

Sovereign Wealth Funds and State Immunity

By

Marco Argentini



BRILL | NIJHOFF

LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Names: Argentini, Marco, author.

Title: Sovereign wealth funds and state immunity / Marco Argentini.

Description: Leiden ; Boston : Brill, 2024. | Series: Queen Mary studies in international law, 1877-4822 ; volume 54 | Includes bibliographical references and index. | Summary: "How does the hybrid nature of SWFs affect the application of state immunity to these funds? May an SWF be sued in foreign courts for wrongful acts committed in the course of its investment activities? Can SWF investments be attached by a private creditor seeking to enforce an investment arbitration award against the fund's state of nationality?"— Provided by publisher.

Identifiers: LCCN 2024031548 (print) | LCCN 2024031549 (ebook) | ISBN 9789004710788 (hardback) | ISBN 9789004710795 (ebook)

Subjects: LCSH: Sovereign wealth funds—Law and legislation. | Investments, Foreign—Law and legislation. | Immunities of foreign states. | Investments, Foreign (International law) | Jurisdiction (International law)

Classification: LCC K3825.5 .A74 2024 (print) | LCC K3825.5 (ebook) | DDC 346/.092—dc23/eng/20240716

LC record available at <https://lccn.loc.gov/2024031548>

LC ebook record available at <https://lccn.loc.gov/2024031549>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 1877-4822

ISBN 978-90-04-71078-8 (hardback)

ISBN 978-90-04-71079-5 (e-book)

DOI 10.1163/9789004710795

Copyright 2025 by Koninklijke Brill BV, Leiden, The Netherlands.

Koninklijke Brill BV incorporates the imprints Brill, Brill Nijhoff, Brill Schöningh, Brill Fink, Brill mentis, Brill Wageningen Academic, Vandenhoeck & Ruprecht, Böhlau and V&R unipress.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher. Requests for re-use and/or translations must be addressed to Koninklijke Brill BV via brill.com or copyright.com.

This book is printed on acid-free paper and produced in a sustainable manner.

Contents

| | |
|--------------------------------------|-----|
| Acknowledgments | IX |
| Abbreviations | X |
| International and Domestic Documents | XII |
| Table of Cases | XIX |

| | |
|----------------------------------------|----|
| General Introduction | 1 |
| 1 Problem Statement | 1 |
| 2 Research Question | 5 |
| 3 Selected Jurisdictions and Structure | 10 |

PART 1

SWFs: History, Definitions and Core Elements

| | |
|-------------------------------------------------------------------------------------------------------------------------------|-----------|
| Introduction to Part 1 | 19 |
| 1 The Development of SWFs as New State Investment Vehicles | 21 |
| 1 The Emergence of SWFs | 21 |
| 1.1 <i>Historical Antecedents: the India Companies and the Industrial Revolution (before 1953)</i> | 21 |
| 1.2 <i>The Genesis of Commodity and Non-commodity SWFs (between 1953 and the Mid-1990s)</i> | 22 |
| 1.3 <i>The Expansion of SWFs: the Asian Financial Crisis and the Rise of Crude Oil Price (between the Mid-1990s and 2005)</i> | 24 |
| 1.4 <i>SWFs Achieving International Prominence (after 2005)</i> | 26 |
| 2 The Quest for a Definition of SWFs: the Main Scholarly Definitions | 29 |
| 2.1 <i>The First Definitions</i> | 30 |
| 2.2 <i>SWFs as Government-Managed Entities Seeking Higher Rates of Returns</i> | 32 |
| 2.3 <i>Definitions Focusing on SWFs' Liability</i> | 34 |
| 2.4 <i>Definitions Based on How SWFs Are Managed</i> | 35 |
| 2.5 <i>The Relevance of Funds' Ownership and Purposes</i> | 36 |
| 3 Institutional Attempts to Define and Regulate SWFs | 37 |
| 3.1 <i>IMF Definitions</i> | 37 |
| 3.2 <i>The 'Santiago Principles'</i> | 38 |
| 3.3 <i>Other Definitions Provided by International Organisations</i> | 40 |

| | | |
|-----|-----------------------------------------------------|----|
| 4 | Differences between SWFs and Other Cognate Entities | 41 |
| 4.1 | <i>SWFs and State-Owned Enterprises</i> | 42 |
| 4.2 | <i>SWFs and Public Pension Funds</i> | 43 |
| 4.3 | <i>SWFs and International Reserves</i> | 45 |
| 2 | SWFs' Core Elements | 48 |
| 1 | Legal Structure | 49 |
| 2 | Governance | 51 |
| 3 | Source of Assets | 56 |
| 4 | Purpose | 60 |
| 4.1 | <i>Diplomatic and Political Tool</i> | 61 |
| 4.2 | <i>National Development Tool</i> | 62 |
| 4.3 | <i>Stabilisation and Diversification Tool</i> | 63 |
| 4.4 | <i>Intergenerational Savings Tool</i> | 64 |
| 5 | Types of Investments | 66 |
| | Provisional Conclusions to Part 1 | 68 |

PART 2

SWFs and Adjudicative Immunity

| | | |
|-----|--------------------------------------------------------------------------------------------|----|
| | Introduction to Part 2 | 71 |
| 3 | The UNCSI as an Attempt to Codify International Law on State Immunity | 74 |
| 1 | Relevance of the Convention for Development of a Customary Rule | 74 |
| 2 | Framing of SWFs into the Notion of 'State' | 77 |
| 3 | The Commercial Exception to Adjudicative Immunity | 82 |
| 4 | SWFs with Independent Legal Personality and Immunity of the Parent State | 86 |
| 4 | The Common Law Approach to Adjudicative Immunity: Two Archetypes of Statutory Norms | 88 |
| 1 | United States | 89 |
| 1.1 | <i>Pool-of-Assets SWFs</i> | 91 |
| 1.2 | <i>SWFs Established with Independent Legal Personality</i> | 92 |
| 1.3 | <i>The Commercial Exception under the FSIA</i> | 95 |
| 2 | United Kingdom | 98 |

| | | |
|-----------------------------------------------------------------------------|-------------------------------------------------------------------------------|------------|
| 2.1 | <i>Qualification of a Pool-of-Assets SWF as a 'Department of Government'</i> | 99 |
| 2.2 | <i>The Commercial Exception under the SIA</i> | 100 |
| 2.3 | <i>SWFs Established as Separate Entities</i> | 103 |
| 5 | The Civil Law Approach to Adjudicative Immunity | 109 |
| 1 | France | 110 |
| 2 | Germany | 113 |
| 3 | Italy | 116 |
| 4 | China | 123 |
| 4.1 | <i>Once Upon a Time: PRC as the Last Bastion of Absolute Immunity</i> | 123 |
| 4.2 | <i>State Immunity and SWFs before 2023</i> | 128 |
| 4.3 | <i>The Current Scenario</i> | 129 |
| | Provisional Conclusions to Part 2 | 134 |
| PART 3 <i>SWFs and Immunity from Execution</i> | | |
| | Introduction to Part 3 | 139 |
| 6 | The 2004 UN Convention and Immunity from Execution | 141 |
| 1 | Beneficiaries of Immunity from Execution under the UNCIS | 142 |
| 2 | Differences between Pre- and Post-judgment Measures: the Commercial Exception | 142 |
| 3 | Piercing the Corporate Veil according to the UNCIS | 146 |
| 7 | Immunity from Execution in the US and the UK | 148 |
| 1 | United States | 149 |
| 1.1 | <i>Post-judgment Attachment: Pool-of-Assets SWFs</i> | 150 |
| 1.2 | <i>Post-judgment Attachment: SWFs Established as Separate Entities</i> | 154 |
| 1.3 | <i>Pre-judgment Attachment</i> | 157 |
| 2 | United Kingdom | 160 |
| 2.1 | <i>Post-judgment Execution: the Commercial Exception</i> | 161 |
| 2.2 | <i>Pre-judgment Attachment</i> | 165 |
| 2.3 | <i>SWFs with Separate Legal Personality</i> | 165 |

- 8 Immunity from Execution in Civil Law Jurisdictions: France, Germany, Italy and China** 167
- 1 France 167
 - 1.1 *From ‘Eurodif’ to the ‘Sapin 2’ Law* 167
 - 1.2 *French Courts’ Decisions on SWFs’ Property* 172
 - 2 Germany 174
 - 3 Italy 177
 - 3.1 *Pre-judgment Measures* 180
 - 4 China 181
 - 4.1 *Pre-2023: China’s Traditional Approach towards Immunity from Execution* 182
 - 4.2 *Post-2023: China’s Adherence to the Restrictive Doctrine of State Immunity* 184

Provisional Conclusions to Part 3 187

PART 4

Immunity of SWFs Managed by Central Banks

Introduction to Part 4 191

- 9 The Umbrella Protection of Central Banks to SWFs** 195
- 1 SWFs in Systems Providing for Near-Absolute Protection to Central Bank Assets 195
 - 1.1 *The UNCSI* 195
 - 1.2 *United Kingdom* 197
 - 1.3 *China* 200
 - 2 SWFs and the ‘Purpose’ Test in Jurisdictions Granting a Milder Protection to Central Banks 202
 - 2.1 *United States* 202
 - 2.2 *France* 205
 - 2.3 *Germany* 208
 - 3 A Recent Trend to Be Monitored on Denying Immunity to SWFs Managed by Central Banks: *Stati v. Kazakhstan* 210

Provisional Conclusions to Part 4 215

Concluding Remarks: General Trends on SWFs and State Immunity 216

Bibliography 219

Index 243