Contents

Foreword    Franco Bassanini    viii

PART I   SWFS: NEW ACTORS IN THE INTERNATIONAL SCENE. A DEFINITION AND CLASSIFICATION

1 Sovereign entities investing abroad as private entities: limits of the conventional framework  
   1. State investors between public and private, national and international law 3
2. Specific issues raised by SWFs 5
   2.1 The recent and quick growth of the phenomenon: a review of causes and consequences 6
   2.2 Issues brought by recent developments 10
3. Rationale and objectives of this work 14

2 SWFs: definition and classification 17
   1. The definitions in literature 17
      1.1 Functional definitions 18
      1.2 The differences between SOEs and SWFs 21
      1.3 The ‘five pillars’ definition 23
      1.4 The definitions misconception (definition by classification) 24
   2. The definition in the International Organisations’ practice 26
      2.1 The IMF and OECD definitions 26
      2.2 The limits of IMF definition and classification 29
      2.3 The consequences of the lack of a shared notion 30
   3. The definition and classification suggested 31
      3.1 Our proposed definition 31
      3.2 The resulting classification 32

PART II   SWFS’ NATIONAL AND INTERNATIONAL REGULATION

3 Sovereign wealth funds’ regulation 39
   1. The proposals found in literature 40
1.1 The ‘book of rules’ model 41
1.2 The ‘double constraint’ theory 43
1.3 The temporary suspension of voting rights and other related measures 44

2. The IMF guidelines (‘Santiago GAPPs’) 46
   2.1 GAPP assumptions and their limits 46
   2.2 The classification by regulatory/institutional framework and by investment activity 48
   2.3 The limits of Santiago GAPPs’ classification 50

3. A proposal to transform conduct codes into measures binding on host and home states 52
   3.1 At domestic level: host states’ restrictive measures applicable only to SWFs not complying with GAPPs 53
   3.2 At international level: the guidelines as a benchmark in bilateral investment treaties 54

4 Host states’ laws and SWFs 55
   1. The governing law: obligations of host states 55
      1.1 In WTO treaties 56
      1.2 In OECD regulations 59
      1.3 In EU laws 60
   2. Exemptions from host states’ obligations 61
      2.1 In WTO treaties 61
      2.2 In OECD regulations 62
      2.3 In EU law and practice 64
      2.4 Exemptions applied by host states: preventive and repressive measures 68
   3. Little efficacy of the measures adopted at multilateral and national level 76
      3.1 Soft law and international protection of SWFs investment 76
      3.2 Host state measures, law and practice 78
   4. The challenging task SWFs must carry out, and some proposals to simplify it 83

PART III SWFS’ PROTECTION IN BILATERAL RELATIONS 89

5 SWFs and state immunity 89
   1. In search of a direct relationship 89
   2. ‘Passive’ and ‘active’ immunity: host state and SWF actions relevant for applying state immunity 91
      2.1 Host state actions that might be challenged by an SWF under the profile of state immunity 91
Contents

2.2 SWF actions and assets that might be protected by state immunity \hspace{1cm} 92

3. Immunity from jurisdiction and immunity from execution \hspace{1cm} 92
  3.1 Immunity from jurisdiction \hspace{1cm} 93
  3.2 Immunity from execution \hspace{1cm} 96

4. Application of state immunity to SWFs \hspace{1cm} 99
  4.1 Attribution to a state of the activities and ownership of SWF assets for immunity purposes \hspace{1cm} 99
  4.2 The ‘tax exemption’ factor \hspace{1cm} 106
  4.3 SWFs, state immunity and competition law: the need to overcome a misunderstanding \hspace{1cm} 109
  4.4 SWF models and immunity: a five-step analysis \hspace{1cm} 111
  4.5 Conclusions \hspace{1cm} 114

6 SWFs and bilateral investment treaties \hspace{1cm} 116
  1. An undiscovered relationship \hspace{1cm} 116
  2. Bilateral investment treaties and their relevance for SWF investments \hspace{1cm} 124
    2.1 Theoretical analysis \hspace{1cm} 124
    2.2 SWFs’ home states’ practice \hspace{1cm} 126
  3. The main BIT models. Assessment of their efficacy with respect to SWF investments \hspace{1cm} 132
    3.1 Existing models \hspace{1cm} 133
    3.2 Renegotiation under way \hspace{1cm} 137
    3.3 The efficacy of existing models in protecting SWF investments \hspace{1cm} 142
  4. Final remarks \hspace{1cm} 149

7 Conclusions \hspace{1cm} 151
  1. Conclusions \hspace{1cm} 151

Bibliography \hspace{1cm} 157
Index \hspace{1cm} 169