***ZOOM OUT***

***The question:***

## Searching for an identity: Sovereign Wealth Funds between their private and public nature in international and domestic litigation

*Introduced by Attila Tanzi and Gian Maria Farnelli*

The emergence of sovereign wealth funds ('SWFs') as prominent actors in international economic relations and their involvement in international investment law and domestic litigation is increasingly attracting interest in the scholarly debate. Indeed, SWFs, and their relatives State-owned enterprises ('SOE'), touch upon fundamental institutions of international law in most complex terms, with special regard to their legal standing in international and domestic litigation, and sovereign immunity form jurisdiction and execution.

SWFs, their related SOEs', their States of nationality, or their central banks, may be involved in international and domestic investment related disputes in bi-univocal terms. On the one hand, an SWF/SOE may act as claimant before international investment tribunals, and thus, before a domestic court, seeking execution of an arbitral award in its favour, on a par with any successful foreign investor claimant, or simply as applicant invoking a breach of some domestic law for breach of contract or other. Conversely, SWFs, their related SOEs', their States of nationality, or their central banks, may be sued before international and domestic fora for exactly the same reasons.

Under both sceneries, practice shows different domestic legal frameworks enact different solutions. Thus, a study on practice concerning SWFs/SOEs requires a country-specific approach addressing how a SWF/SOE is treated in the Country where it is sued, or where enforcement of a foreign judgment or of an arbitration award may be sought. When available, some common denominator could inform the formation of some kind of international general law for want any specific international conventional instrument regulating all the relevant aspects under

consideration. However, such common denominator seems difficult to be found.

Even where aspects involving SWFs activities fall in principle under general law, and are even codified in codification conventions, the interpretations and applications of the latter diverge to an extent which leaves the phenomenon at hand in a wasteland of absence of international regulation. This is the case of the customary law on sovereign immunity and its codification in the *United Nations Convention on Jurisdictional Immunities of States and Their Property* of 2004.

States that feel concerned with possible threats from SWFs/SOEs to their financial or economic integrity in key sectors tend to be particularly restrictive in their legislative and jurisprudential interpretation and application of sovereign immunity to SWFs/SOEs, whereas States seeking to be attractive of foreign public capital may be offering immunities additional to those provided by general rules of international law, since 'the [customary] law creates a floor of minimum protection, but does not create a ceiling'.[1]

The above country-specific analysis is to be complemented with a SWF/SOE-specific legal structure analysis. Indeed, immunity should be generally recognised only to those SWF/SOE which are integrated with the State structure. However, the maximum degree of integration of a SWF/SOE with the sovereign structure of the State advancing a plea for immunity before a domestic court or tribunal would also justify its qualification as a State organ, to the effect of grounding claims of State responsibility for its conducts under general international law and, possibly, raising difficulties in being qualified as a 'foreign investor' for purposes of investment agreements.

It is against the above background that Bianca Nalbadian, Cameron Miles, Marco Argentini and Ludovica Chiussi Curzi analyse international and domestic regulations and case law concerning operations of SWF/SOE, in order to shed some light on current trends in the matter at hand.

Bianca Nalbandian's contribution will address whether SWF/SOE may benefit from the legal protection provided by international investment agreements. Her study reviews investment tribunals approaches so

[1] D Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors' (2010) 2 OECD Working Papers on International Investment 14

far as to the entitlement of sovereign investors to seek substantial and procedural protection under the relevant investment agreements, thus acting as claimants in investor-State arbitration.

Cameron Miles' and Marco Argentini's contributions will mirror each other, dealing with domestic judicial and regulatory practice on immunity of SWF/SOE respectively from common law and civil law jurisdictions.

Last but not least, Ludovica Chiussi Curzi's contribution will investigate the existing international regulatory framework that governs the responsibility and accountability of SWFs, with specific regard to international standards pertaining to business and human rights, in order to assess whether a trend can be identified regarding SWFs' practice *vis-à-vis* companies that do not live up to international human rights and environmental law standards.