

The new *Patrimonio Rilancio* and the Italian approach to Sovereign Wealth Funds

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1. Introduction

One of the most debated issues on sovereign wealth funds (SWFs)¹ concerns the applicability of sovereign immunity to them. A positive answer may result in claims against SWFs being *de facto* unenforceable². A negative one may lead to breach the sovereignty of SWFs' parent-states.

This issue is strictly linked to the debate on the definition and the legal nature of SWFs, as they are usually owned by sovereign states in order to invest budgetary surpluses and foreign exchange reserves into the financial market. As highlighted by Adinolfi, '[w]ith respect to SWFs, the key question is whether rules on sovereign immunity and their judiciaries interpretation give greater weight to their innate public characteristics or to the private features of their activities'.³

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¹ See, *inter alia*, F Bassan, *The Law of Sovereign Wealth Funds* (Elgar 2011); F Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Elgar 2015); T Treves, 'The Expansion of International Law' (2019) 398 *Recueil des Cours de l'Académie de Droit International* 73; PJ Schena, 'When States Invest at Home: The Development Role of Sovereign Wealth Funds in Public Finance' (2017) 52 *Wake Forest L Rev* 917; R Beck, M Fidora, 'The Impact of Sovereign Wealth Funds on Global Financial Markets' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144482>; RA Epstein, AM Rose, 'The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow' 76 *U Chicago L Rev* 111; G Mation, 'Regulating Sovereign Wealth Funds: When States Become Entrepreneurs' (2016) 5 *Cambridge J Intl Comparative L* 475; X Ping, C Chao, 'The Theoretical Logic of Sovereign Wealth Funds' <<http://ssrn.com/abstract=1420618>>.

² AC Hahn, 'State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds' (2012) *Revue suisse de droit des affaires et du marché financier* 103, 108.

³ G Adinolfi, 'SWFs and State Immunity: Overcoming the Contradiction' in F Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Elgar 2015) 271.



This article focuses on the link between sovereign immunity and state-owned corporations (SWFs specifically) from the perspective of civil law judiciaries, particularly the Italian one.⁴

A first analysis sheds light on a new Italian fund, called *Patrimonio Rilancio*, the establishment of which has been authorised last year within the framework of the economic measures adopted by the Italian government in response to the Covid-19 pandemic. It is doubtful whether this fund, which will become operational in the coming months, can be qualified as a SWF. The main obstacle for it to fit into SWFs' definitions is the nature of its portfolio, since the fund's establishing law stipulates that it is entitled to invest in Italian companies only. In order to carry out this analysis, a panorama of the main current definitions of SWFs is also drafted.

A second part of the contribution focuses more deeply on the civil law perspective on state immunity (both from jurisdiction and attachment), analysing whether the latter can be applied to SWFs. In particular, the existing legal frameworks of sovereign immunity in France, Germany and Italy are addressed, identifying civil law judiciaries' common features when dealing with the relationship between SWFs and immunity.

2. *The new Italian fund through the lens of the main definitions of SWFs*

Pursuant to Article 27 of the Italian Law-Decree no 34/2020 (*Decreto Rilancio*),⁵ the Italian deposits and loans fund (*Cassa Depositi e Prestiti*, CDP) has been authorised to establish a new twelve-year fund. The fund, called *Patrimonio Rilancio*,⁶ will be put under the auspices of CDP itself

⁴ The common law countries' approach to the matter is addressed by Cameron Miles' contribution.

⁵ Law-Decree 19 May 2020 no 34, 'Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19'. Within the framework of the Italian sources of law, the Law-Decree is a decree with legal force approved by the Government, which must be confirmed by the Parliament within sixty days, as it happened for the *Decreto Rilancio*.

⁶ *Patrimonio Rilancio* can be literally translated with 'Relaunch Fund'. In the first official documents, the fund was also identified as *Patrimonio Destinato* ('trust').



and funded by the Italian Ministry of Economic Affairs.⁷ It will aim at fostering the recapitalisation of Italian companies that have suffered economic losses because of the pandemic effects and, more broadly, implementing intervention and activities to support the recovery of Italian economic system.⁸

Article 27(4) of *Decreto Rilancio* also provides that the detailed regulation of *Patrimonio Rilancio* has to be governed by an implementing decree to be adopted by the Ministry of Economy and Finance, which has been enacted in February⁹ (the Regulation).

Some non-specialised articles have highlighted that *Patrimonio Rilancio* might constitute the first example of an Italian SWF.¹⁰ Despite being very interesting, this statement has to be tested on the basis of the main features of the fund, taking into consideration the primary definitions of sovereign wealth funds. The lack of an official definition of SWFs requires scrutinising the different main ones that have been provided so far.

One of the first definitions of SWFs has been elaborated by the Italian scholars Quadrio Curzio and Miceli: the so-called ‘five pillars definition’.¹¹ According to such definition, an entity might be qualified as a SWF provided that it owns five distinctive features:¹² *a*) it is owned by a sovereign state, either on a central or regional level;¹³ *b*) the entity’s port-

⁷ With Decree 7 May 2021, ‘Apporti al Patrimonio Destinato’, the Ministry of Economy and Finance has regulated the contributions to *Patrimonio Rilancio*. On 18 May 2021, CDP’s Board of Directors approved the proposal to establish the fund.

⁸ Art 27(1).

⁹ Decree of the Ministry of Economy and Finance 3 February 2021 no 26, ‘Regolamento concernente i requisiti di accesso, condizioni, criteri e modalità degli investimenti del Patrimonio Destinato’.

¹⁰ See, *inter alia*, B Bortolotti, ‘Un Programma per Il Fondo Sovrano Made in Italy’ *Il Sole 24 Ore* (31 March 2021) <www.ilsole24ore.com/art/un-programma-il-fondo-sovrano-made-italy-ADTPYCUB?refresh_ce=1>.

¹¹ See Bassan, *The Law of Sovereign Wealth Funds* (n 1) 23.

¹² A Quadrio Curzio, V Miceli, *I Fondi Sovrani* (Il Mulino 2009) 24.

¹³ The possibility that a SWF can be owned by a territorial administration different from central state allows to qualify as SWFs the funds of the states of Alaska, Wyoming, New Mexico and Alabama in the United States, as well as the one of Alberta (Canada); see *ibid.* *Contra*, Ping, Chao (n 1) 3.



folio includes foreign currency assets; *c*) the fund has a low level of indebtedness;¹⁴ *d*) it is separated from official central banks' reserves and is managed through different criteria compared to the latter; and *e*) it aims at pursuing returns above the zero-risk rate. This definition would exclude *Patrimonio Rilancio* from the area of SWFs, as it is allowed to invest and hold assets in Italian companies only.¹⁵

From a different perspective, Ping and Chao have defined a SWF as

'a market-oriented and professional investment body owned and managed by a state's central government, which uses mainly foreign exchange reserves and export revenues to make overseas investment and seeks to maximise long term return'.¹⁶

The definition considers three elements: *a*) ownership, *b*) source of funding, and *c*) purpose and nature of the investment.¹⁷ For what concerns the ownership, the definition requires a central government to be 'the one and only shareholder' of the fund.¹⁸ In the case of *Patrimonio Rilancio*, it bears noting that it will be constituted within CDP, which the Ministry of Economy and Finance owns at 82.77 per cent. Therefore, the Italian fund would not fulfil the requirement of the government's full control completely.

As to the second element, the Authors have argued that 'consensus is that the funding of SWFs is mainly from foreign exchange reserves or export revenues',¹⁹ which is not the case of *Patrimonio Rilancio*.

Lastly, with regards to the third element of the definition, i.e. purpose and style of investment, Ping and Chao highlights that SWFs' purpose is twofold: to 'seek maximised returns within an acceptable risk range and thus have higher risk tolerance and invest in a professional and market-

¹⁴ This requirement does not prevent SWFs, depending on their bylaws, from investing in private equity funds or hedge funds, characterized by a quite high indebtedness; see Quadrio Curzio, Miceli (n 12) 24-25.

¹⁵ For a definition of SWFs as entities investing in foreign assets, see also D Olawuyi, 'Sovereign Wealth Funds and International Law' (Lauterpacht Centre for International Law 2019) <<https://sms.cam.ac.uk/media/2983544>>.

¹⁶ Ping, Chao (n 1) 4.

¹⁷ *ibid* 3.

¹⁸ *ibid*.

¹⁹ *ibid*.

oriented way',²⁰ and to pursue the strategic economic development and the currency stabilisation of the parent-state.²¹ As it will be pointed out in the following paragraph, this requirement will be most probably met by *Patrimonio Rilancio*, at least partially (it will not have a currency stabilisation purpose).

Two more definitions of SWFs have been adopted within the International Monetary Fund framework (IMF), requiring the entity to own a foreign assets portfolio. First, the IMF has elaborated the following definition in its 2007 Global Financial Stability Report: 'SWFs can generally be defined as special investment funds created or owned by governments to hold foreign assets for long-term purpose'.²² Second, the International Working Group of Sovereign Wealth Funds (IWG), established by the IMF, defined SWFs as

'[S]pecial 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 privatisations, fiscal surpluses, and/or receipts resulting from commodity exports'.²³

It is worth noting that the IWG expressly indicates that '[t]he investment strategies include investments in foreign financial assets, so [the definition] excludes those funds that solely invest in domestic assets'.²⁴ Given the provisions of both *Patrimonio Rilancio*'s establishing law and the Regulation, this statement would explicitly exclude the Italian fund from the area of SWFs.

²⁰ *ibid.*

²¹ *ibid.* 4.

²² International Monetary Fund, Monetary and Capital Markets Department, 'Global Financial Stability Report, October 2007 : Financial Market Turbulence Causes, Consequences, and Policies' 45 <www.imf.org/en/Publications/GFSR/Issues/2016/12/31/Global-Financial-Stability-Report-October-2007-Financial-Market-Turbulence-Causes-21125>.

²³ International Working Group of Sovereign Wealth Funds, 'Sovereign Wealth Funds Generally Accepted Principles and Practices - 'Santiago Principles'' 27 <www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf>.

²⁴ *ibid.*

A number of other definitions do not require SWFs to own foreign assets within their portfolio, like the one provided by Beck and Fidora. According to it, SWFs have three common elements: *a*) they are state-owned, *b*) they ‘have no or only very limited explicit liabilities’, and, lastly, *c*) they ‘are managed separately from official foreign exchange reserves’.²⁵ It bears noting that the two Authors still identify the substantial (or total) exposure to foreign investments as a feature that most SWFs share.²⁶

3. *Patrimonio Rilancio’s ownership and purposes*

As seen in the previous paragraph, the main issue that would prevent *Patrimonio Rilancio* from being qualified and treated as a SWF is the lack of foreign investments in its portfolio. This element is not taken into account, at least directly, by Bassan’s definition of SWFs:

‘[F]unds established, owned and operated by local or central governments, which investment strategies include the acquisition of equity interest in companies listed in international markets operating in sectors considered strategic by their countries of incorporation’.²⁷

This definition mainly focuses on two distinct elements: ownership (subjective) and purposes/activities (objective). The former pertains to the fund’s legal personality, governance and accountability.²⁸

This definition may also help to distinguish between SWFs and state-owned enterprises (SOEs), for two reasons. First, concerning the kind of investments, ‘SWFs make financial investments, while SOEs industrial ones’.²⁹ The effect is threefold: SWFs has a more passive role within the target company if compared to SOEs; SWFs’ participation in companies rarely exceeds ten per cent of the latter’s shares (whereas SOEs usually

²⁵ Beck, Fidora (n 1) 6.

²⁶ *ibid.*

²⁷ Bassan, *The Law of Sovereign Wealth Funds* (n 1) 32; see also F Bassan, ‘Sovereign Wealth Funds: A Definition and Classification’ in F Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Elgar 2015) 44.

²⁸ Bassan, ‘Sovereign Wealth Funds: A Definition and Classification’ (n 27) 45.

²⁹ Bassan, *The Law of Sovereign Wealth Funds* (n 1) 23.



control target companies); SWFs' investment horizon is longer than SOEs' one.³⁰ Second, regarding SWFs' purposes, it is to be highlighted that 'SOEs pursue a private (company) interest, while SWFs a public welfare'.³¹

In a nutshell, this definition merges the funds' sovereign nature with their purposes' commercial character.³²

It is now to be assessed whether the features of the new Italian fund do (or, more appropriately, will) fit into Bassan's definition of SWFs. In this regard, it bears noting that the analysis can be grounded on the existing legal framework only (the *Decreto Rilancio* and the Regulation), as *Patrimonio Rilancio* has not become operational yet. The following analysis focuses on the CDP fund's legal personality, portfolio and purposes.

For what concerns *Patrimonio Rilancio*'s legal personality, the fund will not be established with an autonomous one. It will consist of a trust managed by CDP. It is worth emphasising that the legal nature of the latter is widely debated. It has a joint-stock company legal personality and is under public control; its major shareholder is the Italian Ministry of Economy and Finance (82.77 per cent of shares).³³ Among its statutory purposes, CDP is entitled to grant loans to the central state, local authorities, and both public and private entities (different from individuals).

Accordingly, it is not easy to determine whether *Patrimonio Rilancio* is managed by a public or private entity. Nevertheless, two elements lead to qualify the new Italian fund as state-owned: the Ministry of Economy and Finance owns more than the eighty per cent of CDP's shares, and *Patrimonio Rilancio* will be funded entirely by such Ministry.

Its legal autonomy is also governed by Article 27(1) of *Decreto Rilancio*, which stipulates that the fund and any of its compartments are autonomous and separate, for all purposes, from both CDP's assets and any other trust managed by CDP. It also provides that *Patrimonio Rilancio* is liable for the obligations incurred by itself only and within the limits of

³⁰ *ibid.*

³¹ *ibid.*

³² Bassan, 'Sovereign Wealth Funds: A Definition and Classification' (n 25) 46. Bassan considers 'purposes' instead of 'activities' since 'purposes influence investment activities' *ibid.*

³³ Among the remaining 17.23 per cent of shares, 15.93 per cent are owned by bank foundations and 1.30 per cent are treasury shares; see <www.cdp.it/sitointernet/en/azionariato.page>.



assets and legal relationships either conferred to it or generated by its activity's surpluses.

With regards to the portfolio, *Decreto Rilancio* stipulates that the beneficiaries of the fund shall be listed companies with the following requirements: *a)* the registered office has to be located in Italy; *b)* they do not operate in the banking, financial or insurance sectors; *c)* the annual turnover exceeds fifty-million euros.³⁴ The Regulation provides further requirements concerning the lack of serious irregularities by the company or its directors³⁵.

The purpose of *Patrimonio Rilancio* is to preserve Italian economic and production system in the wake of the Covid-19 pandemic, without short-term target yield.³⁶ The kind of activities undertaken by the fund is twofold. First, it acts within the EU State Aid Temporary Framework, adopted on 19 March 2020 to support the EU economy in the context of the outbreak of Covid-19³⁷ (then prolonged until 31 December 2021³⁸). Second, it also works on market terms, provided that private actors are also involved in the investment.³⁹ As a general rule, each investment cannot exceed two billion euros in order to pursue a balanced portfolio allocation.⁴⁰

The first kind of investments can be implemented, provided that several requirements under the Regulation are met, through four different means: *a)* participation in companies' capital increase; *b)* subscription of subordinated corporate bonds with an obligation to convert them into corporate shares; *c)* subscription of subordinated convertible bonds and

³⁴ Art 4 of *Decreto Rilancio*. The implementing Regulation has added further requirements.

³⁵ Art 3 of *Decreto Rilancio*.

³⁶ Art 2(2) of the Regulation.

³⁷ European Commission, 'State Aid: Commission Adopts Temporary Framework to Enable Member States to Further Support the Economy in the COVID-19 Outbreak' (19 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_496>.

³⁸ European Commission, 'State Aid: Commission Prolongs and Further Expands Temporary Framework to Support Economy in Context of Coronavirus Outbreak' (28 January 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_261>.

³⁹ See also B Pagamici, 'Patrimonio destinato: come funzionano le misure per la ricapitalizzazione delle grandi imprese' (IPSOA 16 March 2021) <www.ipsoa.it/documents/finanziamenti/imprenditoria/quotidiano/2021/03/16/patrimonio-destinato-funzionano-misure-ricapitalizzazione-grandi-imprese>.

⁴⁰ Art 4(4) of the Regulation.



d) subscription of subordinated corporate bonds.⁴¹ The investment mean has to be chosen by the target company.

It bears noting that the kinds of investments *sub a)*, *b)* and *c)* must not exceed the minimum amount of resources the company needs in order to secure its business continuity.⁴² The investment may also not result in expanding the value of the company's capital structure if compared to its value at the date of 30 December 2019.⁴³ Furthermore, as a general rule, these investments cannot result in *Patrimonio Rilancio* holding more than twenty per cent of the target company's shares.⁴⁴ The Regulation also provides a number of commitments that the company benefiting from the investment has to make to prevent competition distortions.

Patrimonio Rilancio is also entitled to make investments on market terms, by participating in either the target company's capital increase or the subscription of convertible corporate bonds.⁴⁵ The fund can undertake these investments only if there is a co-investment by at least one private partner. The latter shall not be less than thirty per cent of the entire investment requested by the target company.⁴⁶ For listed companies, the investment cannot result in *Patrimonio Rilancio* holding a percentage of shares that would require it to launch a takeover bid.⁴⁷ Some mechanisms are also provided in order to allow the fund to disinvest.⁴⁸

Within the framework of the investments allowed on market terms, *Patrimonio Rilancio* is also entitled to invest, either directly or indirectly, in strategic listed companies.⁴⁹ Indirect investment can be only made with

⁴¹ Art 6(1) of the Regulation.

⁴² Art 7(1) of the Regulation.

⁴³ *ibid.* This value is to be considered as the average of the ratio between corporate's indebtedness and net worth.

⁴⁴ Art 7(3) of the Regulation. For non-listed companies only, the threshold of the investments *sub a)* and *c)* is 24.99 per cent, provided that the investment is undertaken by *Patrimonio Rilancio* together with a private co-investor.

⁴⁵ Art 17(1) of the Regulation.

⁴⁶ Art 17(2) of the Regulation.

⁴⁷ Art 17(3)(a) of the Regulation. According to art 17(3)(b), for non-listed joint stock companies, *Patrimonio Rilancio's* investment shall not result in the fund holding a number of shares that would grant it the control of the company.

⁴⁸ Art 20 of the Regulation.

⁴⁹ Arts 22 and 23 of the Regulation. Strategic companies are the ones operating in the fields listed in art 4.1 of EU Regulation of 19 March 2019 no 452/2019, establishing a framework for the screening of foreign direct investments into the Union (including, among others, 'energy, transport, water, health, communications, media, data processing

regards to companies with a total capitalisation not exceeding 250 million euros and through the subscription of collective investment undertakings' shares.

Lastly, the fund's establishing law and the Regulation stipulate that all CDP's obligations regarding investments made by *Patrimonio Rilancio* will benefit from an ultimate statutory guarantee by the state.⁵⁰

4. *Lack of foreign investments*

The analysis of *Patrimonio Rilancio*'s elements addressed in the previous paragraph lead to the belief that the fund would fit into the SWFs' definition provided by Bassan. The answer would be different if we look at the definitions grounded on the foreign nature of SWFs' assets.

Comparing the Italian fund's features with Bassan's definition, given the particular nature of CDP and its shareholders, the fund can be considered 'established, owned and operated by [...] central government'. Furthermore, the fund's 'investment strategies include the acquisition of equity interest in companies listed in international markets operating in sectors considered strategic by their countries of incorporation' (i.e. Italy). While the fund is also allowed to invest in non-strategic companies, the purpose of the investments is definitely strategic, as the latter will be used as tools to foster national companies' and the whole country's economic recovery after the financial losses caused by the Covid-19 outbreak.

At the same time, it cannot be underestimated that Bassan's definition has been drafted insofar as it is 'the one that suits best the goal [the Author] want[s] to pursue',⁵¹ which is 'the [need] to meet the growing demand for regulation that derives from host state concerns'.⁵² In other

or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities').

⁵⁰ Art 27(8) of *Decreto Rilancio* and art 38 of the Regulation.

⁵¹ Bassan, *The Law of Sovereign Wealth Funds* (n 1) 31.

⁵² *ibid.* In particular, the Author maintains that '[t]he main concern for host states is that sovereign funds may invest in companies operating in strategic sectors of the economy, in order not only to optimise the investment but also to take over those companies, affect their policies, obtain know-how'.



words, such a definition is functional to subject SWFs to host states' regulations. This purpose is quite blurred with regards to *Patrimonio Rilancio*, since the Italian fund, as soon as it will become operational, will invest in domestic companies only. It cannot also be denied the relevance widely acknowledged to foreign investments in determining whether a public-funded entity can be regarded as a SWF.

A number of similar features to *Patrimonio Rilancio*'s ones are owned by the Turkish Wealth Fund (TSF), launched in 2017. According to the law establishing the fund,⁵³ it has the 'purpose of making contribution to capital markets in terms of depth and diversity of instruments, bringing domestic public assets into the economy, procuring external sources, taking part in strategical, large-scale investments'.⁵⁴ In these regards, it has been highlighted that the fund's ultimate and dissimulated goal might be to foster domestic economic development.⁵⁵ This purpose, while not explicitly acknowledged, is similar to *Patrimonio Rilancio*'s one. Furthermore, even though TSF's establishing law expressly contemplates the possibility for the fund to invest in foreign assets,⁵⁶ the latter's portfolio consists of Turkish state-owned companies' shares only.⁵⁷

5. *Panorama of sovereign immunity rules applicable to SWFs*

The SWFs' nature is key to determine whether such entities may benefit or not from sovereign immunity.⁵⁸ In this perspective, this second part of the contribution focuses on a number of selected civil law domestic systems.

As a general rule, according to the restrictive doctrine of sovereign immunity, which the international community largely follows, states are granted immunity from suit and execution for *iure imperii* acts only. They cannot benefit from sovereign immunity for their commercial activities

⁵³ Turkish Law no 6741 on the establishment of Turkey Wealth Fund Management Company, available in English at <www.tvf.com.tr/uploads/file/law-no-6741.pdf>.

⁵⁴ *ibid* art 1.

⁵⁵ Schena (n 1) 919.

⁵⁶ Turkish Law no 6741 (n 53) art 2(3).

⁵⁷ Schena (n 1) 917.

⁵⁸ Bassan, 'Sovereign Wealth Funds: A Definition and Classification' (n 27) 55.



(*acta iure gestionis*)⁵⁹. Ownership and purposes of a SWF are critical elements in assessing whether the fund's activities have to be regarded as sovereign or commercial. More specifically, it has been highlighted that legal personality and purposes are crucial to determine the application of the immunity *ratione personæ* and *ratione materiæ*, respectively.⁶⁰ The analysis is made even more complex by the heterogeneous characteristics of the different SWFs.⁶¹

Within the broader scenario of the international rules on state immunity, it is worth stressing that the United Nations Convention on Jurisdictional Immunities of States and Their Property⁶² (UNCISI) has not entered into force yet, as it has not been ratified by at least thirty states. Similarly, the European Convention on State Immunity⁶³ (ECSI), adopted under the Council of Europe auspices, is applicable to the relationships between the eight signatory states only.⁶⁴

Therefore, the applicability of the doctrine of sovereign immunity to SWFs is regulated by customary international law.⁶⁵ In this regard, some UNCISI and ELSI provisions can be regarded as declaratory of customary law.⁶⁶ It is worth noting that the ICJ has maintained that '[UNCISI and ELSI] provisions and the process of their adoption and implementation shed light on the content of customary international law'.⁶⁷

⁵⁹ PT Stoll, 'State Immunity' (2011) Max Planck Encyclopedia of Public Intl L 1106.

⁶⁰ Bassan, 'Sovereign Wealth Funds: A Definition and Classification' (n 27) 55.

⁶¹ Adinolfi (n 3) 227.

⁶² Convention on Jurisdictional Immunities of States and their Property UN Doc A/RES/59/38 Annex. See G Hafner, 'United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)' (2010) Max Planck Encyclopedia Public Intl L 549; R O'Keefe, CJ Tams, A Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary* (OUP 2013).

⁶³ European Convention on State Immunity (Council of Europe) UN Reg No I-25699. See R O'Keefe, 'European Convention on State Immunity (1972)' (2007) Max Planck Encyclopedia Public Intl L 1039.

⁶⁴ Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom. See Adinolfi (n 3) 226.

⁶⁵ See L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Recueil des Cours de l'Académie de Droit International*. For a more recent analysis, see M Ferri, 'Attività di certificazione delle navi svolte da società private su delega di Stati: tra immunità e tutela giurisdizionale delle vittime' (2020) 103 *Rivista di Diritto Internazionale* 789.

⁶⁶ Adinolfi (n 3) 226.

⁶⁷ *Jurisdictional Immunities of the State (Germany v Italy)* (Judgement) [2012] International Court of Justice ICJ Rep 99 128. See, *ex multis*, B Nußberger, V Otto,



Before tackling the selected domestic approaches to sovereign immunity (i.e. the French, German and Italian ones), a preliminary distinction between the perspectives of civil law and common law on the matter in hand may be drafted. The former usually results in states adopting comprehensive codes on sovereign immunity.⁶⁸ The latter is characterised by the lack of hard law provisions on the subject; state immunity rules are incorporated within domestic systems as a result of a process of automatic transformation of general (customary) international law into domestic legal frameworks.⁶⁹

The main focus of the article is on the Italian perspective on SWFs and, more specifically in this second part, on how sovereign immunity applies to them. Nonetheless, since the Italian approach shares its main features with other civil law countries, the French and the German perspectives are also addressed. Among many civil law systems, the choice has fallen on France and Germany for two reasons: first, they represent two of the main civil law archetypes; second, Italian private law has mostly been inspired by the French and German codifications.

6. *Sovereign immunity in civil law legal systems*

6.1. *France*

In France there is not a statutory provision on sovereign immunity from jurisdiction. The latter has been implemented in the domestic legal system by case law. One of the landmarks of this incorporation process has been the judgement *Époux Martin v. Banque d'Espagne* of the Court

'Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)' (2015) Max Planck Encyclopedia Public Intl L 2184; S Omri, M Wood, 'Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (2012)' in E Bjorge, C Miles (eds), *Landmark Cases in Public International Law* (Hart 2017) 563.

⁶⁸ As it is the case of the 1976 United States Foreign Sovereign Immunities Act (FSIA) and the 1978 United Kingdom State Immunity Act (SIA).

⁶⁹ See Adinolfi (n 3) 227. The Author also highlights that '[a]s a consequence, when national judges decide upon a specific immunity plea, they add new practice and confirm the *opinion juris* supporting the effectiveness of customary rules or, from a dynamic perspective, they may contribute to the emergence of new rules' (ibid).



of Cassation (*Cour de Cassation*), in 1952.⁷⁰ The Court recognised that the Bank of Spain was a company with its own legal personality, and therefore it was not generally entitled to claim immunity from jurisdiction when acting in its name. However, since it acted as an agent of the state (by printing and exchanging notes on the conditions strictly determined by the government), it was performing public power acts, thus benefiting from sovereign immunity before a French court.⁷¹ As a general rule, a central bank is immune when pursuing state-delegated acts, such as when it manages state's foreign exchange reserves (like SWFs).

With regards to immunity from attachment, the *Cour de Cassation* has pointed out in 2005 that ‘selon les principes de droit international relatifs aux immunités, les Etats étrangers bénéficient, par principe, de l’immunité d’exécution’.⁷² At the same time, the immunity is waived ‘lorsque le bien saisi se rattache, non à l’exercice d’une activité de souveraineté, mais à une opération économique, commerciale ou civile relevant du droit privé qui donne lieu à la demande en justice’.⁷³

In 2016, the French Parliament adopted an amendment to the *Code des procédures civiles d’exécution*, adding a specific provision on immunity from attachment. Pursuant to Article L111-1, para 1 ‘[d]es mesures conservatoires ou des mesures d’exécution forcée ne peuvent être mises en œuvre sur un bien appartenant à un Etat étranger que sur autorisation

⁷⁰ *Époux Martin v Banque d’Espagne* [1952] France; Cour de Cassation, Chambre civile 1 (1953) *Revue critique de droit international privé* 425.

⁷¹ The Court stated the following: ‘... attendu que s’il est loisible à la Banque d’Espagne, dotée d’une personnalité propre, d’effectuer normalement des actes de commerce, activité dont elle répond alors et dont elle est justiciable dans les mêmes conditions qu’un commerçant, il en est autrement lorsqu’elle est sommée d’opérer un estampillage, ou un échange de billets périmés, opération accomplie dans des conditions rigoureusement imposées par l’État espagnol par représentation de ce dernier; attendu qu’à juste titre l’arrêt déclare que la Banque, en la circonstance, n’a été qu’un agent de l’État espagnol, accomplissant dans la plénitude de ses pouvoirs un acte de la puissance publique; que, dès lors, les actes critiqués, même abstraction faite du principe de l’immunité de juridiction, constituaient des actes d’autorité échappant à tout contrôle juridictionnel français ...’. See FAM Riad, ‘L’entreprise publique et semi-publique en Droit international privé’ (1963) 108 *Recueil des Cours de l’Académie de Droit International* 606.

⁷² [2005] 03-18.176, France; Cour de Cassation, Chambre civile 1.

⁷³ *ibid.* In the case addressed by the *Cour de Cassation*, the Court recognized that the purchase by the government of Congo of real estate in France did not constitute a sovereign act, but only a private law operation, notwithstanding that the properties were aimed at hosting diplomatic staff.



préalable du juge par ordonnance rendue sur requête'.⁷⁴ The article stipulates that such measures cannot be authorized by a judge unless at least one of the following requirements is met:

1. L'Etat concerné a expressément consenti à l'application d'une telle mesure ;
2. L'Etat concerné a réservé ou affecté ce bien à la satisfaction de la demande qui fait l'objet de la procédure ;
3. Lorsqu'un jugement ou une sentence arbitrale a été rendu contre l'Etat concerné et que le bien en question est spécifiquement utilisé ou destiné à être utilisé par ledit Etat autrement qu'à des fins de service public non commerciales et entretient un lien avec l'entité contre laquelle la procédure a été intentée'.⁷⁵

Furthermore, according to Article L153-1 of the *Code monétaire et financier*, assets of foreign central banks and foreign monetary authorities (including foreign currency reserves) cannot be attached, unless: *a*) by 'le créancier muni d'un titre exécutoire constatant une créance liquide et exigible', *b*) at the conditions provided by the *Code des procédures civiles d'exécution*, *c*) if the creditor 'établit que les biens détenus ou gérés pour son propre compte par la banque centrale ou l'autorité monétaire étrangère font partie d'un patrimoine qu'elle affecte à une activité principale relevant du droit privé'.

Therefore, according to French law, a SWF established under the aegis of a central bank may benefit from more extensive protection from execution compared to other kinds of SWFs. Prejudgement attachments

⁷⁴ This paragraph has been added to the *Code* pursuant to art 59 of Law no 1691/2016.

⁷⁵ *ibid* para 2. Properties used *à des fins de service public non commerciales* are '*a*) Les biens, y compris les comptes bancaires, utilisés ou destinés à être utilisés dans l'exercice des fonctions de la mission diplomatique de l'Etat ou de ses postes consulaires, de ses missions spéciales, de ses missions auprès des organisations internationales, ou de ses délégations dans les organes des organisations internationales ou aux conférences internationales; *b*) Les biens de caractère militaire ou les biens utilisés ou destinés à être utilisés dans l'exercice des fonctions militaires; *c*) Les biens faisant partie du patrimoine culturel de l'Etat ou de ses archives qui ne sont pas mis ou destinés à être mis en vente; *d*) Les biens faisant partie d'une exposition d'objet d'intérêt scientifique, culturel ou historique qui ne sont pas mis ou destinés à être mis en vente; *e*) Les créances fiscales ou sociales de l'Etat'.

and seizures are, in fact, not admissible for central bank assets. Nevertheless, SWFs' immunity has to be assessed on a case-by-case basis by the competent court, basing on the rules mentioned above.

6.2. *Germany*

Like the French one, German legislation does not contain specific legislation on sovereign immunity. The issue is thus governed by both case law and the general principles of international law, the latter being incorporated within the German domestic system through Article 25 of the Basic Law for the Federal Republic of Germany, which maintains that '[d]ie allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes'.⁷⁶

German judiciary has aligned with the restrictive theory of sovereign immunity, which has followed the distinction between *acta iure imperii* and *acta iure gestionis*.⁷⁷ More specifically, the Federal Court of Justice (*Bundesgerichtshof*) has pointed out that such a distinction is not grounded on either the purposes or the motives of the state's act.⁷⁸ The Court acknowledged that the ultimate goal of states' activities, as a matter of fact, is often a sovereign one. The distinguishing elements of *acta iure gestionis* are the precise nature of the act and its legal effects, regardless of the entity's public nature (even if central banks).⁷⁹

SWFs' typical activities, i.e. the subscription of corporate bond or shares (for instance, through the participation in capital increase operations), can consequently be hardly qualified as sovereign-in-nature acts. These investments might indeed be undertaken by private parties as well.

However, SWFs may benefit from greater protection in terms of immunity from execution. German tribunals have qualified a wide range of

⁷⁶ 'The general rules of international law shall be an integral part of federal law'. It also stipulates that 'these rules shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory'. The English translation of the German Basic Law is available at <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0141>.

⁷⁷ *X v Saudi Arabia* (Appeal judgement) [2016] VII ZR 150/15, Germany; Bundesgerichtshof.

⁷⁸ [2016] VI ZR 516/14, Germany; Bundesgerichtshof.

⁷⁹ *ibid.*



entities and assets as sovereign ones. It should also be noted that the Federal Constitutional Court (*Bundesverfassungsgericht*) highlighted that immunity from execution must not be grounded on the mere fact that an asset (eg a private company's receivables on accounts maintained with German banks) is intended to be transferred to an account of a foreign state with its central bank.⁸⁰

6.3. Italy

Within the Italian legal system, as in most of the civil law ones, a state immunity code has not been enacted. Therefore, sovereign immunity is governed by customary international law. The latter forms part of the domestic legal framework pursuant to Article 10, para 1, of the Italian Constitution (*Cost*).⁸¹ According to Article 10, para 1 *Cost*, '[I]l ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute'.⁸²

The Italian Constitutional Court (*Corte costituzionale*) has drafted a comprehensive picture of the current *status* of sovereign immunity in the Italian legal system in its judgement no 238/2014,⁸³ which followed the

⁸⁰ [1983] BVerfG, Beschluss vom 12.04.1983 - 2 BvR 678/81, 2 BvR 679/81, 2 BvR 680/81, 2 BvR 681/81, 2 BvR 683/81, BVerfGE 64, 1, Germany; Bundesverfassungsgericht. A partial English translation of the judgement is available at <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=577>>.

⁸¹ Art 10(1) has been defined by the Italian scholars T Perassi and L Condorelli as a *trasformatore permanente* ('permanent converter'); see the debates of the Italian Constituent Assembly, in which Perassi took part (Assemblea Costituente, Commissione per la Costituzione, plenary meeting, 24 January 1947, at <http://legislature.camera.it/_dati/costituente/lavori/Commissione/sed018/sed018nc.pdf> 164); L Condorelli, 'Il «riconoscimento generale» delle consuetudini internazionali nella Costituzione italiana' (1979) 62 *Rivista di Diritto Internazionale* 5, 16; see also *inter alia* G Morelli, *Nozioni di Diritto Internazionale* (7th edn CEDAM 1967) 96; T Treves, *Diritto Internazionale. Problemi fondamentali* (Giuffrè 2005) 658; A Cassese, *Diritto Internazionale* (3rd edn Il Mulino 2017) 329; A Tanzi, *Introduzione al Diritto Internazionale contemporaneo* (6th edn Wolters Kluwer 2019) 256.

⁸² 'The Italian legal system conforms to the generally recognised principles of international law'. An English translation of the Italian Constitution is available at <www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

⁸³ Corte costituzionale sentenza n 238/2014. An English translation of the judgement is available at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>.

International Court of Justice (ICJ) ruling on *Jurisdictional Immunities*.⁸⁴ It is worth highlighting that the Constitutional Court disregarded the ICJ decision by affirming the jurisdiction of Italian courts over *delicta imperii*, i.e. those international crimes perpetrated by states in breach of peremptory norms of international law. However, while it maintained that a state cannot benefit from sovereign immunity for *delicta imperii*, the Court confirmed the application of sovereign immunity to ordinary *iure imperii* acts.

The Court pointed out that Article 10, para 1 *Cost*, stipulates the so-called ‘principle of conformity’. According to the latter, the domestic judge must interpret customary international rules complying with the international legal order’s interpretation. It should thus adopt the interpretation followed by the ICJ with regards to sovereign immunity. The Constitutional Court judges also acknowledged that ‘at the international law level, the interpretation by the ICJ of the customary law of immunity of states from the civil jurisdiction of other states for acts considered *iure imperii* is particularly qualified’.⁸⁵ The Courts highlighted that the principle of immunity was initially absolute, and that, ‘[m]ore recently, namely in the first half of the last century, this norm undertook a progressive evolution by virtue of national jurisprudence, in the majority of states, up until the identification of *acta iure gestionis* [...] as the relevant limit’.⁸⁶

The Court then focused on the restrictions posed by the sovereign immunity principle to the individual inviolable right of judicial protection, guaranteed by Article 24, para 1 *Cost*. The latter stipulates that ‘[t]utti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi’.⁸⁷ The Court has identified a point of balance between the two principles in the following perspective:

‘Immunity from jurisdiction of other states can be considered tenable from a legal standpoint, and even more so from a logical standpoint, and thus can justify on the constitutional plane the sacrifice of the principle

⁸⁴ *Jurisdictional Immunities of the State* (n 67).

⁸⁵ Corte costituzionale n 238/2014 (n 83).

⁸⁶ *ibid.*

⁸⁷ ‘Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law’.



of judicial protection of inviolable rights guaranteed by the Constitution, only when it is connected – substantially and not just formally – to the sovereign functions of the foreign state, i.e. with the exercise of its governmental powers’.⁸⁸

Differently from France, in the Italian legal system, neither the Financial Code (*Testo Unico Finanziario*)⁸⁹ nor the Banking Code (*Testo Unico Bancario*)⁹⁰ do contain rules on immunity (eg on central bank immunity). Therefore, it cannot be drafted a distinction on the applicability of sovereign immunity between SWFs established as central banks asset and other SWFs.

7. Concluding remarks

This contribution has focused on *Patrimonio Rilancio*, an Italian fund which establishment has been authorised in order to pursue the recovery of the national economic system after the Covid-19 pandemic. The fund is supposed to become operational during the next months, and it will be allowed to invest solely in domestic companies. An analysis of *Patrimonio Rilancio*’s characteristics has shed light on the similarities between the Italian fund and SWFs. More specifically, whereas the lack of foreign assets within its portfolio would lead it out of the perimeter of most of the SWFs’ definitions, the fund would fit into Bassan’s definition, grounded on ownership and purposes.

It has also been noted that the identification of *Patrimonio Rilancio* with a SWF has almost exclusively a theoretical goal. In fact, since the fund will invest in Italian companies only, it will hardly maintain relationships with foreign states. In other words, it is unlikely that *Patrimonio Rilancio* will undertake activities regarding which the rules governing SWFs, particularly the ones on state immunity, may become relevant.

The article has then tackled the approach to sovereign immunity followed by civil law countries, focusing on France, Germany and Italy. The three systems share the lack of specific legislation on the matter in hand.

⁸⁸ *ibid.*

⁸⁹ Legislative Decree 24 February 1998 no 58 ‘Testo Unico della Finanza’.

⁹⁰ Legislative Decree 1 September 1993 no 385 ‘Testo Unico Bancario’.

State immunity rule has entered within the legal systems under consideration due to the incorporation of general international law into the domestic framework, which has followed domestic constitutional provisions and supreme courts' case law. This feature characterises civil law approach to international immunity, differentiating it from common law one.

The French, German and Italian systems follow the restrictive doctrine of state immunity, as they grant it to *acta iure imperii* only. This approach affects the applicability of immunity to SWFs, which usually undertake activities of commercial nature. Generally, the heterogeneity of the different SWFs in terms of ownership and purposes results in the possibility of granting them immunity either *ratione personæ* or *ratione materiæ*, depending on each fund's features.

The judiciaries of civil law countries usually offer greater protection to SWFs concerning immunity from execution. However, the nature of both the fund and the entity owning it plays a crucial role with regards to immunity from attachment too.