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# Introduction

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The research on the role that sovereign investments can play in a time of crisis is still unsatisfactory. The focus continues to be on the active side (investment flows and trends), grounded in economic scenarios and objectives. Conversely, investigations from a legal standpoint are still few and not focused on the ‘passive side’, namely the host States’ concerns about sovereign investments’ goals and tools. Hence, most of the many relevant drivers that affect current sovereign investments, be they foreign direct investment (FDI) or portfolio investments, remain unexplained.

This Research Handbook aims at illustrating the state of the art of the legal investigation on sovereign investments, asking contributors to fill the gaps, when possible and necessary. The book structure is original. The editor sent not only topics and themes to the contributors, but also detailed guidelines explaining the goal of the research that each contributor was asked to conduct.

The intention of this Introduction is to outline the whole original framework, so that readers may understand the path followed in order for this collection of contributions to have one least common denominator and a *fil rouge* connecting all chapters. Each reader will judge the outcome and assess whether and to what extent this book has fulfilled its purpose.

In Chapter 1 the authors were asked to give a general overview of the sovereign investment scenario and make a comparative analysis of sovereign wealth funds (SWFs), focusing on their size and growth, their investments (FDI or portfolio) and analysing the macroeconomic dynamics as well.

In Chapter 2 the author has illustrated and briefly commented on the definitions elaborated by scholars and posited a new general one, also clarifying whether and to what extent public pension funds can be considered as SWFs and what effects the definition posited may have on the implementation of codes of conduct, or national investment rules, and on international investment treaties. The author has also listed and commented on classifications elaborated by scholars and posited a new one, both explaining the reasons why classifying SWFs is so critical, and

why and how SWFs differ from State-owned enterprises (SOEs), investigating the consequences of the classification proposed as well.

A definition and classification of SWF are crucial, for according to the growing discussion on competitive neutrality, any issues under international investment law – some of which are investigated in the following chapters – would presumably apply to both SWFs and SOEs. Both definitions and classifications have taken due account of the concerns raised by the recent growth of SWFs.

The author has also investigated SWF structure, functions and governance from a legal perspective. The governance design of an SWF is relevant for SWF scoring purposes, for setting SWF standards and best practices, for applying host-State security measures (subject to certain conditions) and for assessing whether sovereign immunity or Bilateral Investment Treaties (BITs) clauses apply. But, first of all, the governance structure is relevant for classifying SWFs. Classification is relevant, in turn, for foreseeing and understanding their behaviour, assessing what may reasonably be expected from them in terms of transparency, accountability and investment strategies, also considering the SWFs' different regional practices, political or religious constraints, relations with their home State, and purposes (intergenerational equity and/or ethical objectives or stabilisation purposes etc.). Many scholars have focused on specific aspects of governance design (Clark, Dixon, Monk, Gelpren, Baker, Truman, Gilson, Milhaupt, Bassan); in this chapter the author has deepened the research on the legal profiles, in order to better understand how SWFs operate.

In Chapter 3 the author has illustrated SWF characteristics in different areas and regions. The structure and governance of many SWFs are not clear yet; hence, even a simple horizontal reconstruction is highly valuable. Furthermore, a study on this topic from a comparative law perspective has not been made yet, and it appears to be extremely useful for understanding differences – in structure, accountability, transparency and governance, but also in purposes – based on different legal traditions. Many new SWFs are joining the investment field (Mongolia, Angola, Nigeria and Ghana in recent years), and are following international best practices and benchmarks, but also regional models. A study on such regional models – whether they really exist, what they consist of, and how they can be compared with international benchmarks – is becoming urgent also from this perspective. Finally, a comparative analysis on the way States use SWFs or SOEs is highly valuable in order to better understand the States' investment practices.

In Chapter 4 the author was asked to investigate the contents and efficacy of the Santiago Generally Accepted Principles and Practices

(GAPPs) in terms of impact on SWFs and State behaviour. The Santiago GAPPs were commented on by scholars upon adoption (2008). In 2011 the International Working Group published a report on their implementation by the SWFs. It is interesting to verify, after five years, the GAPPs' efficacy and assess their influence on SWF codes of conduct and, more generally, on soft law.

In Chapter 5 the authors have investigated whether and to what extent UN, WTO and OECD rules may apply to SWFs and host States respectively, and how OECD investment guidelines and codes of conduct may affect – and have actively influenced – State practices with respect to SWF investments.

In July 2007 the United States Congress passed the Foreign Investment and National Security Act (FINSAs) to supplement US regulations governing foreign investments in the United States. In Chapter 6 the author was asked to assess, more than five years after implementation, the effects of such regulation on SWF investments, focusing on two main directions. First, the author was asked to verify the competitive neutrality paradigm, drawing attention to possible differences in the implementation of FINSAs rules for SWFs or for SOEs. Second, the author has assessed whether FINSAs rules and their implementation actually meet the need to protect the United States from the concerns raised by the growth of SWFs.

The European Commission and the European Council did not consider providing for new specific rules binding Member States, deeming the existing rules governing Member State obligations adequate – i.e. waivers justified by public order or public security reasons adopted by Member States within the framework of the general and specific safeguard clauses provided for by the treaties. In Chapter 7 the author has investigated what role may be played by the EU rules on free circulation of capital and freedom of establishment; whether and to what extent the new EU competence on FDIs provided for by the Lisbon Treaty (Art. 207 TFEU) may affect both the EC perspective and judgments of the European Court of Justice (ECJ); how national rules on golden shares and golden power may affect (or may be affected by) the new balance of competences and what consequences for foreign (and sovereign) investments may arise in this new scenario. The author was also asked to assess whether the implementation of Art. 207 TFEU may have different effects on SWFs and SOEs.

Some States exempt SWFs from paying taxes, according to a common practice and generally accepted principle that one government does not tax another. Scholars usually focus on US law and regulations, which provide for a general tax exemption, but State practices range widely,

from exemptions applied to both commercial and non-commercial transactions, to both portfolio investments and FDI (UK), to exemptions limited to non-commercial investments (Canada) or to passive, portfolio investments (Australia); again, from a dual system, where exemption is granted by law to portfolio investments, and by the Ministry of Finance to FDI (France), to a general exclusion of exemptions (Germany, Switzerland, Poland, Norway). A comparative analysis of both treatment and grounds for tax exemption applying to SWFs has been carried out in Chapter 8.

At first sight, SWFs cannot enjoy State immunity, for through an SWF States invest as a private entity, and should therefore be treated as such. Moreover, most SWF investment tools provide for immunity clauses. In spite of that, the author of Chapter 9 has investigated whether State immunity from jurisdiction or from execution may apply to SWFs, explaining the relevant circumstances in those cases where such immunities apply. The author has also tried to assess whether SWF structure and governance (i.e., when an SWF is operated by a central bank), investment purposes (i.e. economic and social developments, savings for future generations), financing practice or investment nature (not commercial) may be grounds for immunity claims.

In Chapter 10 the authors were asked to investigate the issue of SWF investment protection through BITs, in order to assess: a possible relationship between SWFs and BITs; BIT relevance for SWF investments; whether and to what extent BITs are taken into consideration by SWFs willing to invest in a certain country; whether BITs are adequate and effective in protecting SWF investments, which are portfolio investments more often than FDIs; whether definitions of investment, investor and indirect expropriation may affect SWF investments, and how SWFs – due to their ‘sovereign’ nature – may in turn steer their home State governments towards the negotiation of BITs with certain countries, even influencing the text of the agreement. The renegotiation of many BITs under way and the increase of new BITs negotiated by SWF home States may shed new light on this phenomenon.

In Chapter 11 the author has investigated the dual contradiction existing between the maximisation of capital remuneration and the protection of human rights (financial vs. social investment criteria) on one hand, and between the investors’ more and more socially responsible behaviour and the minimum deterrent effect of the violation of human rights due to globalisation (and SWF growth) on the other hand.

The author has also delved into the question of whether SWFs, as government-owned entities, should be held to the highest standards of due diligence in terms of human rights. Should they apply the same

human rights standards as private financial institutions, or the same (higher) standards as governments? In the second instance, do these standards affect the SWFs' ability to compete in the market according to private sector standards? Is there a difference between the human rights standards applied to SWFs and to SOEs?

The author has finally analysed how the concept of complicity can apply and whether and how legal standards for determining complicity and Generally Accepted Principles for due diligence in human rights protection (i.e. the proposed UN Protect-Respect Remedy Principles) apply. Are SWFs obliged to avoid becoming complicit in human rights violations committed by the corporations they invest in, or by the States where these corporations operate?

In Chapter 12 the author was asked to investigate the relationship between investments and environmental protection, also focusing on SWF practices both internally (codes of conducts, practices, principles) and externally (investment policy, disinvestments, GAPPs). The author has also examined whether SWFs can be considered complicit in environmental damage with the corporation they invest in, should their investment be socially irresponsible, and if such a behaviour can be attributed to the SWF's home State under international public law. The author has also investigated the level of due diligence requested by environmental treaties and practices, evaluating possible differences in the environmental protection practices of SWFs and SOEs and assessing if the principles, criteria and State practices on environmental protection and human rights protection differ.

In an OECD paper of 2008, J. Santiso argued that SWFs, because of their origins (emerging economies, most of them) and their potential (or already effective) repositioning towards emerging markets, could be usefully considered as Sovereign Development Funds (SDFs). In 2008 the President of the World Bank suggested channelling a small part of SWF investments through the International Finance Corporation. Others proposed a Multilateral Sovereign Investment Agency. In the last few years, many emerging countries (Mongolia, Nigeria, Angola, Ghana, among the latest) have launched new SWFs that will become major actors in development finance not only domestically, but also abroad, often in emerging countries. In Chapter 13 the authors were asked to assess whether, how and to what extent SWFs can be considered tools of development, taking into account the practices of both SWFs and international organisations. The authors have also assessed, according to State practices, the differences between SWFs and SOEs as development tools.

In Chapter 14 the authors were asked to investigate the international practice regarding the tools that SWFs, SOEs, States and international organisations use to assess whether a certain investment complies with general sustainability criteria. There are behaviours, criteria and tools that each SWF can use, such as filtering out (the fund will not invest in companies that violate human rights or have a negative impact on the environment, no matter how profitable the investment may be); filtering in (the fund will actively look for companies highly valuing human rights or the environment throughout their business); social activism (the fund will use voting and other shareholder rights in order to discuss or address environmental and social issues with the companies directly); divestment strategies (whether the corporation is violating basic human rights or damaging the environment, or is involved in the manufacturing of mass-destruction weapons – e.g. cluster munitions – or is doing business with countries where human rights are not fully respected). The authors were asked to assess whether these tools are adequate; whether there are other instruments used by companies in adopting socially responsible behaviours and whether they can positively apply also in the financial investments of SWFs. The authors finally examined whether the UN Principles of Responsible Investment (signed by many important SWFs) can influence this practice; whether the Santiago GAPPs have set certain principles calling for a socially responsible investment; how these have been implemented, and whether we need one or more detailed GAPPs in that field; whether the SWFs have adopted internal socially responsible investment rules and codes of conduct and what their effects are.

All in all, this Research Handbook has delved into the practice of SWFs and State-owned companies, focusing on the legal perspective as a driver for investigating both the ‘passive’ and the ‘active’ side, assessing on one (‘passive’) side, how and to what extent the legal constraints imposed by host States act as barriers to SWF and SOE investments, and on the other (‘active’) side, whether ethical principles, treaty renegotiations, and sovereign immunity practices may influence State investments.