

The Law of Sovereign Wealth Funds

Contents

| | |
|-------------------------------------------------------------------------------------------------|-----|
| <i>Preface</i> | vii |
| PART I SWFS: NEW ACTORS IN THE INTERNATIONAL SCENE. A DEFINITION AND CLASSIFICATION | |
| 1 Sovereign entities investing abroad as private entities: limits of the conventional framework | 3 |
| 1. State investors between public and private, national and international law | 3 |
| 2. Specific issues raised by SWFs | 5 |
| 2.1 The recent and quick growth of the phenomenon: a review of causes and consequences | 6 |
| 2.2 Issues brought by recent developments | 10 |
| 3. Rationale and objectives of this work | 14 |
| 2 SWFs: definition and classification | 17 |
| 1. The definitions in literature | 17 |
| 1.1 Functional definitions | 18 |
| 1.2 The differences between SOEs and SWFs | 21 |
| 1.3 The 'five pillars' definition | 23 |
| 1.4 The definitions misconception (definition by classification) | 24 |
| 2. The definition in the International Organisations' practice | 26 |
| 2.1 The IMF and OECD definitions | 26 |
| 2.2 The limits of IMF definition and classification | 29 |
| 2.3 The consequences of the lack of a shared notion, | 30 |
| 3. The definition and classification suggested | 31 |
| 3.1 Our proposed definition | 31 |
| 3.2 The resulting classification | 32 |
| PART II SWFS' NATIONAL AND INTERNATIONAL REGULATION | |
| 3 Sovereign wealth funds' regulation | 39 |
| 1. The proposals found in literature | 40 |

| | | |
|-----------------------------------------------------|-------------------------------------------------------------------------------------------------------|----|
| 1.1 | The 'book of rules' model | 41 |
| 1.2 | The 'double constraint' theory | 43 |
| 1.3 | The temporary suspension of voting rights and other related measures | 44 |
| 2. | The IMF guidelines ('Santiago GAPPs') | 46 |
| 2.1 | GAPP assumptions and their limits | 46 |
| 2.2 | The classification by regulatory/institutional framework and by investment activity | 48 |
| 2.3 | The limits of Santiago GAPPs' classification | 50 |
| 3. | A proposal to transform conduct codes into measures binding on host and home states | 52 |
| 3.1 | At domestic level: host states' restrictive measures applicable only to SWFs not complying with GAPPs | 53 |
| 3.2 | At international level: the guidelines as a benchmark in bilateral investment treaties | 54 |
| 4 | Host states laws and SWFs | 55 |
| 1. | The governing law: obligations of host states | 55 |
| 1.1 | In WTO treaties | 56 |
| 1.2 | In OECD regulations | 59 |
| 1.3 | In EU laws | 60 |
| 2. | Exemptions from host states' obligations | 61 |
| 2.1 | In WTO treaties | 61 |
| 2.2 | In OECD regulations | 62 |
| 2.3 | In EU law and practice | 64 |
| 2.4 | Exemptions applied by host states: preventive and repressive measures | 68 |
| 3 | Little efficacy of the measures adopted at multilateral and national level | 76 |
| 3.1 | Soft law and international protection of SWFs investment | 76 |
| 3.2 | Host state measures, law and practice | 78 |
| 4. | The challenging task SWFs must carry out, and some proposals to simplify it | 83 |
| PART III SWFS PROTECTION IN BILATERAL RELATIONS | | |
| 5 | SWFs and state immunity | 87 |
| 1. | In search of a direct relationship | 87 |
| 2. | 'Passive' and 'active' immunity: host state and SWF actions relevant for applying state immunity | 89 |
| 2.1 | Host state actions that might be challenged by an SWF under the profile of state immunity | 89 |

| | | |
|-----|--------------------------------------------------------------------------------------------|-----|
| 2.2 | SWF actions and assets that might be protected by state immunity | 90 |
| 3. | Immunity from jurisdiction and immunity from execution | 90 |
| 3.1 | Immunity from jurisdiction | 91 |
| 3.2 | Immunity from execution | 94 |
| 4. | Application of state immunity to SWFs | 97 |
| 4.1 | Attribution to a state of the activities and ownership of SWF assets for immunity purposes | 97 |
| 4.2 | The 'tax exemption' factor | 104 |
| 4.3 | SWFs, state immunity and competition law: the need to overcome a misunderstanding | 107 |
| 4.4 | SWF models and immunity: a five-steps analysis | 109 |
| 4.5 | Conclusions | 112 |
| 6 | SWFs and Bilateral Investment Treaties | 114 |
| 1. | An undiscovered relationship | 114 |
| 2. | Bilateral Investment Treaties and their relevance for SWF investments | 116 |
| 2.1 | Theoretical analysis | 116 |
| 2.2 | SWFs' home states' practice | 118 |
| 3. | The main BIT models. Assessment of their efficacy with respect to SWF investments | 130 |
| 3.1 | Existing models | 131 |
| 3.2 | Renegotiation under way | 135 |
| 3.3 | The efficacy of existing models in protecting SWF investments | 140 |
| 4. | Final remarks | 147 |
| 7 | Conclusions | 149 |
| 1. | Conclusions | 149 |
| | <i>Bibliography</i> | 155 |
| | <i>Index</i> | 167 |