

State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds

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Recent years have seen the emergence of sovereign wealth funds (SWFs) as a new category of institutional investors. While these entities typically engage in commercial activities, they are owned and controlled by sovereign states. Apart from regulatory issues, the increasing importance of SWFs also raises questions with regard to potential commercial disputes. Firstly, creditors trying to enforce claims against states may try to challenge the legal independence of SWFs in order to obtain the attachment or seizure of assets held by them. Secondly, SWFs may in disputes

with third parties want to claim immunity from jurisdiction or enforcement with regard to their activities and assets. As explained hereafter, challenges to the independence of SWFs organized as separate legal entities are unlikely to succeed, unless there are indications of fraudulent conduct. By contrast, the enforcement of claims against SWFs may turn out surprisingly difficult, as courts in many jurisdictions exercise considerable restraint with regard to the execution of claims against foreign state-controlled assets.

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I. Introduction

1. Sovereign Wealth Funds: a New Category of State-Controlled Actors

Recent years have seen a dramatic redistribution of global wealth and, as a result thereof, a remarkable shift in foreign investment flows. In the period between 2000 and 2010, the economic growth of China and other emerging economies by far outpaced

growth in advanced economies. The surge in prices for oil and other commodities, as well as fast economic growth in Asia, contributed to massive trade surpluses and to the creation of large foreign exchange reserves in a number of emerging or newly industrialized countries.¹

In many countries, this has led to the creation of state-controlled investment vehicles in the form of sovereign wealth funds ("SWFs"). Even though this term came in use less than 10 years ago,² such entities are not a new phenomenon. The Kuwait Investment Authority was created in 1953 already, before Kuwait even gained independence from the United Kingdom. The Singapore government set up its two investment vehicles, Temasek Holdings and GIC, in 1974 and 1981 respectively, while the Abu Dhabi Investment Authority ("ADIA"), which remains by far the largest SWF in terms of assets under management,³ was established in 1976. Since then, a number of similar vehicles have been created by

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¹ The oil price per barrel rose from USD 20 in 2002 to USD 105 in 2011, leading to an increase in revenues of OPEC members from USD 197 billion to USD 847 billion, cf. <http://www.tecson.de/oelweltmarkt.html> and U.S. Energy Information Administration, OPEC Revenues Fact Sheet, available at http://www.eia.gov/emeu/cabs/OPEC_Revenues/Factsheet.html (both last viewed on 21 March 2012).

² Its first use is generally attributed to *Andrew Rozanov*, Who holds the wealth of nations? *Central Banking Journal* vol. 15 (2005), 4.

³ Cf. the Sovereign Wealth Fund Institute's ranking, available at <http://www.swfinstitute.org/fund-rankings/>.

countries in the Middle East, North Africa and Asia, mostly to manage either revenues from oil and gas or foreign currency reserves.⁴ 2007 saw the launch of the China Investment Corporation (CIC), which received an initial USD 200 billion capital injection from Chinese foreign reserves.⁵ These developments and the increasing visibility of SWF transactions have since led to a broad debate about this new category of investors.⁶

Like state-owned companies (SOCs), SWFs are controlled by the government of their home country. There are, however, significant differences between the two types of entities. SOCs such as national oil or gas companies typically manage an operative business. They were and are still used in many developing or emerging countries to maintain control over key industries or to serve as points of entry for foreign investors, for instance through mandatory joint venture projects.⁷ SWFs, by contrast, are employed to preserve or increase the country's national wealth by engaging in passive investments. They generally acquire stakes in banks, financial service companies or industrial companies,⁸ and their activities typically have an international or even global reach. Although emerging markets are becoming increasingly impor-

tant for SWFs,⁹ many of them have made prominent investments in mature Western economies, for example by acquiring stakes in UBS, Merrill Lynch, Morgan Stanley, Citigroup, Credit Suisse or the London Stock Exchange and Volkswagen.¹⁰

In recipient countries, investments by SWFs have been met with mixed reactions.¹¹ The funding provided to ailing financial institutions in Europe and the US in the wake of the 2008 global financial crisis was, for obvious reasons, widely welcomed, and recently hopes have been expressed that SWFs might help to overcome the Euro crisis. However, there have also been questions, in particular with regard to transparency and financial stability issues as well as geopolitical implications. It has been observed that many SWFs are not subject to any internationally binding disclosure requirements with regard to their investment strategies, stakeholders, or performance, and that they may be taking advantage of internationally liberalized financial markets to achieve strategic purposes on behalf of the countries controlling them.¹² In the US, these concerns have led to the strengthening of the powers of the Committee on Foreign Investment in the United States (CFIUS), which is in

⁴ This includes in particular the Revenue Regulation Fund of Algeria (2000), the Abu Dhabi-based Mubadala Development Company (2002), the Qatar Investment Authority (2003), the Brunei Investment Agency (1983), the Norwegian Government Pension Fund (1990), the Libyan Investment Authority (2006), the Investment Corporation of Dubai (2006), the Oman Investment Fund (2006), the Russian National Welfare Fund (2008) as well as the Abu Dhabi Investment Council (2006).

⁵ CICs capital was recently increased by another USD 30 billion, cf. <<http://www.ibtimes.com/articles/309281/20120305/china-investment-corp-30-billion-government.htm>> (last viewed on 21 March 2012).

⁶ There is a rich and fast-growing body of literature on SWFs; for introductions to the subject cf. *Saw Swee-Hock/Linda Low*, *Sovereign Wealth Funds*, Saw Centre for Financial Studies, Singapore 2009; *Thomas N. Carson/Wilhelm P. Litman* (eds.), *Sovereign Wealth Funds*, New York 2009; *Yvonne Lee*, *The Governance of Contemporary Sovereign Wealth Funds*, *Hastings Business Law Journal* vol. 6 (2010), 197–237; *Myriam Senn*, *Sovereign Wealth Funds – a Challenge for Institutional Governance*, *Jusletter*, 19 April 2010.

⁷ Cf. *Muthucumaraswamy Sornarajah*, *Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments*, (2011) *Asian Journal of International Law* vol. 1 (2011), 1–22, 5.

⁸ Cf. *Saw Swee-Hock/Low* (fn. 6), 53.

⁹ For example, in 2010 alone, Temasek invested SGD 3 billion in China Construction Bank and Bank of China, while investments for more than SGD 500 million were made in India, cf. *Temasek Annual Review*, available at <http://www.temasekreview.com.sg/downloads/full_temasek_review_2011.pdf>, p. 38 (last viewed on 21 March 2012).

¹⁰ *Falling Knives: the smart and the not-so-smart*, *The Economist*, 10 December 2009, available at <<http://www.economist.com/node/15065731>> (last viewed on 21 March 2012); “Back on Course – Sovereign Wealth Fund Activity in 2009”, available under <<http://www.sovereignwealthfundsnews.com/statistics.php>> (last viewed on 21 March 2012); *Monitor*, *Braving the New World: Sovereign Wealth Fund Investment in the Uncertain Times of 2010*, June 2011, available at <http://www.monitor.com/Portals/0/MonitorContent/imported/MonitorUnitedStates/Articles/PDFs/BTNW_Final.pdf> (last viewed on 21 March 2012).

¹¹ Cf., for an overview, *Saw Swee-Hock/Low* (fn. 6), 69–76; *Lee* (fn. 6), 201–207.

¹² Cf., for example, *Martin A. Weiss*, *Sovereign Wealth Funds: Background and Policy Issues for Congress*, in: *Carson/Litman* (fn. 6), 1–20, 10–12, with further references *Mathias Audit*, *Les fonds souverains sont-ils des investisseurs étrangers comme les autres?*, *Dalloz Chron.* 2008, 1424–1428; *Régis Bismuth*, *Les fonds souverains face au droit international*, *Annuaire Français de Droit International* 2010, 567–606, 567–571.

charge of reviewing foreign acquisitions.¹³ Germany and France also adopted new rules purporting to control the acquisition of domestic companies by foreign investors.¹⁴ In response to these developments, many SWFs have increasingly begun to engage in discussions about their structure and activities, in particular in the framework of a working group associated with the IMF. In October 2008, this group published the so-called Santiago Principles, “Generally Accepted Principles and Practices” for SWFs,¹⁵ which, although not legally binding, are by now widely seen as expression of good governance standards for SWFs.¹⁶

2. Commercial Disputes with Sovereign Wealth Funds: the Issues

While the discussion concerning SWFs focuses largely on regulatory issues related to market entry and investment protection, such entities will, as a result of their international investment activities, unavoidably also become increasingly involved in commercial and regulatory disputes, in the same way as this is the case for private investors. There may be controversies with regard to the interpretation or performance of investment or M&A agreements, or with regard to the compliance with insider trading and competition law rules. Claims may also arise as a result of misrepresentations made during the negotiation stage,¹⁷ or be brought by unrelated third parties,

such as creditors of target companies. Such claims were, for example, raised against the Kuwait Investment Authority (KIA) some years ago in relation to a 96% holding in a Spanish company, Grupo Torras, which was unable to meet its obligations due to its insolvency. In this context, creditors of Grupo Torras also sought to obtain the attachment of assets held by KIA in Switzerland, arguing that the group had been undercapitalized, and that KIA was its true “decision centre”.¹⁸

The substantive questions arising in such disputes are likely to be more or less the same as in similar disputes with private parties. However, at the procedural level and especially at the enforcement stage, particular challenges may occur due to one of the parties being controlled by a foreign state. On the one hand, it may be questionable whether SWFs can claim immunity from jurisdiction or enforcement with regard to their activities and assets.¹⁹ On the other hand, SWFs may, due to the significant wealth held by them and due to the international scope of their activities, be attracting the attention of creditors trying to enforce claims against the states controlling them, for example if large (investment) arbitration claims remain unpaid.²⁰ Some years ago, AIG for instance sought to enforce an expropriation claim

claims for misrepresentations allegedly made during negotiations on an investment in Countrywide, formerly the USA’s biggest lender for residential purposes, cf. <<http://theglobalrealm.com/2011/09/08/bank-of-americas-legal-woes-go-global-after-norways-sovereign-wealth-fund-sues-for-mortgage-fraud/>> (last viewed on 21 March 2012).

¹³ Cf. <<http://www.treasury.gov/offices/international-affaires/cfius/>> (last viewed on 21 March 2012); and, generally, James J. Jackson, The Committee on Foreign Investments in the United States (CFIUS), in: Carson/Litman (fn. 6), 331–352.

¹⁴ Cf. for Germany, §7(1)(4) and (2)(6) Aussenwirtschaftsgesetz and § 53 Aussenwirtschaftsverordnung; for France Art. 153-1 to 153-3 Code Monétaire et Financier. France also created its own state-owned fund, which is to act as “white knight” in the event of unwelcome takeover bids by foreign investors, cf. Jean-Rodolphe W. Fiechter, The French Strategic Investment Fund: A Creative Approach to Complement SWF Regulation or Mere Protectionism?, The Journal of Applied Economics, 2010/vol. 3, “Critical Regulation”, 59–77, 70–72.

¹⁵ International Working Group of Sovereign Wealth Funds (IWG), Generally Accepted Principles and Practices (GAPP) – Santiago Principles, 2008, available at <<http://www.iwg-swf.org/pubs/gapplist.htm>> (last viewed on 21 March 2012).

¹⁶ For an assessment see Lee (fn. 6), 205 and 224–228; rather skeptically Bismuth (fn. 12), 605–606.

¹⁷ For example, Norway’s Government Pension Fund announced in September 2011 that it was going to bring

¹⁸ Cf. Swiss Federal Supreme Court, 24 January 1994, RS-DIE 1995, 593, *Kuwait v. X. S.A.* The underlying facts are more fully described in the parallel English case *Sarrío v. Kuwait Investment Authority* [1997] 4 All ER 929, 931 (HL).

¹⁹ Cf. also a recent OECD study on this subject, David Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors, OECD Working Papers on International Investment, 2010/2, available at <<http://www.oecd.org/dataoecd/21/32/45036449.pdf>> (last viewed on 21 March 2012); Fabio Bassan, The Law of Sovereign Wealth Funds, Cheltenham 2011, 111–115.

²⁰ The question under what circumstances an SWF may due to its involvement in the underlying transaction be included as a party in preceding proceedings is not considered here, nor is the question when the conduct of an SWF may be imputed to the state as a matter of public international law, cf. on this Judith Gill, Can a Party Benefiting from an Award Rendered Against a State Enforce the Award Against an Instrumentality of Such State: English Law, in: Emmanuel Gaillard/Jennifer Youan (eds.), State

against Kazakhstan by attaching cash and securities of the country's national savings fund in the UK.²¹ The request was rejected on the grounds that the relevant assets enjoyed immunity from execution under English statutory law (*cf.* IV.2. below).

3. Nature and Structure of SWFs

Any enquiry into whether sovereign wealth funds may be entitled to immunity protection, or whether they may be held liable for the obligations of the states controlling them, has to start with a closer look at the structure and activities of such funds. According to a widely accepted definition coined by the International Working Group of Sovereign Wealth Funds (IWG-SWF) in 2008, SWFs are:

"special purpose investment funds or arrangements, owned [and created] by the general government [...] for macro-economic purposes [which] hold, manage, or administer assets to achieve financial objectives, [including by] investing in foreign financial assets. [...] 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".²²

As indicated already by this definition, SWFs are not a homogenous group.²³ Their legal structure and governance vary significantly from country to country.²⁴ Some SWFs, such as GIC and Temasek of Singapore, or China Investment Corporation (CIC), are state-owned corporations organized in accordance with national company laws. Other SWFs, for example the Abu Dhabi Investment Authority, the Korea Investment Corporation and the Qatar Investment

Authority, are entities governed by specific constitutive laws. A third group, which includes the SWFs of Norway, Chile and Botswana, consists of administrative units or asset pools set up and controlled by the country's national central bank or treasury.²⁵ Norway's Government Pension Fund Global, for instance, has a fund structure without legal personality. Its assets are managed by Norges Bank Investment Management, the management arm of the Norwegian Central Bank (Norge Bank), in accordance with regulations laid down by the Ministry of Finance.²⁶ Furthermore, some SWFs with legal personality only hold and invest assets on behalf of the state – this is for instance true for GIC, which invests part of Singapore's reserves under an investment mandate by the government.²⁷

SWFs generally describe themselves as commercial investors pursuing purely financial goals, rather than political objectives.²⁸ The operational activities and investment strategies pursued by SWFs support this self-portrayal.²⁹ SWFs typically invest by acquiring minority stakes in companies, or purchasing bonds and structured finance products. Depending on their complexity and size, these investments may either be realized through stock or bond market trans-

Entities in International Arbitration, Huntington 2008, 131–147, 133; *Bismuth* (fn. 12), 577–581.

²¹ *Cf. AIG Capital Partners Inc and another v. Republic of Kazakhstan* [2005] EWHC Comm. 2239, 20 October 2005.

²² *Cf.* International Working Group of Sovereign Wealth Funds (IWG), Generally Accepted Principles and Practices (GAPP) – Santiago Principles (fn. 15), 27. On the various definitions discussed in the literature *cf.* also *Basan*, (fn. 19), 17–35.

²³ *Cf. Andrew Rozanov*, Definitional Challenges of Dealing with Sovereign Wealth Funds, *Asian Journal of International Law* 1 (2010), 249–265, 251.

²⁴ *Cf.* International Forum of Sovereign Wealth Funds, IFSWF Members' Experiences in the Application of the Santiago Principles, available at <<http://www.ifswf.org/pst/stp070711.pdf>> (last viewed on 21 March 2012), 7 July 2011, 13.

²⁵ *Cf.* International Forum of Sovereign Wealth Funds, IFSWF Members' Experiences in the Application of the Santiago Principles (fn. 24), 13.

²⁶ *Cf.* Annual Report 2010, 6–7, available at <http://www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/2011/NBIM_2010_eng.pdf> (last viewed on 21 March 2012). Despite its name, the Norwegian SWF has no formal pension liabilities.

²⁷ GIC: Ensuring sound governance, available at <<http://www.gic.com.sg/about/corporate-governance/overview>> (last viewed on 21 March 2012); *Swee-Hock/Low* (fn. 6), 22.

²⁸ *Cf.* International Forum of Sovereign Wealth Funds, IFSWF Members' Experiences in the Application of the Santiago Principles (fn. 24), 30–31.

²⁹ *Rolando Avendaño/Javier Santiso*, Are Sovereign Wealth Funds' Investments Politically Biased? A Comparison with Mutual Funds, OECD Working Paper No. 283, December 2009, available at <www.oecd.org/dataoecd/43/0/44301172.pdf> (last viewed on 21 March 2012), 18; *Michele Barbieri*, Sovereign Wealth Funds and the Principle of State Immunity from Taxation – Which Implications for Economic Development, UNCTAD-Virtual Institute digital library, 2010, available at <http://vi.unctad.org/digital-library/%3Ftask%3Ddl_doc%26doc_name%3D389-swftaxation&rct=j&sa=U&ei=dWiETrTpEYjL0QXcx9jWDw&ved=0CA4QFjAA&q=michele+barbieri+sovereign&usq=AFQjCNFQBMCD1qdQvFzBlrgK2cOWS3yV1A,17> (last viewed on 21 March 2012).

actions, or be channeled through investment or M&A agreements. Investment decisions are made based on the research of internal finance teams with the help of external investment banks and other advisors. SWFs also work with hedge funds or private equity funds, and a much like for investment companies in the private sector, their performance is measured by benchmarks, with the remuneration of managers being tied to this performance.³⁰

Unsurprisingly, the appointment and removal of members to the governing bodies of SWFs typically require the consent of the government controlling the relevant entity.³¹ In many cases, key positions are conferred to individuals with close ties to the state, such as present or former ministers. The Ruler of Abu Dhabi, for example, serves as chairman of the Abu Dhabi Investment Authority, with another family member acting as managing director.³² The CEO of Temasek, Ho Ching, is the wife of Singapore's Prime Minister Lee Hsien Loong, while the country's President, Dr. Tony Tan, previously acted as Deputy Chairman and Executive Director of GIC. In China, the Chairman and Chief Executive Officer of CIC, Lou Jiwei, had a ministerial position within the State Council.³³

State interests also determine the goals which SWFs are supposed to achieve. States typically use SWFs as tools to protect themselves against unforeseen economic challenges, for example as a result of plunges of commodity prices, currency fluctuations or general downturns in the economy.³⁴ In Singapore, for example, the reserves managed by GIC are regarded as "a critical resource that provides a key defense for Singapore in times of crisis and serve as an important safeguard for our future" as well as an "important factor in maintaining confidence in the Singapore dollar as all as the financial system and

broader investments in the Singapore economy".³⁵ Similarly, the Abu Dhabi Investment Authority sees itself as "guardian of Abu Dhabi's financial security", in charge of investing "funds on behalf of the Government of the Emirate of Abu Dhabi to make available the necessary financial resources to secure and maintain the future welfare of the Emirate".³⁶ The SWFs of Chile and Botswana are expected to finance possible fiscal deficits or contribute to the country's annual budget,³⁷ while the somewhat vaguer mission of the Norwegian Government Pension Fund Global is to preserve and enhance national wealth from the exploitation of oil for the benefit of future generations.³⁸

II. Piercing the Corporate Veil in Relation to State Entities

1. The Presumption of Independence

By virtue of their sovereign prerogatives, states may organize their internal matters as they see fit, including by delegating commercial or financial activi-

³⁰ *Swee-Hock/Low* (fn. 6), 53, 65.

³¹ For example, both GIC and Temasek are designated Fifth Schedule Companies under the Constitution of Singapore, which means that the appointment and removal of board members and of the CEO require the consent of the elected President of Singapore, *cf.* Frequently Asked Questions about Temasek, available at <http://www.temasek.com.sg/media_centre_faq.htm> (last viewed on 21 March 2012).

³² *Swee-Hock/Low* (fn. 6), 17.

³³ *Cf.* China Investment Corporation, Board of Directors, available at <http://www.china-inv.cn/cicen/governance/governing_bod.html> (last viewed on 21 March 2012).

³⁴ *Roazanov* (fn. 23), 253–254.

³⁵ *Cf.* Singapore Ministry of Finance, FAQ: Protection of Reserves, para. 3, available at <http://www.ifaq.gov.sg/mof/apps/fcd_faqmain.aspx?qst=2fN7e274RAp%2bbUzLdEL%2fmCxs7iwcgv8gv2atNDovsLCoQoU64dOP35IEnfd9iE4kL2UilxIJ%2b%2bVQbp%2bLUq1nUmRsFKjKnwj7Z2X9eSN16rfClotTtOiE4C8Y7Gy0KRERxY9y1j5Dai3srs0hHY6XMnLrpGOjmrFXiSppPEHGfH0Hjdfvd8sXmrtM2VuuPeRYI3KAvGQd5GEI%2fWC0w4ciumH2cbfRlszVDmShVQKkKdKdxuZS9yBNUWd98vS4KWZuMsArfGqRoz87jobZK6jYsGEiYDdg8rgooZ4wFb5aCFiAPjPTAet8HH4jWHMe1ytJHI3aZ%2b8taVM%3d> (last viewed on 21 March 2012). On the occasion of GIC's 30th Anniversary Dinner on 9 May 2011, Mr. *Lee Kuan Yew*, then Minister Mentor, noted that the national reserves managed by GIC serve as buffer for Singapore in economic downturns, enhance the stability of the Singapore dollar, and supplement general government revenues, <<http://www.gic.com.sg/newsroom/news/article/09-May-2011-3>> (last viewed on 21 March 2012).

³⁶ *Cf.* "About ADIA: Mission", available at <<http://www.adia.ae/En/About/Mission.aspx>> (last viewed on 21 March 2012).

³⁷ *Cf.* International Forum of Sovereign Wealth Funds, IFSWF Members' Experiences in the Application of the Santiago Principles (fn. 24), with further references.

³⁸ *Cf.* Norges Bank Investment Management, About Us: Government Pension Fund Global, available at <<http://www.nbim.no/en/About-us/Government-Pension-Fund-Global/>> (last viewed on 21 March 2012).

ties to separate entities.³⁹ The legal independence of such entities is generally respected by other states. As the English House of Lords put it in 1983:⁴⁰

“State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them and their governing state may appear artificial: but it is an accepted distinction in the law of England and other states”.

Nevertheless, 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.⁴¹ Concretely, creditors may find that assets held by the state are immune from execution, whereas commercial assets are not within their reach because they are held by separate legal entities.⁴² Piercing the corporate veil existing between the state and its entities may therefore be the only way of enforcing claims against the state. In practice, the standards for challenging the legal independence of state-controlled entities are, however, very high, as shown hereafter.

2. Applicable Rules and Standards of Review

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.⁴³ Whether or not the legal independence of a foreign

entity may be disregarded therefore depends on national laws.

From a conflicts of law perspective, these rules can essentially be determined through two alternative approaches: either the independence of the foreign entity is assessed in accordance with the laws of the forum state, or it is analyzed in light of the laws under which the entity was incorporated (*cf.*, for Switzerland, Articles 154 and 155 lit. c Swiss Private International Law Act). The former approach is generally motivated by concerns that the relevant foreign law may not provide for an adequate protection of third party interests.⁴⁴ However, most, if not all, legal systems allow disregarding the legal independence of a separate entity under certain conditions.⁴⁵ Consequently, it is generally considered more appropriate for courts to analyze the status and autonomy of a foreign entity under the very laws by which it is governed and to only exceptionally rectify the conclusions thus reached on the basis of public policy rules. After some hesitation,⁴⁶ this approach has indeed been endorsed by Swiss courts, both in relation to private companies⁴⁷ and foreign state-controlled entities.⁴⁸ It is also largely followed by German,⁴⁹ Belgian⁵⁰ and English⁵¹ courts, although the criteria used for analyzing the legal independence of foreign state-controlled entities often tend to be somewhat

³⁹ *Cf.* ATF 105 Ia 255 et seq. (*Communes de Saint-Aubin-Sauges et Gorgier v. Conseil d'Etat du canton de Neuchâtel*); *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356; *First National City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)* 462 US 611, 626 (1983), para. 33; *cf.* also Restatement (Third) of the Law of the Foreign Relations of the United States, (1986) § 452, para. 2.

⁴⁰ *Playa Larga v. I Congreso del Partido* [1983] 1 AC 244, 258.

⁴¹ *Cf. Emmanuel Gaillard*, Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities – Three Incompatible Principles, in: Emmanuel Gaillard (ed.), *State Entities in International Arbitration*, Huntington 2008, 179–193, 189.

⁴² *Cf. Gaillard* (fn. 41), 179–193.

⁴³ *Cf.* German Federal Constitutional Court, BVerfGE 64, 1 (*National Iranian Oil Company*) holding that there was no rule of international law obliging municipal courts to treat funds held by state entities with legal personality as assets of the state. The issue of veil piercing was deliberately excluded from the UN Convention on Jurisdictional Immunities of States and Their Property, as it was considered to

go beyond immunity issues, *cf.* Article 10(3) and the corresponding explanations in the Annex.

⁴⁴ *Cf. Bancec* (fn. 39), para. 23, where the US Supreme Court considered that the law of the state of incorporation was only relevant to the internal affairs of a foreign corporation, but not for the rights of third parties; generally *Karen Vandekerchove*, Piercing the Corporate Veil, *Alphen aan den Rijn* 2007, 585–587.

⁴⁵ *Cf. Felix Dasser*, Der Durchgriff im Internationalen Privatrecht, in: *Festschrift für Hans Michael Riemer*, Berne 2007, 35–48, 48.

⁴⁶ *Cf.* District Court of Zurich, Decision of 1 February 1994, ZR 1999, no. 52.

⁴⁷ ATF 128 III 346.

⁴⁸ *Cf.* Zurich Superior Court, Decision of 28 September 1990, ZR 1992/1993, no. 27, p. 88, no. 27, para. 3, concerning the Central Bank of Libya and Federal Supreme Court, 23 April 1992, ZR 1992/1993, no. 27, p. 94, confirming the lower court's holding.

⁴⁹ German Supreme Court, BGHZ 25, 127 (11 July 1957).

⁵⁰ Cour de Cassation, 6 December 1996 (*Sonatrach*), R.D.C. 1997, 300.

⁵¹ *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853, 972; *National Bank of Greece and Athens SA v. Metliss* [1958] A.C. 509, 528.

influenced by the corporate law principles of the forum state most familiar to the relevant court.⁵²

In examining the independence of foreign state-controlled entities, courts therefore typically start out by examining whether the entity is, under its articles of incorporation and other founding documents, entitled and able to autonomously deal with third parties, such that it can enter into contracts and sue or be sued in its own name.⁵³ Sometimes even such a purely formal analysis leads to the conclusion that the entity lacks legal personality under the very rules by which it is governed. Such a finding was, for example, made by the Swiss Federal Supreme Court with regard to the Moscow Center for Automated Air Traffic Control, whose articles of incorporation indicated that, contrary to its allegations, both itself and its assets constituted property of the Russian Federation.⁵⁴

Conversely, where foreign entities do have a separate legal existence under the relevant foreign law, Swiss courts are generally reluctant to question their independence.⁵⁵ In line with general principles of Swiss corporate law, they typically require evidence of an abuse of right. Such an abuse may result from the fact that the state itself did in the past not respect the autonomy of the entity under its control, for example by unilaterally disposing of its assets,⁵⁶ or by deliberately setting up structures in an effort to deceive creditors. However, this threshold is rarely met in practice. In the wake of the Libyan revolution of 1969, creditors of the Libyan state, for example, sought the attachment of Swiss assets held by the Libyan central bank. The attachment failed because the central bank was found to be distinct from the

state.⁵⁷ This conclusion was mainly reached based on the bank's formal status under the relevant Libyan statute. That the central bank had been specifically set up to perform state functions and that it had received directions by the state with regard to its activities was not considered sufficient to disregard its formal independence, and allegations concerning broader interference by the Libyan government could not be proven.⁵⁸

Some foreign courts have, at least at first glance, been more receptive to veil-piercing claims in relation to state-controlled entities. The US Supreme Court has held that exceptions from the presumption of separateness may be made "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created",⁵⁹ or where "fraud or injustice" would result from recognizing its independence.⁶⁰ However, while a principal-agent relationship has occasionally been seen in the implementation of state policies by a tightly controlled state-owned entity,⁶¹ most US courts have required evidence that the state itself disregarded the separateness of the entity under its control.⁶²

A similar approach has been taken by French and English courts, as illustrated by parallel cases concerning state-controlled companies of Congo and Cameroon.⁶³ In the French cases, the piercing of the

⁵² Cf. also Gill (fn. 20), 140.

⁵³ Cf. ATF 128 III 346; Zurich Superior Court, 28 September 1990, ZR 1992/1993, no. 27, p. 88, para. 3; cf. Federal Supreme Court, 23 April 1992, ZR 1992/1993, no. 27, p. 94.

⁵⁴ Cf. ATF 134 III 122, para. 4.3 (*Moscow Center for Automated Air Traffic Control*); cf. also Cass. 1e civ., 6 June 1990 (*Ministère des Affaires économiques et des Finances de la République islamique d'Iran v. Framatome et Cie*), Bull. civ. I, no. 141.

⁵⁵ Cf. ATF 76 III 60, 69; Zurich Superior Court, 28 September 1990, ZR 1992/1993, no. 27, p. 88, para. 4.

⁵⁶ Cf. Swiss Federal Supreme Court 5P.1/2007, Decision of 20 April 2007 (*X. SA v. Banque Centrale Z.*), para. 3: 5A_871/2009, Decision of 2 June 2010, para. 7 (*X. SA v. Y.*), concerning an entity held and controlled by the Central Bank of Libya. This is in line with the court practice concerning private companies, cf. ATF 102 III 165, para. II/2a (*Hangartner v. Port Pregny SA*).

⁵⁷ Cf. Zurich Superior Court, 28 September 1990, ZR 1992/1993, no. 27, p. 88, para. 4. On appeal, this decision was upheld by the Federal Supreme Court.

⁵⁸ Cf. Zurich Superior Court, 28 September 1990, ZR 1992/1993, no. 27, p. 88, no. 27 (fn. 50).

⁵⁹ *Bancec* (fn. 39), para. III.13.

⁶⁰ *Bancec* (fn. 39), para. III.13.

⁶¹ *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (DC Cir. 1995), para. 26, concerning the interference of shareholder rights in a joint venture project.

⁶² *De Letelier v. Republic of Chile*, 748 F.2d 790 (1984); *LNC Imvs. Inc. v. Republic of Nicaragua*, 115 F. Supp. 2d 358, 363 (S.D.N.Y. 2000); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 478 (2d Cir. 2007); *Bridas S.A.P.I.C. v. Turkmenistan*, 447 F.3d 411 (5th Cir. 2006).

⁶³ Cf. *Société nationale des pétroles du Congo v. S.A. Walker International Holdings Ltd.*, Cour d'appel de Paris, 8^e ch., 3 July 2003 and *Société Winslow Bank & Trust Company v. Société nationale des hydrocarbures*, Cour d'appel de Paris, 8^e ch., 22 January 2004, reprinted in *Emmanuel Gaillard/Jennifer Youan* (eds.), *State Entities in International Arbitration*, Huntington 2008, 475–497 and 499–517; *Walker International Holdings Ltd. v. République Populaire du Congo* [2005] EWHC 2813; *Kensington International Limited v. Republic of Congo* [2005] EWHC 2684.

corporate veil was allowed because the companies' sole function was to manage the interests of the relevant states, their governing bodies were composed of government members, and their day-to-day operations were subject to tight government controls and directions. Furthermore, the two companies were, from a financial perspective, not run as fully independent businesses, as the state was able to draw on their funds in the absence of formal resolutions regarding the distribution of profits.⁶⁴ Similar conclusions were reached in a parallel English case.⁶⁵ Here, it was considered decisive that the entity in question, SNPC, had unaudited and unverifiable current accounts with the state, and that it had directly paid for expenditures normally made by the state, for example in relation to elections or government projects. In addition, many of the company's day-to-day documents were signed by a delegate of the country's President. In light of this evidence, SNPC was held to be an organ of the state, rather than a separate legal entity.⁶⁶

These recent examples should not lead to the conclusion that the standards for piercing the corporate veil in relation to state entities are generally lower in England and France than in Switzerland. In these jurisdictions, too, the legal independence of state-controlled entities is only exceptionally disregarded – typically when the state itself did not respect the entity's organizational and financial autonomy.⁶⁷ By contrast, entities having sufficient assets to carry out their activities in accordance with their own decisions and the applicable corporate framework are generally recognized as legally independent, unless the state *de facto* regularly interferes with their day-to-day activities.

3. Veil-Piercing in Relation to Sovereign Wealth Funds?

In light of the strict standards for veil-piercing, it is likely that SWFs organized as separate entities will generally be recognized as being legally independent. The government control exercised over SWFs, the personal ties that typically exist with the government, and the fact that the activities of SWFs are driven by the interests of the state controlling them are, in and of themselves, unlikely to suffice for disregarding the separate legal existence of SWFs.

In this regard, the good governance principles laid down in the Santiago Principles (*cf.* I.1.) may provide helpful guidelines, as they aim to ensure that SWFs enjoy operational independence from the government controlling them. The Santiago Principles in particular provide that the management of SWFs should “implement the SWF's strategies in an independent manner and in accordance with clearly defined responsibilities” (Principle 9), with the governing bodies acting “in the best interests of the SWF”, rather than in the interest of the government controlling the fund (Principle 8). The Santiago Principles also suggest that clear rules and policies be adopted with regard to withdrawals, and that, where SWFs cover general government expenditure, they do so by making contributions to the general budget, rather than by directly paying for expenditure (Principle 4).⁶⁸ Consistent application of these principles should generally ensure that the separate legal existence of SWFs is recognized by courts and that their assets will not be treated as assets of the state.

However, as generally in veil-piercing cases, much will depend on the way in which a particular SWF actually operates. If entities labeled as sovereign wealth funds are deliberately used to hide state assets from creditors, or if their formal independence is regularly disregarded by the government controlling them, courts may well come to the conclusion that they, too, should not be bound to respect formal legal structures that do not correspond to actual realities. Furthermore, as explained above, some sov-

⁶⁴ *Cf. Société nationale des pétroles du Congo v. S.A. Walker International Holdings Ltd.*, Cour d'appel de Paris, 8^e ch., 3 July 2003, reprinted in *Emmanuel Gaillard/Jennifer Youan* (eds.), *State Entities in International Arbitration*, Huntington 2008, 475–497.

⁶⁵ *Cf. Walker International Holdings Ltd. v. République Populaire du Congo* [2005] EWHC 2813.

⁶⁶ *Cf. Walker International Holdings Ltd. v. République Populaire du Congo* [2005] EWHC 2813. In a second case, creditors were allowed to disregard the separateness of as many as four entities set up by a state-owned company, *cf. Kensington International Limited v. Republic of Congo* [2005] EWHC 2684.

⁶⁷ *Cf. the Bancec case* (fn. 39), where the relevant entity had been dissolved after the commencement of the litigation, with its assets being distributed among other state agencies.

⁶⁸ According to the International Forum of Sovereign Wealth Funds, IFSWF Members' Experiences in the Application of the Santiago Principles, 7 July 2011, 15, most SWFs making such contributions either do so annually in view of covering future obligation or, in the case of reserve funds, if certain targets are reached, *cf.* <http://untreaty.un.org/ilc/documentation/english/A_46_10.pdf>.

oreign wealth funds, such as the Norwegian Government Pension Fund Global, are organized as pools of assets without legal personality. In this case, assets held or managed by a SWF constitute property of the state, and are in principle available for the execution of claims against the state, subject to immunity defenses.

III. Immunity for States and State-Controlled Entities

State immunity allows foreign states, by reason of their status, to enjoy immunity from adjudication and enforcement in domestic courts. It has its foundation in the formal equality of sovereign states and in the principle of non-interference.⁶⁹ It is considered to form part of customary international law⁷⁰ and has in addition been expressly recognized in the European Convention on State Immunity (ECSI) of 1972⁷¹ as well as in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (UN Convention) which, while not yet being in force,⁷² is already today referred to as expression of internationally accepted principles in the area of immunity law.⁷³

1. The Move Towards the Restrictive Doctrine

State immunity has traditionally been granted to states because of who they are (*ratione personae*), not because of what they do (*ratione materiae*).⁷⁴ State-controlled entities with a separate legal existence have therefore traditionally been denied any immunity protection,⁷⁵ while states enjoyed, by reason of

their status, absolute immunity from adjudication and enforcement in domestic courts.

As is well known, many – but not all – jurisdictions have in the course of the 20th century adopted a more restrictive approach, reserving immunity defenses to acts of sovereign nature (*de iure imperii* acts) as opposed to commercial activities (*de iure gestionis* acts). Italian⁷⁶ and Belgian⁷⁷ courts played a precursor role in this regard, as did the Swiss Federal Supreme Court, who first adopted the restrictive doctrine in 1918.⁷⁸ The restrictive approach gained further ground after World War II.⁷⁹ The 1963 decision of the German Constitutional Court in the Empire of Iran case⁸⁰ and the 1952 Tate Letter from the US Department of State were important hallmarks in this regard. They set off a trend that led to a number of cases⁸¹ as well as to the adoption of statutes endorsing the restrictive approach, including in the US (Foreign Sovereign Immunities Act of 1976), England (State Immunity Act of 1978), Canada (State Immunity Act of 1982), Australia (Foreign States Immunities Act of 1985), and Singapore (State Immunity Act of 1979).

With the increasing acceptance of the restrictive doctrine, the focus has shifted to the nature of the acts

schrift für Wirtschafts- und Bankrecht) 2000, 269–332, 270, with further references.

⁶⁹ Cf. Justice Marshall in: *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) at 137.

⁷⁰ Cf. the Preamble to the UN Convention on Jurisdictional Immunities of States and Their Property; Hazel Fox, *The Law of State Immunity*, 2nd ed., Oxford 2008, 13–19.

⁷¹ The ECSI applies in Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom.

⁷² So far, the UN Convention has been signed by twenty-eight states, and ratified or acceded to by thirteen states, <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=III-13&chapter=3&lang=en>.

⁷³ Cf. *Svenska Petroleum Exploration AB v. Government of Lithuania* [2006] EWCA Civ 1529, para. 132; ATF 134 III 122; ATF 130 III 136; ATF 124 III 382.

⁷⁴ Fox (fn. 70), 418.

⁷⁵ Cf. Bernd Krauskopf/Christine Steven, Immunität ausländischer Zentralbanken im deutschen Recht, WM (Zeit-

⁷⁶ Cf. Fox (fn. 70), 224, with references to cases from the 1880s, drawing a distinction between acts of the state as holder of public authority (*ente pubblico*) or as subject of private law (*ente civile*).

⁷⁷ Cf. *SA des Chemins de Fer Liégeois-Luxembourgeois v. l'Etat Néerlandais* (1903), cited by Fox (fn. 70), 225.

⁷⁸ ATF 44 I 49 (*Austrian Ministry of Finance v. Dreyfus*); ATF 56 I 237 (*Hellenic Republic*); cf. generally Dominique Favre, L'immunité de juridiction et d'exécution dans la jurisprudence du Tribunal fédéral, in: Festschrift für Hans Peter Walter, Berne 2005, 471–485, 473; Michael E. Schneider/Joachim Knoll, Enforcement of Foreign Arbitral Awards against Sovereigns – Switzerland, in: R. Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns*, Huntington 2009, 311–353, 324–327.

⁷⁹ See generally Fox (fn. 70), 502, with further references; for French law Klaus Grabinski, Staatenimmunität im Erkenntnisverfahren – die französische Rechtsprechung im internationalen, insbesondere deutschen Vergleich, IPRax 1992, 55–58, 56.

⁸⁰ German Federal Constitutional Court, BVerfGE 16, 27 (*Empire of Iran*).

⁸¹ Cf. in particular, for US law, *Alfred Dunhill of London Inc. v. Republic of Cuba* 425 US 682, and, for English law, *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 WLR 1485, 1491 as well as *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356, 366–369.

for which immunity is claimed: the central issue is whether these acts and assets qualify as sovereign or commercial. As a result, there has been a tendency to also grant separate state entities immunity *ratione personae*. This is most visible in US law, under which such entities generally enjoy immunity, provided only that the majority of their shares is directly held by the state (Section 1603(b) FSIA),⁸² although the protection afforded to them is, *ratione materiae*, defined more narrowly than for the state itself (*cf.* § 1610(b)).⁸³ Under Swiss law, by contrast, separate entities are only entitled to immunity if they in fact exercise sovereign functions on behalf of the state.⁸⁴ This is also the position of English law (Section 14(2) and (3) of the English State Immunity Act) as well as of the UN Convention (Article 2.1(b)), while French courts have tended to grant immunity to state-controlled entities as soon as their acts serve public purposes.⁸⁵

Despite the broad recognition of the restrictive approach, some jurisdictions still continue adhering to an absolute concept of state immunity. This is, for example, the case for China⁸⁶ and Hong Kong,⁸⁷ as well as for Russia.⁸⁸ Additionally, court practice in jurisdictions following the restrictive doctrine varies significantly.⁸⁹ The Swiss practice in particular stands out in this regard, as court proceedings or execution

measures against foreign states are only considered admissible if the case, in addition to concerning commercial claims and assets, presents a sufficient connection to Switzerland (*Binnenbeziehung*).⁹⁰ According to the case law of the Swiss Federal Supreme Court, such a connection is even required if the foreign state waived its immunity.⁹¹ The underlying idea is that the foreign state must have created expectations justifying that proceedings or execution measures should take place in Switzerland. While this idea may have some merit at the jurisdictional level (*cf.* also Article 5 para. 3 of the Swiss Private International Law Act), it often has the effect of frustrating enforcement measures against foreign states in situations where such measures would in fact seem appropriate (*cf.* 3. below).

2. Immunity from Jurisdiction

At the jurisdictional level, courts following the restrictive doctrine in principle distinguish between commercial and sovereign matters by referring to the nature of the act (*cf.* Section 3(3)(c) SIA; Section 1603(d) FSIA).⁹² For this purpose, they typically examine whether a particular act could have been completed by a private person, or whether it necessarily involves the exercise of sovereign power.⁹³ If a state

⁸² *Cf. Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

⁸³ *Cf. Christopher F. Dugan/James E. Berger*, Enforcement against Assets of State-owned Companies, in: R. Doak Bishop (ed.), Enforcement of Arbitral Awards against Sovereigns, Huntington/NY 2009, 185–222, 188–189 and 198–200.

⁸⁴ *Cf.* ATF 104 Ia 367 (*Central Bank of Turkey v. Weston Compagnie de Finance et d'Investissement S.A.*); ATF 110 Ia 43, 45, para. 4b (*Banco de la Nación v. Banca Cattolica del Veneto*); ATF 111 Ia 62, para. 7b (*Sozialistische Libysche Arabische Volks-Jamahiriyah v. Actimon SA*); ATF 134 III 122, para. 5.2. (*Moscow Center for Automated Air Traffic Control*); ATF 135 III 608, para. 4.4 (*X Ltd. v. Banque Y.*).

⁸⁵ *Cf. Bismuth* (fn. 12), 582, with further references.

⁸⁶ *Cf. Dahai Qi*, State Immunity, China and its Shifting Position, Chinese Journal of International Law vol. 7 (2008), 307–337, 321–325.

⁸⁷ *Cf. Democratic Republic of Congo v. FG Hemisphere Associates LLC*, 637 F.3d 373 (2011).

⁸⁸ *Cf. Fox* (fn. 70), 230, with further references.

⁸⁹ *Cf. François Egli*, L'immunité des juridictions et des exécutions des États étrangers et de leurs agents dans la jurisprudence du Tribunal fédéral, in: Festschrift 100 Jahre SchKG, Zurich 1989, 201, 202; Jérôme Candrian, La Convention des Nations Unies sur les immunités juridictionnelles des états et de leurs biens: introduction à une lecture, SJ 2006 II, 95–138.

⁹⁰ *Cf.* ATF 44 I 49, 55 (*Austrian Ministry of Finance v. Dreyfus*); ATF 56 I 237, 49; ATF 82 I 82, 85, para. 7; ATF 86 I 23, 28, para. 2 (*République Arabe Unie v. Dame X*); ATF 104 Ia 367, para. 4 (*Central Bank of Turkey v. Weston Compagnie de Finance et d'Investissement S.A.*); ATF 106 Ia 142, para. 3b (*LIAMCO*); ATF 135 III 608, para. 4 (*X Ltd. v. Banque Y.*); ATF 120 II 400, para. 4a (*M. v. République Arabe d'Egypte*); ATF 124 III 382, 388 (*Banque Bruxelles Lambert (Suisse) SA v. République du Paraguay*).

⁹¹ *Cf.* ATF 106 Ia 142, para. 4; *cf.* critically *Schneider/Knoll* (fn. 78), 342–344.

⁹² Art. 2.2 UN Convention allows to also consider the purpose if this corresponds to the practice of the forum state, or if it has been agreed so among the parties.

⁹³ *Cf.* for German law, German Federal Constitutional Court, BVerfGE 16, 27 (*Empire of Iran*); *cf.*, for Swiss law, ATF 104 Ia 367, para. 2c (*Central Bank of Turkey v. Weston Compagnie de Finance et d'Investissement S.A.*); ATF 113 Ia 172, 175, para. 2 (*S. v. République Socialiste de Roumanie*); ATF 124 III 382, para. 4a (*Banque Bruxelles Lambert (Suisse) SA et huit consorts v. République du Paraguay*); ATF 134 III 122, para. 5.2.1 (*Moscow Center for Automated Air Traffic Control*); ATF 134 III 570, para. 2.2 (*République du Congo-Brazzaville v. X.*); Decision of the Swiss Federal Supreme Court, 10 January 2008,

enters into a relation with a foreign person or entity without using diplomatic channels,⁹⁴ or if it agrees to submit disputes to foreign courts or tribunals,⁹⁵ this typically creates an inference of a *iure gestionis* act. By contrast, it is generally not considered relevant whether the relevant act qualifies as a matter of private or public law under the applicable law.⁹⁶ Rather, as the US Supreme Court put it.⁹⁷

“the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in ‘trade and traffic or commerce’”.

Based on these criteria, it has been held that loans or bonds,⁹⁸ the conclusion of agreements for the lease or construction of embassy buildings,⁹⁹ the procurement of financing for public projects or hospitals,¹⁰⁰ as well as employment agreements with embassy personnel other than high-ranking staff¹⁰¹ all constitute commercial transactions. Conversely, takings of property,¹⁰² measures taken in view of the preser-

vation of historical or archaeological objects,¹⁰³ or regulations restricting the use of foreign currencies¹⁰⁴ have been qualified as sovereign acts.

Although courts generally focus on the nature of the act and not on the underlying objectives, they sometimes deviate from this principle by considering the broader context of a transaction. For example, supply contracts made by states have occasionally been qualified as sovereign on the basis that they were entered into for public interest purposes.¹⁰⁵ More broadly still, it has sometimes been considered that states may be immune from claims for breaches of contract which are the result of political choices, for example of government measures taken in situations of economic crisis.¹⁰⁶ While these are borderline cases, they show that the characterisation of a particular transaction may not only vary between jurisdictions, but also evolve with the passing of time, depending on which particular moment is considered relevant.

3. Immunity from Execution

3.1 General Restraint with Regard to Execution Measures

As a matter of principle, the restrictive doctrine of immunity not only allows to bring suit against foreign states in matters relating to commercial transactions, but also to take execution measures against their commercial assets (cf. Article 92(1) of the Swiss Debt Enforcement Act; Article 19(c) UN Convention; Section 14(2) and (4) of the English SIA).¹⁰⁷ Nev-

Corp. v. Iraqi Airways Co. (No. 2) (2002) AC 883, holding that the initial seizure of Kuwaiti aircraft by Iraqi forces but not their subsequent incorporation into the Iraqi Airways Corporation by way of Iraqi legislation amounted to a sovereign act.

⁹⁴ Cf. ATF 111 Ia 52, para. 4a (*Italy v. X*), concerning historic tombstones; ATF 124 III 382, para. 4a (*Banque Bruxelles Lambert (Suisse) SA et huit consorts v. République du Paraguay*).

⁹⁵ *Republic of Argentina v. Weltover*, 504 US 607, 614 (1992).

⁹⁶ Cour de Cassation, 2 May 1990, Bull. civ. I, n. 9, where the national Iranian gas company was considered immune with regard to procurement contracts, on the basis that they had been concluded for public interest purposes; cf. also *Grabinski* (fn. 79), 55–58.

⁹⁷ Cf. *Borri Loca v. Republic of Argentina*, Cassazione civile (sez. un.), decision no. 11225 of 27 May 2005; but see *Republic of Argentina v. Weltover*, 504 US 607 (1992), where such reasoning was rejected.

⁹⁸ *August Reinisch*, European Court Practice Concerning State Immunity from Enforcement Measures, European

5A_618/2007 para. 1; for US law, *Republic of Argentina v. Weltover*, 504 US 607 (1992).

⁹⁴ Cf. ATF 86 I 23, 30, para. 2.

⁹⁵ Cf. ATF 124 III 382, 388, 390, para. 4a and 4b.

⁹⁶ ATF 124 II 382, 388, para. 4a (*Banque Bruxelles Lambert (Suisse) SA et huit consorts v. République du Paraguay*); Egli (fn. 89), 206.

⁹⁷ *Republic of Argentina v. Weltover*, 504 US 607, 614 (1992).

⁹⁸ Cf., for Swiss law, ATF 104 Ia 367, 374 (*Central Bank of Turkey v. Weston Compagnie de Finances et d'Investissement SA*); cf., for English law, *Trendix Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356, 369; *I congreso del partido* [1983] AC 244, 262; for US law, *Republic of Argentina v. Weltover*, 504 US 607 (1992); *Najarro De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, para. 25.

⁹⁹ ATF 86 I 23, para. 3 (*République Arabe Unie v. Dame X*); ATF 112 Ia 148, para. 3b (*Königreich Spanien v. Firma X. S.A.*); ATF 124 III 382, para. 4b (*Banque Bruxelles Lambert (Suisse) SA et huit consorts v. République du Paraguay*); German Federal Constitutional Court, BVerfGE 16, 27 (*Empire of Iran*).

¹⁰⁰ Cf. *Banque Camerounaise de Développement v. Société des Etablissements Rolber*, Court of Cassation, 1st ch. civ., 18 November 1986, RCDIP 76 (1987) 773.

¹⁰¹ ATF 110 II 255, para. 3–5 (*S. v. India*); ATF 120 II 400, para. 4a (*M. v. République Arabe d'Egypte*); ATF 120 II 408, para. 5 (*R. v. République d'Irak*); but see ATF 134 III 570, para. 2.2 (*République du Congo-Brazzaville v. X*), where immunity from jurisdiction was granted to a foreign state in relation to claims by a former legal consultant and translator.

¹⁰² ATF 113 Ia 172, 176, para. 3 (*S. v. République Socialiste De Roumanie*); cf. also *Kuwait Airways Corp. v. Iraqi Airways Co.* (1995) 3 All ER 694 HL and *Kuwait Airways*

ertheless, immunity from execution is generally defined more broadly than immunity from jurisdiction, as execution measures tend to be more intrusive than the mere commencement of litigation and as they are therefore also more likely to have negative repercussions on diplomatic relations between the states involved.¹⁰⁸ Thus, waivers given with respect to court or arbitral proceedings do not automatically extend to the execution stage. Even if a state previously agreed to submit to arbitration, it is generally still able to claim immunity from execution.¹⁰⁹ Furthermore, in a number of jurisdictions and also under Article 18 of the UN Convention, no execution measures are available before a judgment has been obtained. The most important limitation results, however, from the fact that the relevant assets must be used for non-sovereign purposes – in other words, the commercial nature of the underlying claim is not sufficient to overcome immunity pleas at the enforcement stage.¹¹⁰

In analyzing the nature of the assets, the focus is on their actual or intended use: they are immune if they serve sovereign, rather than commercial purposes. Again, there are significant differences as to how this principle is implemented by national courts, in particular also with regard to evidentiary requirements. Under Swiss law, the burden of proof is placed on the state.¹¹¹ Consequently, it is for the state to es-

tablish the sovereign character of the assets against which execution measures are directed. The threshold in this regard is rather high, as the assets must have been specifically dedicated to sovereign purposes in a manner that is recognizable to outsiders. Hence, instead of simply claiming that cash deposits and securities are intended for public purposes, the state must actually establish that they were designated as sovereign assets and kept separate from the states' other property.¹¹²

This narrow understanding of sovereign purposes is, however, significantly tempered by the additional requirement of a sufficient connection to Switzerland (*Binnenbeziehung*).¹¹³ According to the practice of the Swiss Federal Supreme Court, such a connection must exist regardless of the commercial nature of the assets against which execution measures are directed, and even if the foreign state previously waived its immunity.¹¹⁴ It is not *per se* sufficient in this regard that an award concerning the claim was rendered by an arbitral tribunal in Switzerland,¹¹⁵ or that the relevant assets are located in Switzerland.¹¹⁶ By contrast, the necessary connection may result from the fact that the underlying contract was made, or was intended to be performed in Switzerland, or that a tort was com-

Journal of International Law vol. 17 (2006), 803–836, 823.

¹⁰⁸ Fox (fn. 70), 600–601; *Reinisch* (fn. 107), 803–836, 804; *Candrian* (fn. 89), 102; Botschaft über die Genehmigung und die Umsetzung des UNO-Übereinkommens über die Immunität der Staaten und ihres Vermögens von der Gerichtsbarkeit, 25 February 2009, BBl 2009 1721.

¹⁰⁹ Cf. ATF 111 Ia 62, para. 7 (*Sozialistische Libysche Arabische Volks-Jamahiriya v. Actimon SA*); Cour d'Appel, Paris, 10 August 2000, *Russian Federation v. NOGA*, Yearbook Comm. Arb'n XXVI (2001), 273. But see Cour de Cassation, 6 July 2000, *Creighton Ltd. v. Government of Qatar*, Yearbook Comm. Arb'n XXV (2000), 458.

¹¹⁰ This is in particular also true for Switzerland, although the Swiss Federal Supreme Court generally claims to analyze immunity from adjudication and immunity from execution according to the same rules, cf. Article 92(11) of the Swiss Debt Enforcement and Bankruptcy Act; ATF 82 I 75 (*Kingdom of Greece v. Julius Bär*); ATF 111 Ia 52 (*Italy v. S.*); ATF 112 Ia 148, para. 3b (*Kingdom of Spain*); ATF 124 III 382, para. 4a (*Banque Bruxelles Lambert [Suisse] SA v. République du Paraguay*); Egli (fn. 89), 205; *Candrian* (fn. 89), 103; *Reinisch* (fn. 107), 803–836, 809–810.

¹¹¹ ATF 108 III 107, para. 1 (*Honorarkonsul der Republik Tschad*); ATF 111 Ia 62, para. 7b (*Sozialistische Libysche*

Arabische Volks-Jamahiriya v. Actimon SA); ATF 135 III 608, para. 4 (*X Ltd. v. Banque Y.*).

¹¹² ATF 86 I 23, para. 5 (*République Arabe Unie v. Dame X*); ATF 111 Ia 62, para. 7b (*Sozialistische Libysche Arabische Volks-Jamahiriya v. Actimon SA*); ATF 134 III 122, para. 5.2.3 (*Moscow Center for Automated Air Traffic Control*).

¹¹³ Cf. ATF 44 I 49, 55 (*Austrian Ministry of Finance v. Dreyfus*); ATF 56 I 237, 49; ATF 82 I 82, 85, para. 7; ATF 86 I 23, 28, para. 2 (*République Arabe Unie v. Dame X*); ATF 104 Ia 367, para. 4 (*Central Bank of Turkey v. Weston Compagnie de Finance et d'Investissement S.A.*); ATF 106 Ia 142, para. 3b; ATF 135 III 608, para. 4 (*X Ltd. v. Banque Y.*); ATF 120 II 400, para. 4a (*M. v. République Arabe d'Egypte*); ATF 124 III 382, 388 (*Banque Bruxelles Lambert (Suisse) SA v. République du Paraguay*).

¹¹⁴ Cf. ATF 106 Ia 142, para. 4 (*LIAMCO*).

¹¹⁵ Cf. ATF 106 Ia 142, para. 5 (*LIAMCO*), concerning compensation claims which were brought following the expropriation of concession rights and production facilities in Libya. The narrow approach adopted in the LIAMCO decision may have been influenced by the fact that the seat of the arbitration had in this case been chosen by the arbitrator and not by the parties; cf. *Eugen Bucher*, Vollstreckbarkeit schweizerischer Schiedssprüche und Staatenimmunität im Vollstreckungsverfahren, IPRax 1982, 161–164, 164.

¹¹⁶ ATF 106 Ia 142, para. 5 (*LIAMCO*).

mitted in Switzerland.¹¹⁷ As a result of this additional hurdle, attempts by state creditors seeking to execute claims against assets held in Swiss banks often fail in spite of Switzerland's liberal approach to the distinction between sovereign and commercial property.

While the requirement of a close connection as a general prerequisite for court proceedings and execution measures is peculiar to Switzerland,¹¹⁸ other jurisdictions limit the possibility of enforcing claims against foreign states through other tools. In fact, outside Switzerland, the burden of proof concerning the nature of assets is typically borne by the creditor, who has to establish that they serve commercial purposes (*cf.* Article 19 (c) UN Convention).¹¹⁹ Thus, French courts have taken the position that all state-owned assets owned are presumed to serve public purposes, such that execution measures may not proceed where assets used for sovereign activities cannot be distinguished from other assets.¹²⁰ To overcome this presumption, the creditor must show that the relevant assets were allocated, or are related, to commercial activities.¹²¹ Similarly, it has been held by German¹²²

and English¹²³ courts that embassy bank accounts are as a whole immune from execution, even if part of the funds may be used to satisfy liabilities arising from commercial transactions.¹²⁴ In relation to state-owned entities, a more execution-friendly approach tends to be taken, for example, as funds held by such entities are, according to German court practice, not deemed sovereign simply because they are intended to be transferred to the government or to the country's central bank.¹²⁵

3.2 Special Protection for Central Bank Assets

Apart from generally taking a cautious approach to execution measures against states, some countries also grant special protections to certain types of state property considered particularly vulnerable. Such rules exist in particular for central bank assets. Central bank reserves allow states to implement their monetary policies, especially in times of crisis, and typically part of them are held abroad in the form of bank deposits, securities or derivative instruments.¹²⁶ There is considerable competition between financial institutions to attract such deposits, and countries with strong financial centers have been particularly inclined to afford special protections to foreign central bank assets.¹²⁷ Rules to this effect have for decades existed in English (Section 14(4) SIA) and US (§ 1611(b)(1) FSIA) law and have more recently been introduced in French (Article L. 153-1 Code monétaire et financier) and Chinese law.¹²⁸ This tendency

¹¹⁷ *Cf.* ATF 86 I 23, para. 4 (*République Arabe Unie v. Dame X*); ATF 104 Ia 376 (*Central Bank of Turkey v. Weston Compagnie de Finance et d'Investissement S.A.*); ATF 134 III 122, para. 5.2.2 (*Moscow Center for Automated Air Traffic Control*); ATF 135 III 608, para. 4.5 (*X Ltd. v. Banque Y*), noting that, if the debtor can choose where to make payments, payment to a Swiss bank account will not be considered sufficient.

¹¹⁸ Under Section 1605(a)(2) FSIA, a connection to the forum state is required under US law in relation to the commercial exception, however only for the purposes of establishing jurisdiction over a foreign state.

¹¹⁹ *Fox* (fn. 70), 628.

¹²⁰ *Eric Teynier*, Can a Party Benefiting from an Award Rendered Against a State Enforce the Award Against an Instrumentality of Such State: French Law, in: Emmanuel Gaillard/Jennifer Youan (eds.), *State Entities in International Arbitration*, Huntington 2008, 103–130, 117, with further references.

¹²¹ *Cf.* Cour de Cassation, ch. civ. I, 14 March 1984, *Société Eurodif v. République islamique d'Iran*, 1984 *Revue critique de droit international privé* 644. If the assets belong to the state, rather than to a state entity, the creditor must in addition establish that they are connected to the underlying claim, *cf.* Cour de Cassation, ch. civ. I, 1 October 1985, *Société Sonatrach v. Migeon*, 77 *ILR* 525. See generally *Sarah François-Poncet/Brenda Horrigan/Lara Karam*, Enforcement of Arbitral Awards against Sovereign States or State Entities – France, in: R. Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns*, Huntington 2009, 355–379, 361, with further references.

¹²² German Federal Constitutional Court, BVerfGE 46, 342 (*The Philippine Embassy*).

¹²³ *Alcom Ltd. v. Republic of Colombia and Others* [1984] AC 580 (HL).

¹²⁴ The protection of diplomatic property is also expressly provided for in Article 22(3) of the Vienna Convention on Diplomatic Relations of 1961 as well as in Article 21(1)(a) of the UN Convention, *cf.* *Fox* (fn. 70), 637–643.

¹²⁵ German Constitutional Court, BVerfGE 64, 1 (*National Iranian Oil Company*).

¹²⁶ *Cf. William Blair*, The Legal Status of Central Bank Investments under English Law, *Cambridge Law Journal* 57 (1998), 374–390, 374.

¹²⁷ *Fox* (fn. 70), 469–471; *Blair* (fn. 126), 378; *Lijiang Zhu*, State Immunity from Measures of Constraint for the Property of Foreign Central Banks: The Chinese Perspective, *Chinese Journal of International Law* Vol. 6 (2007) 6 (1), 67–81. For the Swiss position, *cf.* *Botschaft über die Genehmigung und die Umsetzung des UNO-Übereinkommens über die Immunität der Staaten und ihres Vermögens von der Gerichtsbarkeit* (fn. 108), 1747.

¹²⁸ Chinese Immunity Law Concerning the Property of Foreign Central Banks, available at <http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384123.htm>.

is also reflected in Article 21 of the UN Convention, which provides that central bank assets are generally deemed to be used for non-commercial purposes.

By contrast, under Swiss¹²⁹ and German law,¹³⁰ central banks and other monetary authorities are, with the exception of the Bank for International Settlement in Basle and the European Central Bank,¹³¹ generally treated in the same way as other state-controlled entities. Consequently, they are only entitled to immunity if and to the extent that they exercise sovereign functions. Foreign central banks, therefore, do not enjoy immunity when engaging in activities which could also be carried out by a commercial bank, such as the issuance of letters of credit,¹³² or the acceptance of time deposits,¹³³ and their assets are only protected from execution if they were set aside for sovereign purposes.¹³⁴ The Swiss position is, however, bound to change as a result of Switzerland's ratification of the UN Convention in 2010. Once the Convention enters into force, which will be the case following its ratification by thirty countries, the protection afforded to foreign central bank assets will be significantly extended in departure from the existing case law.

¹²⁹ Article 92(11) of the Swiss Debt Enforcement and Bankruptcy Act does provide for immunity of central bank assets, but only if they are dedicated to sovereign purposes, cf. ATF 111 Ia 62, para. 7b (*Sozialistische Libysche Arabische Volks-Jamahiriyah v. Actimon SA*); ATF 134 III 122 para. 5.2 (*Moscow Center for Automated Air Traffic Control*).

¹³⁰ Cf. *Krauskopf/Steven* (fn. 75), 270, with further references.

¹³¹ Both institutions enjoy immunity under the respective Headquarters Agreements with Switzerland and Germany, for the Bank of International Settlement cf. also ATF 136 III 379, para. 4.

¹³² Cf. ATF 104 Ia 367, para. 4 (*Central Bank of Turkey v. Weston Compagnie de Finance et d'Investissement S.A.*), where it was held that a loan granted to a foreign company does not amount to a sovereign transaction simply because the country's central bank has to assist with the transfer of funds under the country's currency.

¹³³ Cf. ATF 104 Ia 367 (*Central Bank of Turkey v. Weston Compagnie de Finance et d'Investissement S.A.*).

¹³⁴ Cf. 5A_92/2008, Swiss Federal Supreme Court (*Central Bank of Syria v. Koncar Elektroindustrija d.d.*, Decision of 25 June 2008, para. 3). The German Federal Constitutional Court indicated in *obiter dicta* that funds held by a central bank for monetary purposes should be regarded as sovereign funds, cf. German Federal Constitutional Court, BVerfGE 64, 1 (*National Iranian Oil Company*) (fn. 43), para. 2.f); cf. also *Krauskopf/Steven* (fn. 75), 271.

IV. State Immunity for Sovereign Wealth Funds?

1. Immunity from Jurisdiction

At the jurisdictional stage, immunity defenses raised by SWFs are likely to fail in countries following the restrictive doctrine of immunity.

Firstly, for SWFs organized as separate entities, it may be questionable whether they are at all entitled to immunity pleas, *ratione personae*. Under the standards of the UN Convention, but also under Swiss domestic law, this would require a showing that sovereign functions have been conferred to them. Considering that SWFs engage in commercial transactions driven by financial considerations, and that their activities are akin to those of other investors, it would appear difficult to overcome this first hurdle.

Where the claims brought have their basis in a contract, they will, furthermore, in many cases fall under a waiver of immunity, either because such a waiver was expressly included, or because an arbitration clause was agreed upon. Where no waiver exists, or where its enforceability is in doubt, it should nevertheless be possible in most jurisdictions to commence proceedings under the widely accepted commercial exception from immunity. That the activities of SWFs benefit the state controlling them, or that their profits may ultimately be used for sovereign purposes should not matter in this regard, given that their activities are of commercial nature and SWFs also regularly describe themselves as commercial actors pursuing financial objectives.

2. Immunity from Execution

While SWFs should generally not be able to claim immunity from jurisdiction, they may in certain circumstances be able to enjoy immunity from execution, and this even in countries following the restrictive doctrine of immunity.

Firstly, SWFs may benefit from statutory provisions affording special protection to central bank funds. SWFs as such can clearly not be assimilated to central banks, as their function is not to guarantee their country's monetary and financial system.¹³⁵ Unlike traditional monetary reserves, their funds are

¹³⁵ Cf. *Blair* (fn. 126), 375.

typically excess reserves invested in less liquid asset categories in view of long-term returns.¹³⁶ Nevertheless, their country's central bank may be involved in the management of their assets, as illustrated by the English case *AIG v. Kazakhstan*. In this case, enforcement measures were directed against assets of the National Fund of Kazakhstan held by banks in the United Kingdom under a global custody agreement. This agreement had not been made by the National Fund itself, but rather by the National Bank of Kazakhstan, who was in charge of managing the Fund's assets. Although the assets remained the property of the National Fund, the English judge concluded that they constituted central bank property for the purposes of Section 14(4) SIA, arguing that:¹³⁷

"Property of a state's central bank or other monetary authority [...] mean[s] any asset in which the central bank has some kind of "property" interest [...] irrespective of the capacity in which the central bank holds it, or the purpose for which the property is held".

Moving to a second argument, the judge further considered that, even if the central bank rule was not to apply, the assets were in any event immune from execution because they served sovereign purposes. As he put it, "management of a state's economy and revenue must constitute a sovereign activity", even if the transactions made are of a purely commercial nature.

These conclusions contrast with the ones reached by the Swiss Federal Supreme Court in an earlier case involving assets of the Kuwait Investment Authority (KIA) that had been attached in Switzerland.¹³⁸ In this case, immunity pleas were rejected, primarily because KIA was legally separate from the state of Kuwait and had not been shown to exercise sovereign activities. Additionally, it was pointed out that the relevant assets had not been clearly earmarked for sovereign purposes. This is in line with the strict evidentiary standards that Swiss courts generally apply with regard to allegedly sovereign assets. However, the decision also suggests that, if the relevant bank accounts had been clearly designated as "savings for future generations", they might have been qualified

as sovereign and hence have been granted immunity from execution. Had KIA been considered to enjoy immunity *ratione personae*, execution attempts would probably also have failed because the only nexus to Switzerland seems to have been the location of the assets, which would not have been sufficient pursuant to the case law of the Swiss Federal Supreme Court (*cf.* III.1. above).

V. Conclusion

Considering the nature of their operations, it would appear normal that SWFs may be held accountable for their own activities, including, if necessary, through execution measures.¹³⁹ To the extent that SWFs are organized as legal separate entities, they should, furthermore, not be held liable for obligations of the state controlling them, unless there are concrete indications of fraud or abuse. In practice, the second proposition is far more likely to be upheld than the first. The piercing of the corporate veil in relation to foreign states is generally seen as an exceptional measure, which is only rarely allowed. By contrast, the enforcement of commercial claims against states and state-owned entities is sometimes handled with greater restraint than would be required under public international law principles, including in jurisdictions such as Switzerland endorsing the restrictive doctrine of immunity.

Concretely, there may be several obstacles to enforcing claims against SWFs: instead of analyzing what their assets are in fact used for, courts may accept that such assets are of sovereign nature, simply because they are intended to preserve and increase the wealth of the foreign country. In some jurisdictions, assets held by SWFs may also be granted the same immunity privileges as classical central bank funds, even though they have deliberately been set aside from monetary reserves. Finally, in Switzerland, execution measures may fail because the requirement of a close connection is not met, unless care was taken from the outset to create such a connection, for example by virtue of a place of performance in Switzerland.

It is obvious that these hurdles may significantly obstruct private parties wishing to enforce claims

¹³⁶ *Rozanov* (fn. 23), 252; *Swee-Hock/Low* (fn. 6), 4.

¹³⁷ *Cf. AIG Capital Partners Inc. and another v. Republic of Kazakhstan* [2005] EWHC Comm. 2239, 20 October 2005.

¹³⁸ Swiss Federal Supreme Court, 24 January 1994, RSDIE 1995, 593, *Kuwait v. X. S.A.*

¹³⁹ *Barbieri* (fn. 29), 29, 18; *Bismuth* (fn. 12), 584.

against SWFs. At a time when Europe is increasingly counting on sovereign investors from Asia and the Middle East to help it overcome the current debt crisis, some countries might be tempted to even go one step further, by specifically granting SWFs immunity in order to attract investments. However, considering the interests involved, but also the framework within which enforcement actions occur, such a move would neither be justified, nor even feasible in my view. As illustrated by the cases against the sovereign wealth funds of Kazakhstan and Kuwait, the applicable immunity laws are determined by the location of the relevant assets, not by the country where the investment was made: in the two cases, assets were held by banks in London and Switzerland, while the underlying claims related to investments in Kazakhstan and Spain, respectively.

While recipient countries may be able to attract sovereign investments by removing requirements for prior government approvals (*cf.* I.1. above), changes

in immunity laws are hardly likely to matter in this regard. Furthermore, immunity from execution may, apart from frustrating the legitimate expectations of commercial partners and third parties, also turn out to be a double-edged sword for SWFs themselves. If sovereign wealth funds can successfully raise immunity defenses, their partners in subsequent transactions will most likely insist on comprehensive waivers or perhaps even require that certain commercial properties be set aside in view of potential execution measures. Immunity pleas by individual SWFs may, beyond the concrete case, also affect the general perception of such entities and suggest that they are, after all, different from other market participants. In any event, commercial parties dealing with SWFs are well advised to clarify from early on how their partners are organized, where and in what form relevant assets are held, and, of course, whether their partners are prepared to provide a comprehensive waiver from immunity.