019, para 139.

135 *Marco Gavazzi and Stefano Gavazzi v Romania*, ICSID Case No ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, para 105.

136 *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/36, Final Award, 4 May 2017, para 213.

137 Ibid, para 228.

138 *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras 157-60.

139 *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 206-7. As to the use of trusts, in *Blue Bank v Venezuela*, the Tribunal considered that because the claimant itself as trustee had not contributed any funds to the investment, it had no jurisdiction over the dispute (cf *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).

140 *Mason Capital LP and Mason Management LLC v Republic of Korea*, Case No 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, para 207.

141 Cf Office of Investment Security, 'Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States', (8 December 2008) 73 Fed Reg 74567, 74571, https://home.treasury.gov/system/files/206/CFIUSGuidance.pdf accessed 3 September 2021.

142 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009), 121. The same authors at 133 of the afore-cited textbook make the point that '[s]ince 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'.

143 Cf Giacomo Rojas Elgueta and Benedetta Mauro, 'The Paradoxical Relationship between "Foreign Direct Investment Screening" and International Investment Law: What Role for Investor-State Arbitration?' (2020) *Kluwer Arbitration Blog* http://arbitrationblog.kluwerarbitration.com/2020/04/30/the-paradoxical-relationship-between-foreign-direct-investment-screening-and-international-investment-law-what-role-for-investor-state-arbitration/ accessed 3 September 2021; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009), 127 and 133; Giacomo Rojas Elgueta, *'Il rapporto fra discipline nazionali in materia di "foreign direct investment screening" e diritto internazionale degli investimenti'* (2020) 2 *Diritto del Commercio Internazionale* 325, s 4.

144 Cf Grant Hanessian and Kabir Duggal, 'The Role of Sovereign Wealth Funds and National Oil Companies in Investment Arbitrations' *GAR* (5 June 2017) https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/2nd-edition/article/the-role-of-sovereign-wealth-funds-and-national-oil-companies-in-investment-arbitrations#_ftnref22 (subscription required).

145 Cf Agreement between the Government of the Republic of Kazakhstan and Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (signed 9 December 1996, entered into force 26 July 2001, terminated 22 March 2017) Article 3(1).

146 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009), 137. Cf, for example, 2012 US Model Bilateral Investment Treaty, Articles 3(1) and 4(1), according to which the 'national treatment' and 'most-favoured nation treatment' apply *inter alia* to the 'establishment' and 'acquisition' of an investment. Most recently, see Article 14.4 and 14.5 of the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (signed 30 November 2018, entered into force 1 July 2020). Cf also Giacomo Rojas Elgueta and Benedetta Mauro, 'The Paradoxical Relationship between "Foreign Direct Investment Screening" and International Investment Law: What Role for Investor-State Arbitration?' (2020) *Kluwer Arbitration Blog* http://arbitrationblog.kluwerarbitration.com/2020/04/30/the-paradoxical-relationship-between-foreign-direct-investment-screening-and-international-investment-law-what-role-for-investor-state-arbitration/ accessed 3 September 2021; Giacomo Rojas Elgueta, *'Il rapporto fra discipline nazionali in materia di "foreign direct investment screening" e diritto internazionale degli investimenti'* (2020) 2 *Diritto del Commercio Internazionale* 325, s 4.

147 EU-Canada Comprehensive Economic and Trade Agreement ('CETA') (signed 30 October 2016, provisionally in force except for Chapter 8 on 'Investment').

148 Cf CETA, Article 8.4 ('Market Access'), Article 8.6(1) (containing the 'national treatment' standard which applies with regard to the '**establishment, acquisition**, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal' of an investment (emphasis added)) and, similarly, Article 8.7(1) (containing the 'most-favoured nation treatment' standard).

149 Under CETA Article 8.18 ('Scope'), paragraph 1, the investor-State dispute settlement provisions in Chapter 8, Section F, of CETA apply to claims in respect of breaches of 'Section C [which includes the afore-cited Articles 8.6(1) and 8.7(1)], **with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal**' of a covered investment (and, therefore, not the 'establishment' and 'acquisition' of such an investment).

150 Muthucumaraswamy Sornarajah, 'Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments' (2011) 1 Asian Journal of International Law 266, 274.

151 Cf Giacomo Rojas Elgueta, '*Il rapporto fra discipline nazionali in materia di "foreign direct investment screening" e diritto internazionale degli investimenti'* (2020) 2 *Diritto del Commercio Internazionale* 325, s 5.

152 Ibid; Karl Sauvant, '*The rise of self-judging essential security interest clauses in international investment agreements', Columbia Perspectives 2016.*

153 MNSS BV and Recupero Credito Acciaio NV v Montenegro, ICSID Case No ARB(AF)/12/8, Award, 4 May 2016, para 299.

155 *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*, SCC Case No V 116/2010, Award, 19 December 2013, paras 309, 1094. This case is analysed in *Annex 4*.

156 Ibid, para 1094.

157 Ibid.

158 Öztaş Construction, Construction Materials Trading Inc v Libya, ICC Arbitration No 21603/ZF/AYZ, Award, 14 June 2018.

159 *Case Concerning the Payment of Various Serbian Loans Issued in France* (*France v Kingdom of the Serbs, Croats and Slovenes*) *(Judgment) PCIJ Rep Series A No 20*, para 239.

160 *Ambatielos* (*Greece v United Kingdom*) (Judgment) [1952] ICJ Rep 28, 30.

161 Ibid, 46.

162 *Ambatielos* (*Greece v United Kingdom*) (Judgment) [1953] ICJ Rep 10, 23.

163 *Case Concerning Barcelona Traction, Light, and Power Company Ltd* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3, paras 1 and 25.

164 Ibid.

165 Ibid, paras 88, 92, 103.

166 Ibid, paras 90 and 92-3.

167 Ibid, paras 88, 92.

168 *Italian Republic v Republic of Cuba*, ad hoc, Final Award, 1 January 2008.

169 Ibid, para 56.

170 Ibid, para 193.

171 *Italian Republic v Republic of Cuba*, ad hoc, Dissenting Opinion of Attila Tanzi, 1 January 2008.

172 Cf ibid, paras 6-14.

173 *Italian Republic v Republic of Cuba, Ad hoc State-State arbitration, Final Award and Dissenting Opinion of Attila Tanzi, 1 January 2008; see also, eg Avena and Other Mexican Nationals (Mexico v United States of America), Judgment [2004] ICJ Rep 12, Separate Opinion of Judge Tomka, para 7.*

174 Ian Brownlie, Principles of Public International Law (OUP 2008), 492.

175 Theodor Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies (1959) XXXV BYIL 83, 87-88.

176 In the public international law context, see eg *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, 14 February 2002, ICJ Rep 2002, 17, para 39.*

177 Theodor Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies' (1959) XXXV BYIL 83, 87-88.

178 Cf *Railway Land Arbitration (Malaysia/Singapore)*, PCA Case No 2012-01, Award, 30 October 2014, analysed in *Annex 4*.

179 Cf DSU, Article 2(1).

180 The DSB has the sole authority to establish 'panels' of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. See DSU, Article 2(1). It follows that private individuals or companies do not have direct access to the dispute settlement system, even if they may often be most directly affected by the measures allegedly violating the WTO Agreement. However there can be instances in which certain private behaviour has strong ties to some governmental action. Whether this can be attributed to the Member, and therefore is actionable under the WTO, will depend on each case.

181 Cf WTO, *Japan – Measures Affecting Consumer Photographic Film and Paper – Panel Report,* WT/DS44/R, 31 March 1998, para 10.56.

182 Cf GATS, Article XXVIII(g) defining 'service supplier' as 'any person that supplies a service'; Article XXVIII(j) defining 'person' as 'either a natural person or a juridical person'; and Article XXVIII(l) defining 'juridical person' as 'any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association'.

183 GATS, Article XXVIII(d) ('"Commercial presence" means any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service').

184 GATS, Article 1.3(b) and (c).

185 To fulfil the requirement of a commercial presence through the constitution, acquisition or maintenance of a juridical person in the host Member State, the service supplier of the other Member State must, in accordance with the definition or 'juridical person' in the GATS, must have more than 50% beneficial equity interest in the company and a controlling interest with the power to 'name a majority of its directors or otherwise to legally direct its actions' (cf Article XXVIII(n)).

186 Cf, for example, GATS, Article XIV on General Exceptions, i.e. to protect public morals or to maintain public order, to protect human, animal or plant life or health, to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT, to ensure the equitable and effective imposition or collection of direct taxes, or for the avoidance of double taxation. Cf also Article. XIV on Security Exceptions; Annex on Article II Exemptions.

187 Ie where the SWF's do not fall within the definition of 'services supplied in the exercise of governmental authority' under Article 1.3(b) and (c).

188 Ie in the sectors where specific commitments are undertaken by the host Member State in its Schedule of Specific Commitments (cf GATT, Article XX).

189 GATS, Article II.

190 GATS, Article XVII

191 GATS, Article XVI. Such guarantee is afforded under the terms, limitations and conditions agreed and specified in the host Member State's Schedule.

192 GATS, Article XXIII.

193 The Paris Convention for the Protection of Industrial Property ((adopted 20 March 1883, entered into force 7 July 1884, as subsequently amended) 828 UNTS 305) extends protection more generally to all 'Nationals of any country of the Union', without imposing any requirement as to domicile or establishment in the country where protection is claimed for the enjoyment of any industrial property rights (cf Article 2(1) and (2)). The Paris Convention also affords protection to 'Nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union', cf Article 3.

194 The Berne Convention for the Protection of Literary and Artistic Works ((adopted 9 September 1886, entered into force 5 December 1887, as subsequently amended) 828 UNTS 221) in Article 3(1) affords protection to '(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not; (b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union'. It also extends protection to in Article 3(2) to 'Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country'.

195 The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) ((adopted 26 October 1961, entered into force 18 May 1961) 496 UNTS 43) similarly affords protection under Article 5, to producers of phonograms on the basis of criteria of nationality, fixation, production; and Article 6 protection to broadcasting organisations if (a) the headquarters of the broadcasting organisation is situated in another Contracting State; (b) the broadcast was transmitted from a transmitter situated in another Contracting State.

196 TRIPS Agreement, Article 1(3).

197 Cf WTO, 'Overview: the TRIPS Agreement' https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm accessed 3 September 2021; TRIPS Agreement, Article 64(1).

198 DSU, Article 19(1).

199 Ibid.

200 Ibid, Article 22.

201 Carrie S 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) Leiden Journal of International Law 1, 3.

202 Cf, for example, *Kuwait v Sarrio SA,* Swiss Federal Tribunal, 24 January 1994, B5/1994; *Sarrio SA v Kuwait Investment Authority* [1997] CLC 280. Cf also *Societe Sonatrach v Migeon*, French Court of Cassation, 1 October 1985, 77 ILR 525 (which, however, concerns an SOE, the Algerian State's oil company Sonatrach).

203 *GSS Grp.Ltd v Nat'l Port Auth, District Court for the District of Columbia, Case No 1:09-cv-01322-PLF, 30 March 2011, 6.*

204 Ibid, 5.

205 Ibid, 7.

206 Ibid, 6.

207 Ibid, 11. The decision was affirmed by the Court of Appeal for the District Court of Columbia in GSS Group Ltd v National Port Authority 680 F.3d 805 (DC Cir 2012) (which, at para 808, characterises the National Port Authority as an SOE).

208 Ceskoslovenska Obchodni Banka, AS v The Slovak Republic, ICSID Case No ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para 17.

209 Ibid. Cf also *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction, 31 May 2017, para 35; and *CDC Group plc v. Republic of Seychelles*, ICSID Case No ARB/02/14, Award, 17 December 2003, para 17.

210 US Foreign Sovereign Immunities Act 1976, 28 US Code § 1605.

211 Victorino Tejera, 'The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds' (2016) 25 University of Miami Business Law Review 1, 73.

212 Cf US Foreign Sovereign Immunities Act 1976, 28 US Code § 1605, s 1605(a)(1) and (2). Cf also, on this point, Hwan Kim, 'Sovereign Wealth Funds – Preserving Sovereign Immunity' (11 July 2019) *The National Law Review* https://www.natlawreview.com/article/sovereign-wealth-funds-preserving-sovereign-immunity accessed 3 September 2021.

213 *Atlantica Holdings, Inc v Sovereign Wealth Fund Samruk-Kazyna JSC*, No 14-917-CV, 2016 WL 403445 (2d Cir Feb 3, 2016).

214 *Janvey v Libyan Investment Authority*, 840 F.3d 248 (5th Cir, 2016) 26 October 2016.

215 Tai-Heng Cheng and Ivo Entchev, 'State incapacity and sovereign immunity in international arbitration' (2014) 26 Singapore Academy of Law Journal 942, 957.

216 Ibid, 957-8.

217 *Jackson v People's Republic of China* (1986) 794 F.2d 1490. Cf also Yilin Ding, 'Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?' (2012) 26 Emory International Law Review 997.

218 *TNB Fuel Services SDN BHD v China National Coal Group Corp* [2017] HKCFI 1016, para 14.

219 Carrie S 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) Leiden Journal of International Law 1, 13.

220 Cf, for example, Lacey Yong, 'Kazakhstan creditors seek discovery from asset managers' *GAR* (7 March 2018) https://globalarbitrationreview.com/kazakhstan-creditors-seek-discovery-asset-managers accessed 3 September 2021.

221 Cf, for example, Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments (signed 3 June 2014, entered into force 17 April 2015), Article 10(7) and Article 10(7) of the annexed Protocol, which states as follows: '[i]t is understood that these provisions do not allow for the double recovery of the compensation by the investor'.

222 English State Immunity Act 1978, s 13(3).

223 In the UK, State-owned property will only fall within the 'commercial property' exception where the property is used or intended to be used exclusively for commercial purposes. Thus, in *Alcom v Colombia*, the House of Lords found that an enforcement action could not be taken against a bank account that was used to make payments both in relation to commercial transactions and for more general purposes by Colombia's diplomatic mission in the UK (*Alcom Ltd v Republic of Colombia* [1984] AC 580, para 604).

224 Naveen Thomas, 'Regulating Sovereign Wealth Funds through Contract' (2014) 24(3) Duke Journal of Comparative and International Law 459, 466.

225 Anne-Catherine Hahn, 'State immunity and Veil Piercing in the Age of Sovereign Wealth Funds' (2012) 2 *Revue Suisse de Droit des Affaires et du Marché Financier* 101, 108.

226 Ibid.

227 Ibid, 110.

228 ICSID Convention, Article 54(1).

229 UN Convention on State Immunity, Article 19. These principles in the UN Convention on State Immunity in relation to whether a party may seek enforcement against State assets have been adopted in certain States' domestic legislation. For example, the UK has the State Immunity Act 1978 and the US has the Foreign Sovereign Immunities Act 1976.

230 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, para 117.

231 Naveen Thomas, 'Regulating Sovereign Wealth Funds through Contract' (2014) 24(3) Duke Journal of Comparative and International Law 459, 472.

232 Cf Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009), 1153.

233 ICSID Convention, Article 55.

234 Anne-Catherine Hahn, 'State immunity and Veil Piercing in the Age of Sovereign Wealth Funds' (2012) 2 *Revue Suisse de Droit des Affaires et du Marché Financier* 101, 117.

235 KIA, 'Investing responsibly today for Kuwait's prosperity in the future' https://kia.gov.kw/ accessed 3 September 2021, 'Mission Statement'.

236 *Société Mohamed Abdel Moshen Al-Kharafi et Fils v Société Libyan Investment Authority and Société Libyan Arab Foreign Investment Company*, Paris Court of Appeal, 18/17592, 5 September 2019.

237 Ibid.

238 Ibid.

239 Ibid.

240 Ibid.

241 Ibid.

242 Ibid.

243 Ibid.

244 English State Immunity Act 1978, s 14(1).

245 Ibid.

246 *AIG Capital Partners Inc v Kazakhstan* [2005] EWHC 2239 (Comm).

247 Ibid, para 61.

248 *Stati v Kazakhstan, Cases Nos 2018/AR/1209 and 2018/AR/1214, Judgment of the Brussels Court of Appeal, 29 June 2021.*

249 UNCTAD, 'National Security-Related Screening Mechanisms for Foreign Investment' (December 2019) https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf accessed 3 September 2021, 2.

250 Jonathan Bonnitcha, 'The Return of Investment Screening as a Policy Tool' (19 December 2020) *IISD* https://www.iisd.org/itn/en/2020/12/19/the-return-of-investment-screening-as-a-policy-tool-jonathan-bonnitcha/ accessed 3 September 2021.

251 For example, consider Australia's rejection of China's push for a formal alignment of Canberra's AUD 5 billion State infrastructure fund with the New Silk Road strategy, based on concerns it could damage relations with the US (cf Jamie Smyth, 'Australia rejects China push on Silk Road strategy' (22 March 2017) *Financial Times* https://www.ft.com/content/e30f3122-0eae-11e7-b030-768954394623 accessed 3 September 2021).

252 Efraim Chalamish, 'Global Investments Regulation and Sovereign Funds' (2012) 13 Theoretical Inq L 645, 646.

253 A broader overview of national security legislation enacted by different countries in Europe and in the world, including in recent years, is contained in Pascale Accaoui Lorfing, 'Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines' in (2021) European Yearbook of International Economic Law 179, 180-6. Cf also, OECD, 'Investment screening in times of COVID-19–and beyond' (7 July 2020) https://read.oecd-ilibrary.org/view/?ref=135_135247-aj6t8n-mwlr&title=Investment-screening-in-times-of-COVID-and-beyond&_ga=2.265384141.31534768.1627313189-620228958.1627313189 accessed 3 September 2021; and, in relation to investment screening tools adopted by EU Member States, the list of screening mechanisms notified by the EU Member States to the European Commission pursuant to Article 3.8 of Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. A version of the list updated at 14 July 2021 is available at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf accessed 3 September 2021.

254 US Foreign Investment and National Security Act 2007, 121 Stat 246, Public Law 110-49 (26 July 2007). More recently, the US have adopted the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018, concerning *inter alia* the powers of the Committee on Foreign Investment in the United States (CFIUS) (the Act can be found here: https://investmentpolicy.unctad.org/investment-laws/laws/285/united-states-of-america-foreign-investment-risk-review-modernization-act accessed 3 September 2021). As reported by PA Lorfing, on 13 January 2020, the Department of the Treasury released two final regulations to implement the changes that FIRRMA made to CFIUS's jurisdiction and processes (cf PA Lorfing, 'Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines' (2021) European Yearbook of International Economic Law 179, 185 and n 33, citing US Department of the Treasury website, 'The Committee on Foreign Investment in the United States (CFIUS)' at https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius accessed 3 September 2021).

255 An overview of the various legislative and statutory instruments that make up the Italian 'Golden Power' legislation can be found on the Italian Presidency of the Council of Ministers' website: cf *Governo Italiano, Presidenza del Consiglio dei Ministri,* 'Golden Power*, la normativa*' https://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-norm-goldenpower/9299 accessed 3 September 2021; and *Governo Italiano, Presidenza del Consiglio dei Ministri,* 'Golden Power' at https://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-att-goldenpower/9296 accessed 3 September 2021.

256 French Financial and Monetary Code (*Code monétaire et financier*), Articles L-151-1 to L-151-7 and R-151-1 to R-151-17 (at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072026/LEGISCTA000006140476/#LEGISCTA000006140476 accessed 3 September 2021). Other rules relevant to investment screening are contained in separate instruments: see 'List of screening mechanisms notified by Member States' https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf accessed 3 September 2021.

257 The National Security and Investment Act 2021 received Royal Assent on 29 April 2021 (cf UK Parliament, 'National Security and Investment Act 2021' https://bills.parliament.uk/bills/2801/stages accessed 3 September 2021, 'Stages'). According to the UK Government 2 March 2021 'Statement of policy intent' (which describes how the Secretary of State expects to use the 'call-in power' in the – now enacted – National Security and Investment Bill): '[c]learly, national security risks are most likely to arise when acquirers are hostile to the UK's national security, or when they owe allegiance to hostile states or organisations. However, **the National Security and Investment regime does not regard** state-owned entities, **sovereign wealth funds** – or other entities affiliated with foreign states – **as being inherently more likely to pose a national security risk**. The Secretary of State recognises that **these organisations may have full operational independence in pursuing long-term investment strategies with the object of economic return, raising no national security risks**' (UK Government, 'Policy Paper, Statement of policy intent' (2 March 2021) https://www.gov.uk/government/publications/national-security-and-investment-bill-2020/statement-of-policy-intent accessed 3 September 2021 (emphasis added)).

258 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.

259 Ibid, Article 1(1).

260 Ibid.

261 Ibid, Article 1(3).

262 Ibid, Article 3(1).

263 Georges Kratsas and Jon Truby, 'Regulating Sovereign Wealth Funds to Avoid Investment Protectionism' (2015) Journal of Financial Regulation 95, 96.

264 Ibid.

265 UNCTAD, 'National Security-Related Screening Mechanisms for Foreign Investment' (December 2019) https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf accessed 3 September 2021, 1, noting that '… numerous countries have introduced new or reinforced existing mechanisms and procedures specifically dedicated to national security-related investment screening, reflecting rising political concerns in this area'.

266 OECD, 'Investment screening in times of COVID-19–and beyond' (7 July 2020) https://read.oecd-ilibrary.org/view/?ref=135_135247-aj6t8nmwlr&title=Investment-screening-in-times-of-COVID-and-beyond&_ga=2.265384141.31534768.1627313189-620228958.16273131899 accessed 3 September 2021, 1.

267 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) Doc C(2020) 1981 final, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf accessed 3 September 2021, 1.

268 Cf William H Kaempfer and Anton D Lowenberg, 'Unilateral Versus Multilateral International Sanctions: A Public Choice Perspective' (1999) 43(1) International Studies Quarterly 37, 39. The authors make the point that: '… unilateral sanctions are likely to be more effective than multilateral sanctions in achieving their sought-after political results, even if unilateral sanctions perhaps reflect the interests of narrow groups in the sanctioning countries more than a global political consensus'.

269 Emirates Policy Center, 'National Development Fund of Iran: Savings Estimation and Expected Scenarios' (27 May 2020) https://epc.ae/topic/national-development-fund-of-iran-savings-estimation-and-expected-scenarios accessed 3 September 2021.

270 US Treasury, 'Treasury Sanctions Iran's Central Bank and National Development Fund' (20 September 2019) https://home.treasury.gov/news/press-releases/sm780 accessed 3 September 2021.

271 Matthew Zweig and Saeed Ghasseminejad, 'Cash-strapped Regime in Tehran taps sovereign wealth fund' (17 June 2019) https://www.fdd.org/analysis/2019/06/17/cash-strapped-regime-in-tehran-taps-sovereign-wealth-fund/ accessed 3 September 2021.

272 Mohammed Al-Sulami, 'A reading of US sanctions on Iran' (30 September 2019) *Arab News* https://www.arabnews.com/node/1562011 accessed 3 September 2021.

273 IFSWF, 'Libyan Investment Authority', available at https://www.ifswf.org/member-profiles/libyan-investment-authority accessed 3 September 2021.

274 Cf Dini Sejko and Daley J Birkett, 'When United Nations Sanctions Impact International Financial Governance: Lessons from the Libyan Sovereign Wealth Fund' (2018) 34 American University International Law Review 387, 398-405.

275 Cf UNSC Res 1970 (2011) UN Doc S/RES/1970 (2011).

276 Cf ibid, Annexes I and II.

277 UNSC Res 1973 (2011) UN Doc S/RES/1973 (2011), Annex II, 'Entities', No 2.

278 UNSC Res 2009 (2011) UN Doc S/RES/2009 (2011), para 15(a) and (b).

279 Ibid, Preamble.

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