University of Miami Business Law Review

12-1-2016

The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds

Victorino J. Tejera

The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds

Victorino J. Tejera*

This article is concerned with the applicability of sovereign immunity[1] *to the so-called sovereign wealth funds ("SWFs") within the U.S. legal system. While sovereign immunity has existed for at least two centuries, SWFs and the types of investment activities they conduct on behalf of their parent foreign states are a rather recent phenomenon. As a result, the issue of the applicability of the rules on sovereign immunity to the SWFs poses novel legal challenges and difficulties. In a nutshell, this article is intended to answer the following questions: Are SWFs entitled to invoke sovereign immunity before U.S. courts? If so, what is the U.S. law regime of sovereign immunity applicable to the case of the SWFs?*

---

* The author is admitted to practice law in Venezuela and is a Ph.D. Candidate in International Law at the Graduate Institute of International and Development Studies in Geneva, Switzerland. At the time of writing, the author served as a Visiting Researcher at Florida International University College of Law as holder of a Swiss National Science Foundation (SNSF) Doc.Mobility Fellowship, which supported his research. This article is part of the author's Ph.D. thesis. The author wishes to express his gratitude to his Ph.D. supervisor, Professor Zachary Douglas for his useful comments to a preliminary draft of this article. All mistakes are the author's alone.

1 It appears like in the U.S. legal system, the term "sovereign immunity" is more commonly used than "state immunity." They both are synonyms, although "state immunity" is more commonly used in international law.

I. BACKGROUND

The last few years have witnessed the emergence and growth of certain new modalities of transnational commercial activities by States. State-owned enterprises ("SOEs"), the traditional form of State involvement in commercial activities, have long played an important role in international commerce–whether trading in goods or through foreign direct investment ("FDI").[2] To a lesser extent, SOEs have also participated in "portfolio investment."[3]

Yet, despite their participation in financial markets by means of portfolio investment, the most significant part of SOEs' international investments has traditionally taken the form of FDI. Indeed, the major part of their businesses abroad are operational and SOEs get involved in the exercise of corporate rights and over management of operations. SWFs, on the other hand, a modern type of vehicle for State commercial activities,

---

[2] Broadly speaking, I refer to the notion of FDI to describe the possession of stock and involvement in the operations of the relevant corporation. The OECD has defined FDI as:

> a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship.

See OECD, *Benchmark Definition of Foreign Direct Investment* 234 (4th ed. 2008). In the same vein, the International Monetary Fund ("IMF") has referred to "direct investment" as: "a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy." *See* International Monetary Fund, *Balance of Payments and International Investment Position Manual* 100 (6th ed. 2009). This publication of the IMF refers back to the OECD "*Benchmark Definition of Foreign Direct Investment.*" *See* OECD, *supra.*

[3] The IMF indicates that, in contrast to direct investors, portfolio investors typically have less of a role in the decision making of the enterprise with potentially important implications for future flows and for the volatility of the price and volume of positions:

> Portfolio investment differs from other investment in that it provides a direct way to access financial markets, and thus it can provide liquidity and flexibility. It is associated with financial markets and with their specialized service providers, such as exchanges, dealers, and regulators. The nature of financial derivatives as instruments through which risk is traded in its own right in financial markets sets them apart from other types of investment. Whereas other instruments may also have risk transfer elements, these other instruments also provide financial or other resources.

See International Monetary Fund, *supra* note 2 at 99.

invest and trade in financial markets and, for the most part, engage in "portfolio investment." This phenomenon of State investment abroad, either through SOEs or SWFs, has been referred to as "sovereign investment."[4] But, what are SWFs?

1. A Definition of SWFs

In simple and very general terms, it may be said that SWFs are State-owned or governmental investment funds akin to private hedge funds.[5] They are a heterogeneous group of State-controlled entities, with much dissimilarity among them. Even though they all pursue financial objectives on behalf of their states, they are very diverse in terms of legal structures, purposes, sources of funding, activities, investment strategies and ultimate goals. Nevertheless, there have been certain attempts to define SWFs as a whole. In that connection, a few commentators and entities have put forward definitions ranging from the most simple and straight-forward[6] to more elaborate and detailed ones.[7] Perhaps the most widely accepted

---

4 José Alvarez, *Sovereign Concerns and the International Investment Regime*, SOVEREIGN INVESTMENT 259, Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012).

5 The International Working Group of Sovereign Wealth Funds ("IWG"), in the foreword of the so-called Generally Accepted Principles and Practices ("GAPP" or "Santiago Principles"), refers to SWFs as: "special purpose investment funds or arrangements that are owned by the general government." Int'l Working Grp. of Sovereign Wealth Funds, *Generally Accepted Principles and Practices 'Santiago Principles,'* Sovereign Wealth Funds 3 (October 2008).

6 Das, Mazarei and Stuart (all IMF officers) refer to the "loosely definition" of SWFs as: "government-owned investment funds with investments in foreign financial assets." Udaibir S. Das, Adnan Mazarei and Alison Stuart, *Sovereign Wealth Funds and the IMF,* SOVEREIGN INVESTMENT 515 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012). Franco Bassanini, for his part, defines SWFs as: "Special investment vehicles with long-term horizons, created or owned by a sovereign State." Franco Bassanini, *Foreword* to Fabio Bassan, THE LAW OF SOVEREIGN WEALTH FUNDS viii (Edward Elgar Publishing, Inc. 2011). A more practical definition of SWFs is that of the European Commission, which has stated that SWFs are: "state-owned investment vehicles, which typically look to invest the receipts from budget or trade surpluses (e.g. from oil revenues)." European Commission, *Sovereign Wealth Funds,* http://ec.europa.eu/internal_market/capital/third-countries/sovereign_wealth_funds/index_en.htm (last visited July 11, 2016).

7 Fabio Bassan, the author of perhaps the only comprehensive book on the law of SWFs in existence so far, suggests that they are: "funds established, owned and operated by local or central governments which investment strategies include the acquisition of equity interest in companies listed in international markets operating in sectors considered strategic by their countries of incorporation." Fabio Bassan, THE LAW OF SOVEREIGN WEALTH FUNDS 32 (Edward Elgar Publishing, Inc. 2011). This definition does not mention financial investments other than equity interest. Thus, it appears to be rather incomplete. Edwin M. Truman, for his part, refers to SWFs as: "Separate pools of assets, including at least some international assets that are owned and managed, directly or indirectly, by a government to achieve a mixture of economic, financial, and political objectives." Edwin

definition of SWFs is that formulated in the so-called GAPP or "Santiago Principles:"[8]

> [S]pecial purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.[9]

This definition points to SWFs' intrinsic characteristics while, at the same time, it refers to other elements such as purposes and objectives, source funding and investment strategies.

2. *The GAPP-Santiago Principles*

In April and May 2008, a group of 23 countries with SWFs,[10] at a meeting in Washington, DC established the IWG and then, under coordination of the IMF, endeavored to put together a set of voluntary principles or code of good practices of wide acceptance among SWFs, aimed at establishing a framework for governance, accountability and

---

M. Truman, *Do the Rules Need to be Changed for State-Controlled Entities? The Case of Sovereign Wealth Funds,* SOVEREIGN INVESTMENT 404 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012). Truman highlights that included in that definition are all government pension funds except those that merely execute the investment choices of individuals, because government pension funds raise many of the same public policy issues as non-pension SWFs. *Id.* The authors Gordon and Niles refer to SWFs as: "investment vehicles established by governments to invest a portion of their excess foreign exchange reserves in search of higher returns than are typically earned on official reserves." Mark Gordon and Sabastian V. Niles, *Sovereign Wealth Funds: an Overview,* SOVEREIGN INVESTMENT 25 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012). They highlight that SWFs are managed separately from other government assets and SOEs, but remain subject to some degree of governmental control or management. *Id.*

8 The principles are referred to as the "Santiago Principles" after the capital of Chile where the final meeting of the IWG took place and where the principles were adopted in 2008.

9 Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5, at 27.

10 The following 23 countries with SWFs comprised the IWG: Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Islamic Republic of Iran, Iran, Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, the United Arab Emirates and the United States of America. Some of these countries have more than one SWF. However, some of those countries with more than one SWF participated in the IWG through one SWF only.

transparency for SWFs. The IWG started off by identifying and drafting a set of generally accepted principles and practices that properly reflected their investment practices and objectives.[11] The result of such initiative was the conclusion of the 2008 GAPP or Santiago Principles.

Along with the definition, the GAPP or Santiago Principles' Appendix I makes the caveat that such definition of SWFs excludes foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, operations of SOEs in the traditional sense,[12] government-employee pension funds, or assets managed for the benefit of individuals. Additionally, Appendix I of the GAPP refers to three "key elements" as defining SWFs: ownership; investments; and purposes and objectives.[13] Apart from those elements, their sources of funding and their legal structures are quite significant for the characterization of SWFs. As will be discussed below, their legal structure and whether or not they have separate legal personality have a great impact on what rules of sovereign immunity apply to different SWFs.

3. SWFs' Activities

SWFs' typical activity is the investment of funds in financial markets. Being investment funds themselves, in some cases SWFs even invest in private hedge funds, just like individuals or corporations do. Until a few years ago, it was not common for the State or any of its emanations—including the few SWFs then in existence—to undertake financial investments. While certain SWFs have existed for quite some time (the first SWF was established in the early 1950s),[14] they had no significant investments abroad. Nevertheless, the recent and rapid accumulation of multibillionaire foreign assets by some countries has resulted in the multiplication in terms of number and size of these *sui generis* State-controlled entities and the increase of their investments in global financial markets. Moreover, various projections suggest that their presence in international capital markets is set to increase further.[15] At present, SWFs account for about one tenth of the world's total assets under management.[16]

---

[11] Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5, at 1.

[12] It appears like the reference to "SOEs in the traditional sense" is aimed at making a distinction with state participation in operative and non-financial business.

[13] Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5.

[14] The Kuwait Investment Authority ("KIA") was set up in 1953 and is the oldest SWF in the world. *See* Kuwait Investment Authority, http://www.kia.gov.kw/En/Pages/default.aspx (last visited July 11, 2016).

[15] Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5, at 3.

[16] U.N. Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance* at 15, U.N. Doc. UNCTAD/WIR/2015.

As a result, SWFs have gained an important place as major participants in the world international financial markets, making the State engage in transactions other than the traditional commercial operations that states have ordinarily engaged in for the last 150 years or more. Not surprisingly, SWFs have even been characterized as the masters of the new global financial order.[17] Indeed, according to UNCTAD's World Investment Report, by 2014, SWFs had approximately $7 trillion (U.S. dollars) in assets under management[18] whereas, by the first quarter of 2016, hedge funds had approximately $2,700 billion (U.S. dollars) in assets under management.[19]

The role of the SWFs in the world economy became particularly salient in light of the 2007-2008 economic crisis,[20] where certain SWFs from the Middle East and Asia invested multibillionaire amounts of money in U.S. and European financial institutions. Some of those headline-grabbing deals included eleven large, much-needed capital infusions into major financial institutions such as Citigroup, Merrill Lynch, UBS, and Morgan Stanley.[21]

For example, the Abu Dhabi Investment Authority ("ADIA"), one of the largest SWFs in the world and the largest in the Middle East,[22] invested $7.5 billion (U.S. dollars) in Citigroup.[23] In fact, it has been reported that ADIA's investments in Citibank, along with those of the Kuwaiti and Singaporean SWFs, totaled approximately $20 billion (U.S. dollars).[24] Likewise, it was reported that ADIA's investment in Citibank consisted of debt convertible into 4.9% of its common shares, which could have made ADIA one of the bank's largest shareholders.[25]

Merrill Lynch raised a total of approximately $10 billion (U.S. dollars), initially from Singapore's Temasek Holdings and later from similar wealth funds in the Republic of Korea and Kuwait, amongst others.[26] One Chinese SWF invested nearly $10 billion (U.S. dollars) in

17 Joel Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*, 11 U. PA. J. BUS. L. 967, 967 (2009).
18 U.N. Conference on Trade and Development, *supra* note 16.
19 *Hedge Fund Industry,* BARCLAYHEDGE: ALTERNATIVE INVESTMENT DATABASE, http://www.barclayhedge.com/research/indices/ghs/mum/HF_Money_Under_Management.html (last visited July 11, 2016).
20 Arina V. Popova, *Sovereign Wealth Funds: To Be or Not to Be is Not the Question; Which One to Choose Is,* 40 GEO. J. INT'L L. 1191, 1192 (2009).
21 Gordon & Niles, *supra* note 7, at 25.
22 SWF INSTITUTE, *Abu Dhabi Investment Authority*, http://www.swfinstitute.org/swfs/abu-dhabi-investment-authority/ (last visited July 11, 2016).
23 Gordon & Niles, *supra* note 7.
24 Slawotsky, *supra* note 17, at 977.
25 *Id.*
26 Gordon & Niles, *supra* note 7, at 44.

Morgan Stanley and The Blackstone Group.[27] The Swiss giant, UBS, received funds from the Government of Singapore Investment Corporation (GIC) and the British bank, Barclays, also received from Singapore's Temasek Holdings. Abu Dhabi's Mubadala Development Company, with assets over $10 billion (U.S. dollars), ended up being one of the top ten investors in General Electric. It paid $800 million (U.S. dollars) for control of the Chrysler Building and $2.35 Billion (U.S. dollars) for 7.5% ownership in The Carlyle Group.[28] Paradoxically, although these activities mostly consist of FDI, that is not the major part of SWFs activities.

SWFs usually invest in foreign financial assets. These funds are in a strong position to influence global financial and capital markets, but are much less active in FDI. The value of their FDI has been marginal compared with the value of assets under management. In 2014, the amount of FDI by SWFs reached $16 billion.[29] Contrary to the case of SOEs, the core of SWFs activities takes the form of portfolio investment abroad. Hence, the bulk of SWFs' funds are held in relatively liquid financial assets.

Of course there are some overlaps between the activities of SOEs and SWFs. It would not be accurate to assert that SOEs only engage in FDI while SWFs only invest in portfolio investments. Indeed, some SOEs engage in portfolio investments as well, while some SWFs may make certain investments in FDI. Yet, when SWFs engage in FDI, they do not normally get involved in the management or business of the operating enterprise and behave as passive investors. Also, when SWFs engage in portfolio investments, they do so on a long-term basis.

As a pattern, SWFs do not seek to obtain controlling stakes in those operating companies in the host states where they acquire equity shares. And even if they do obtain a controlling stake, they do not avail themselves of the possibility of obtaining seats on the boards of directors. Furthermore, SWFs are generally employed to preserve or increase the country's national wealth by engaging in passive investments.[30] Conversely, SOEs involvement in FDI oftentimes entails the acquisition of controlling stakes, participation in management, and operations. Even if SWFs may in certain cases be a vehicle for FDI, they differ from SOEs in their mandate. Some SOEs activities are typically public service related,

---

27 Slawotsky, *supra* note 17.

28 Alan M. Rugman, *Sovereign Wealth Funds and Regulation: Some Conceptual Issues,* SOVEREIGN INVESTMENT 300 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012).

29 U.N. Conference on Trade and Development, *supra* note 16.

30 Anne-Catherine Hahn, *State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds*, REVUE SUISSE DE DROIT DES AFFAIRES ET DU MARCHÉ FINANCIER 103, 104 (2012) (Switz.).

can even be non-profitable in economic terms, and they are normally focused on their respective industry.[31] Conversely, SWFs activities, by definition, are financially speculative.

According to the GAPP, SWFs must have broadly defined liabilities that allow them employ a wide range of investment strategies with a medium to long-term timescale.[32] Importantly, the GAPP excludes from the definition of SWFs those funds that solely invest in domestic assets.[33] That exclusion is certainly important for purposes of the rules on sovereign immunity. In fact, if SWFs were to handle domestic investments only, those would less likely give rise to legal issues involving foreign elements and thus the application of foreign sovereign immunity.

4. SWFs' Ownership and Origins

As the GAPP indicate, SWFs are owned by the general government, *i.e.*, by central governments as well as by subnational governments. Indeed, certain constituent units of Federal States or other political subdivisions, *e.g.*, Alaska (U.S.), Alberta (Canada), Hong Kong (China), or Abu Dhabi (U.A.E.) have their own SWFs. On the other hand, their ownership may rest in the hands of states *eo nomine*, their central banks, or other monetary authorities.

But which are those states with SWFs? The Sovereign Wealth Institute[34] reports, as of the first quarter of 2016, a total of 79 SWFs coming from some 56 countries with assets in around $ 7 billion (U.S. dollars). Of those states, several possess more than one SWF.[35] The Appendix presented at the end of this article contains a list of states with their respective SWFs.

---

31 Wouter P.F. Schmit Jongbloed, Lisa Sachs and Karl P. Sauvant, *Sovereign Investment: an Introduction*, SOVEREIGN INVESTMENT 9, (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012).

32 Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5.

33 *Id.*

34 The Sovereign Wealth Fund Institute is private entity. It is described on its website as a global organization designed to study sovereign wealth funds, public pensions, central banks and other long-term public investors in the areas of investing, asset allocation, risk, governance, economics, policy, trade and other relevant issues. *See* The Sovereign Wealth Fund Institute, http://www.swfinstitute.org/about/ (last visited July 11, 2016). It provides specialized services such as research and consulting to various corporations, funds and governments. *Id.* The Sovereign Wealth Fund Institute delivers information and insights on current issues and trends related to sovereign wealth. *Id.*

35 *See* The Sovereign Wealth Fund Institute, *Tracking the Activity of Sovereign Wealth Funds, Pensions and other Public Funds*, SWFI, http://www.swfinstitute.org/fund-rankings/ (last visited April 16, 2016).

5. *Source of SWFs' Funding*

Although some SOEs may receive State subsidies, they are typically funded through the proceeds of their own activities rather than by State foreign reserves.[36] In contrast, SWFs consist of currency reserves accumulated through foreign trade in commodities or products, which are managed separately from the official reserves under the control of central banks or monetary authorities. Hence, SWFs' funds are distinct from the official reserves of their states. SWFs may also consist of budgetary surpluses resulting from other foreign income.[37] Yet, it is estimated that about 60% of the total funding of SWFs comes from oil and gas revenues; the remaining 40% are more diffuse and include export earnings (mostly from raw materials and commodity trade).[38]

It is interesting to note that GAAP's Appendix I highlights that 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. Such mention is aimed at reflecting both the traditional background to the creation of SWFs—the revenues received from mineral wealth—and the more recent approach of transferring 'excess reserves.'[39]

Indeed, SWFs arose, in part, due to the accumulation of foreign exchange reserves by certain high-exporting states. Global trade and prevailing high prices of natural resources (mostly oil and gas) allowed a number of countries, particularly oil-producing and exporting countries, to build up large foreign exchange reserves that far exceed the needs of exchange rate management.[40] At the same time, some countries with high levels of foreign exchange reserves started to use SWFs to hedge currency risk and pursue equity-like returns rather than fixed-income returns.[41]

A curious and more recent trend, however, is that which has been reported of SWFs seeking to diversify their sources of funding by reaching out to the private capital market through bond offers, Islamic finance devices, or even selling equity participations in subsidiaries.[42] This kind of activity by SWFs may certainly create conditions for legal disputes involving foreign and governmental elements which could, in turn, make sovereign immunity play further roles.

---

36 Schmit Jongbloed, Sachs & Sauvant, *supra* note 31.

37 Maya Steinitz, *Foreign Direct Investment by State-Controlled Entities at Crossroad of Economic History: Conference Report of the Rapporteur,* SOVEREIGN INVESTMENT 535 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012).

38 Schmit Jongbloed, Sachs & Sauvant, *supra* note 31, at 4.

39 Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5.

40 Gordon & Niles, *supra* note 7, at 29.

41 *Id.* at 30.

42 Schmit Jongbloed, Sachs & Sauvant, *supra* note 31, at 5.

6. Purposes

SWFs generally describe themselves as commercial investors pursuing purely financial goals, rather than political objectives.[43] Their aim is to obtain returns for their investments, higher than those that would be provided by standard placement of reserves by the states. As investment funds, SWFs operate and invest on the basis of economic and financial risk and return-related considerations.[44] SWFs are created to serve objectives other than, for example, reserve portfolios held only for traditional balance of payments purposes. According to the GAPP, it is important to demonstrate that SWFs' investments are made on economic and financial basis.[45] While SWFs may include reserve assets, the intention of the GAPP is not to regard all reserve assets as SWFs.[46]

At the same time, however, SWFs' ultimate purpose differ from case to case and some of them may seem somewhat governmental. Indeed, most SWFs are established for macroeconomic stabilization purposes; others have a mandate to guarantee the future wealth of their nations (*e.g.* Norway's SWF is mandated to grow in perpetuity) or others may have 'fostering regional development' as their goal.[47] Some SWFs may be development funds designated to fund socio-economic projects or may have a mandate to promote gentler economic cycles providing reserves for difficult times.[48]

The authors Das, Mazarei and Stuart offer a helpful classification of five types of SWFs according to their dominant objectives: (1) stabilization funds, where the primary objective is to insulate the budget and the economy against commodity (usually oil) price volatility; (2) savings future funds for future generations, which aim to convert non-renewable assets into a more diversified portfolio of assets and mitigate the effects of the Dutch disease;[49] (3) reserve investment corporations,

---

43 Int'l Forum of Sovereign Wealth Funds, *IFSWF Members' Experiences in the Application of the Santiago Principles* at 30–31 (IFSWF 2011).

44 Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5, at 5.

45 Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5, at 4. In particular, GAPP Principle 19 states that: "The SWF's investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy, and based on economic and financial grounds."

46 *Id.* at 27.

47 Schmit Jongbloed, Sachs & Sauvant, *supra* note 31.

48 Gordon & Niles, *supra* note 7.

49 Dutch disease is the negative impact on an economy of anything that gives rise to a sharp inflow of foreign currency, such as the discovery of large oil reserves. The currency inflows lead to currency appreciation, making the country's other products less price competitive on the export market. It also leads to higher levels of cheap imports and can lead to deindustrialization as industries apart from resource exploitation are moved to cheaper locations. The origin of the phrase is the Dutch economic crisis of the 1960s

whose assets are often still counted as reserve assets, and are established to increase the return on reserves; (4) development funds, which typically help fund socio-economic projects or promote industrial policies that might raise a country's potential output growth; and (5) contingent pension reserve funds, which provide (from sources other than individual pension contributors) for contingent, unspecified pension liabilities on the government's balance sheet.[50]

This classification is somewhat in line with the indication by the International Working Group of Sovereign Wealth Funds that SWFs may comprise fiscal stabilization funds, savings funds, reserve investment corporations, development funds, and pension reserve funds without explicit pension liabilities.[51]

7. Concerns

The participation of other sovereigns (through SWFs and SOEs) investing in their territories and economies has brought about certain concerns and policy reactions by some states including the U.S. Those reactions and concerns have focused on issues of national security;[52] SWFs lack of transparency;[53] fears that foreign states—as controlling authorities of SWFs—invest in companies with a view to acquiring intellectual property; "know-how" in military items and technologies; or to research, produce and trade in weapons.[54] Perhaps because of the magnitude of their

---

following the discovery of North Sea natural gas. *See* Sophia Grene, Definition of Dutch disease, FINANCIAL TIMES, http://lexicon.ft.com/Term?term=dutch-disease (last visited July 11, 2016). When a country discovers tradeable natural resources, such as oil, it normally experiences real appreciation of its exchange rate and thus a crowding out of its other tradeable sectors. This phenomenon first drew attention in the case of the Netherlands, where natural gas discoveries clearly hurt the competitiveness of Dutch manufacturing. *See* Paul Krugman, *The Narrow Moving Band, the Dutch Disease, and the Competitive Consequences of Mrs. Thatcher: Notes on Trade in the Presence of Dynamic Scale Economies*, 27 J. DEV. ECON. 41, 49 (1987).

50 Das, Mazarei & Stuart, *supra* note 6, at 516.

51 Int'l Working Grp. of Sovereign Wealth Funds, *supra* note 5.

52 Mark Clodefelter and Francesca Guerrero, *National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level*, SOVEREIGN INVESTMENT 173 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012); Alvarez, *supra* note 4, at 258-282; Patrick DeSouza and W. Michael Reisman, *Sovereign Wealth Funds and National Security*, SOVEREIGN INVESTMENT 283 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012).

53 Simone Mezzacapo, *The so-called 'Sovereign Wealth Funds': regulatory issues, financial stability and prudential supervision*, EUROPEAN COMMISSION ECONOMIC PAPERS 378 (2009).

54 Julien Chaisse, *The Regulation of Sovereign Wealth Funds in the European Union: Can the Supranational Level Limit the Rise of National Protectionism*, SOVEREIGN

investments and the fact that they, in the end, are governmentally-owned entities, SWFs have attracted considerable attention. Particularly, investments by Persian Gulf and East Asian SWFs, in 2007 and 2008, in U.S. and European financial institutions following the economic crisis of those years, caused a general awareness about sovereign investment.

Probably the most prevalent fears relate to the issue that such investments may have detrimental impacts on host countries' national security. In addition, sovereign investment in strategic industries has raised other concerns about the foreign access to sensitive technology or foreign control over natural resources, key industrial complexes, or critical infrastructure.[55] Thus, because their investment motivations have been a source of distrust, it is not uncommon to hear allegations of political objectives behind the investments of SWFs. Interestingly, however, most concerns and policy reactions relate to sovereign foreign direct investment (FDI), which is not the core activity of the majority of SWFs.

An example of a national security concern was the Dubai Ports (DP) World deal in 2006, which consisted of the sale of some ports in the U.S. to DP World from the U.A.E. In the end, public concern in the U.S. forced DP World to divest, even though they had obtained the approval of the U.S. Committee on Foreign Investment (CFIUS).[56] Because some voices raised concerns about this deal in Congress, the President of the U.S. was forced to reopen the process by which DP World had been allowed to proceed with the deal.[57] In light of those pressures, DP World "voluntarily" withdrew from this deal.

8. Regulation

Regulation of FDI in general, and concerning SOEs, in particular, is abundant and is not a new phenomenon. Less common, however, is regulation concerning SWFs' investments. Nonetheless, the abovementioned concerns have made several governments regulate SWFs' investments. Yet, such regulation has focused for the most part on national security issues, foreign government ownership restrictions, market access for SWFs, or on protectionist restrictions.

In addition to legislation, there are certain soft-law instruments touching upon sovereign investment. In fact, in 2008, in the aftermath of the economic crisis, some European institutions, the Organization for Economic Co-operation and Development (OECD) and the International

---

INVESTMENT 462, 470 (Wouter P.F. Schmit Jongbloed et al. eds., Oxford University Press, 2012).

55 Schmit Jongbloed, Sachs & Sauvant, *supra* note 31, at 11-12.

56 Steinitz, *supra* note 37, at 537.

57 *For more details on this deal see* Rugman, *supra* note 28, at 299.

Monetary Fund (IMF) endeavored to create guidelines, policies, or codes of good practices aimed at dealing with the concerns raised about SWFs. In February 2008, for example, the European Commission presented a communication to the European Parliament, Council, European Economic and Social Committee, and the Committee of the Regions proposing a common E.U. approach to SWFs. The European Commission claims that it was in response to that communication that the Santiago Principles were agreed upon.[58]

The OECD, on the other hand, at a Ministerial Council Meeting in Paris, adopted the OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies on June 5, 2008.[59] Later that year, in October 2008, the OECD issued the OECD Guidance on Sovereign Wealth Funds[60] dealing with SWFs' investments in OECD economies. Almost in parallel, the Santiago Principles were agreed upon.

Nevertheless, no specific legislation or soft-law instrument has dealt with issues of sovereign immunity in relation to SWFs' investments. Indeed, neither the E.U. normative nor the OECD Declaration on SWFs and Recipient Country Policies or its Guidance on SWFs deal with issues of sovereign immunity. The GAPP only incidentally (in a footnote),[61] indicate that recipient countries may grant to SWFs certain privileges, such as sovereign immunity and sovereign tax treatment, based on their governmental status. In other words, the GAPP do not contemplate sovereign immunity in the context of judicial proceedings involving SWFs or their property—they do only in relation to regulatory issues.

Because there are no specific rules of sovereign immunity regulating the case of the SWFs, as will be discussed in the next pages, in order to address the U.S. law regime of sovereign immunity applicable to the SWFs, it will be necessary to rely on the general rules and case law concerning traditional State entities.

9. Types of SWFs by Legal Structure

Pursuant to the IWG's explanation and commentary to the GAPP, depending on their legal structures, SWFs could be of three types. The first

---

58 European Commission, *supra* note 6.

59 OECD, *OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies,* http://www.oecd.org/daf/inv/investment-policy/oecddeclarationonsovereignwealthfundsandrecipientcountrypolicies.htm (last visited July 11, 2016).

60 *See* OECD, OECD GUIDANCE ON SOVEREIGN WEALTH FUNDS, http://www.oecd.org/daf/inv/investment-policy/oecdguidanceonsovereignwealthfunds.htm (last visited July 11, 2016).

61 Int'l Working Grp. of Sovereign Wealth Funds, *Generally Accepted Principles and Practices 'Santiago Principles,'* SOVEREIGN WEALTH FUNDS 22 n. 35 (IWF-SWF 2008) (explaining and commenting on GAPP 20 Principle).

type refers to those SWFs established as "separate legal identities" under public law, with full capacity to act. They are normally governed by a specific constitutive legislation.[62] It may be added that these SWFs typically have separate legal personalities from the State even though they are not SOEs. The second type of SWFs identified by the IWG take the form of SOEs. As such, they are typically governed by corporate law although other specific laws may also apply.[63] Lastly, the third type consists of "pools of assets" without separate legal personalities from the states, which are normally owned by them or by their central banks. In most cases, specific legislation govern these SWFs.[64] In reality, for purposes of this article, SWFs may be categorized in two broader groups: SWFs with separate legal personalities and SWFs without separate legal personalities from the State.

II. SWFS AND SOVEREIGN IMMUNITY IN THE U.S. LEGAL SYSTEM

Because SWFs are State-controlled entities, their financial activities[65] and assets in U.S. territory may imply a role for the sovereign immunity of their foreign states under U.S. law. As was indicated by one commentator, the ever-increasing globalization and the concurrent explosion in the number and variety of entities such as SWFs, with significant ties to foreign sovereigns, will only increase litigation. For example, one issue is whether they qualify as "organs" for purposes of the FSIA.[66] Private parties in the U.S. may want to bring claims against SWFs before U.S. courts and sovereign immunity may make it difficult for those private parties to pursue their legitimate claims.[67] Because of their specific nature as State investment vehicles, claimants may be confronted with SWFs relying on State immunities.[68]

---

62 *Id.* at 11.
63 *Id.*
64 *Id.*
65 I refer interchangeably to both commercial and financial activities of SWFs as a generic way to describe their activities. However, strictly speaking, those financial activities are a sub-type of commercial activities.
66 Michael A. Granne, *Defining 'Organ of a Foreign State' Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1, 3-4 (2008). The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602, (1976), will be discussed below.
67 David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors* 5 (OECD, Working Paper No. 2010/02, 2010).
68 Bart De Meester, *International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State*, 20 EUR. BUS. L. REV. 779, 812 (2009).

At the same time, not only can SWFs' dealings with third parties give rise to litigation, but creditors of parent states can also try to execute their judgments or awards targeting the assets that compose or belong to their SWFs. Indeed, SWFs may, due to the significant wealth held by them and the international scope of their activities, be attracting the attention of creditors trying to enforce claims against the states controlling them.[69] At that point, issues of sovereign immunity will in all likelihood arise.

For example, as one commentator argued, where involved in litigation, SWFs would undoubtedly claim immunity under U.S. law, as "agencies or instrumentalities" of the foreign government.[70] These issues are certainly not the only aspects of sovereign immunity that could arise in connection to SWFs. Also, because SWFs are State-controlled entities, judges may have to apply sovereign immunity rules *sua sponte*.

At the same time, State immunity may turn out to be a double-edged sword for SWFs themselves or their states. If they 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.[71]

Therefore, it would not be surprising that SWFs' activities in the U.S. become, in the near future, a common cause or reason for litigation and for the consequent invocation or application of sovereign immunity. Globalization and the explosion in number and variety of SWFs will certainly increase litigation dealing with immunity issues.[72] Moreover, in the wake of the 2007-2008 economic crisis, various SWFs invested in financial institutions in the U.S. and Europe. That circumstance alone could eventually get those SWFs into transnational litigation where sovereign immunity will certainly play a role.

Nevertheless, the application of sovereign immunity to the SWFs poses certain difficulties resulting out of the tension between their dual

---

69 Anne-Catherine Hahn, *State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds,* REVUE SUISSE DE DROIT DES AFFAIRES ET DU MARCHÉ FINANCIER 103, 105 (2012) (Switz.).

70 Slawotsky, *supra* note 17, at 995. Although in the context of the SEC assessing violations of U.S. laws, SEC Chairman Christopher Cox noted that, in his view: "Neither international law nor the Foreign Sovereign Immunities Act renders [SWFs] immune from the jurisdiction of U.S. courts in connection with their commercial activity conducted in the United States." Christopher Cox, Chairman, U.S. Securities and Exch. Comm'n, Keynote Address and Robert R. Glauber Lecture at the John F. Kennedy School of Government, Harvard University, Cambridge, Massachusetts: *The Role of Government in Markets* (Oct. 24, 2007) (transcript available at http://www.sec.gov/news/speech/2007/spch102407cc.htm).

71 Hahn, *supra* note 69, at 118.

72 Granne, *supra* note 66, at 3-4.

status as investors in financial markets and State-controlled entities. Yet, there are no specific sovereign immunity rules that address cases involving SWFs and sovereign immunity. Moreover, even though U.S. case law dealing with State immunity in connection to the State or State entities is abundant, U.S. case law dealing with SWFs and sovereign immunity is still very scarce and has only addressed isolated aspects. Scholarship on the topic is also limited.[73] Thus, the question whether—and to what extent—SWFs are entitled to invoke sovereign immunity in the U.S. is a very important one.[74] Hence, the need to analyze how the U.S. legal regime of sovereign immunity would address situations involving SWFs.

1. The Regime of Sovereign Immunity from Jurisdiction Under the FSIA

The regime of sovereign immunity under U.S. law is basically what is provided for under the FSIA. The 1976 enactment of the FSIA constituted a crucial contribution of U.S. law to the development of international law on State immunity. The FSIA provides the statutory system governing issues of sovereign immunity in the U.S. in connection to suits against foreign states.[75] That piece of legislation endorsed, codified, and

---

[73] Only a few commentators have referred to the problems posed without going into too much detail. For example, Bart De Meester suggests that the property of SWFs could qualify as commercial property without providing further explanation. Bart De Meester, *supra* note 68, at 815. Daniel Etlinger advocates for an amendment to the FSIA. However, the content of such proposed amendment is not the core of his research and is limited to suggest an amendment "for an investor to recover anything he or she would need to traverse through the [FSIA]." Daniel Etlinger, *Sovereign Wealth Fund Liability: Private Investors Left Out in the Cold,* 18 U. MIAMI BUS L. REV. 59, 90 (2010). Professor Anne van Aaken conducted a thorough law and economics analysis of modern State commercial activities *vis-à-vis* state immunity from execution. She concluded: "[F]rom an economic perspective, SWFs and SOEs with the purpose of return on assets for the general account of the state should not be immune—neither in jurisdiction nor the assets from execution." Anne van Aaken, *Blurring Boundaries between Sovereign Acts and Commercial Activities. A Functional View on Regulatory Immunity and Immunity from Execution* 44*,* (Univ. of St. Gallen L. Sch., L. & Econ. Research Paper Series, Working Paper No. 2013-17, 2013). Two other commentators in the U.S. have touched upon issues of sovereign immunity related to SWFs although both papers have focused on more general issues, only touching upon the SWFs in an incidental way. *See* Slawotsky, *supra* note 70; Granne, *supra* note 66 at 1.

[74] Slawotsky, *supra* note 70, at 971; Granne, *supra* note 66, at 3.

[75] *See* Samantar v. Yousuf, 560 U.S. 305, 320 (2010) ("we do not think that the [FSIA] codified the common law with respect to the immunity of individual officials."). The Supreme Court also stated,

> we think this case . . . is properly governed by the common law because it is not a claim against a foreign state as the [FSIA] defines that term. Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing

implemented the restrictive theory of sovereign immunity:[76] It affords foreign states immunity for their 'sovereign' acts and denies them immunity for their "commercial" or "private" acts.[77] In the words of Chief Justice Roberts in the recent decision of *OBB Personenverkehr AG v. Sachs*, "[t]he Foreign Sovereign Immunities Act shields foreign states and their agencies from suit in United States courts unless the suit falls within one of the Act's specifically enumerated exceptions."[78]

As a matter of U.S. law, the FSIA codifies the restrictive theory of sovereign immunity.[79] Thus, a foreign State will benefit from a grant of immunity from jurisdiction, subject to the exceptions specified in § 1605 and § 1605(A) of the FSIA. The exceptions to such grant of immunity include: (1) cases in which the foreign State has waived its immunity; (2) actions that arise out of the foreign sovereign's commercial activities that either are conducted in, or cause a direct effect in the U.S.; (3) cases in which rights in property taken in violation of international law are at issue; (4) actions concerning rights in real estate and inherited gift property located in the U.S.; (5) cases concerning certain noncommercial torts allegedly committed within the U.S.; (6) cases in which a foreign State has agreed to arbitrate and the arbitration agreement is or may be governed by a treaty signed by the U.S. calling for the recognition and enforcement of arbitral awards; and (7) actions for personal injury or death arising out of, among other things, acts of aircraft sabotage, provided that the defendant nation has been designated a State sponsor of terrorism.[80] Section 1607 of the FSIA also contemplates an exception to the general rule of immunity from jurisdiction for cases of counterclaims.

Section 1602 of the FSIA sets out the premises of the regime of State immunity provided for under such statute. That section of the FSIA indicates that, under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. In the words of the Justice Souter, the FSIA

> in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.

Id. at 325.

76 *Id.* at 313.

77 GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 234 (5th ed. 2007) (quoting *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983)).

78 OBB Personenverkehr AG v. Sachs, 577 U. S. ____, 1 (2015).

79 BORN & RUTLEDGE, *supra* note 77, at 72.

80 28 U.S.C.A. §1605(a)(1)-(7)(2008)(section 7 repealed 2008); *see* Mezerhane v. the Bolivarian Republic of Venezuela, et al., No.: 11-23983-CIV-Cooke/Turnoff (S.D. Fla. Dec. 30, 2013) (order dismissing case).

embraces the restrictive theory of sovereign immunity, which provides that: "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts *(jure imperii)*, but not as to those that are private or commercial in character *(jure gestionis)*."[81] In consequence, there will be immunity from jurisdiction where the relevant State activity can be categorized as *iure imperi* and, conversely, there will not be immunity where the activity is considered *iure gestionis*.

At the same time, the property of a foreign State will be immune from arrest, attachment or execution, subject to the exceptions contemplated under § 1610 of the FSIA. Lastly, from a procedural point of view, it is interesting to note the comments of one of the most renowned scholars in the field, Lady Hazel Fox, who argues that under the FSIA regime, sovereign immunity is an affirmative defense which must be specially pleaded.[82] Fox states that unlike the U.K. regime, there is no statutory requirement in the FSIA carried over from the common law that the court itself is under a duty to address the issue of immunity.[83] However, there have been cases where U.S. courts have raised the issue of sovereign immunity *sua sponte*.[84]

A. SWFs and Sovereign Immunity from Jurisdiction in the U.S. Based on "Status"

Even though all SWFs are State entities, not all of them may be entitled to immunity in the U.S. Certain legal structures may be afforded immunity from jurisdiction while others may not.[85] Depending on the legal form it adopts, a SWF may be considered as part of the State proper, as an "agency or instrumentality" or as a SOE not protected by immunity. At the same time, based on the status of a SWF as: 1) a pool of assets without separate legal personality held by the State or a central bank; 2) an entity with separate legal personality from the State qualifying as "agency or instrumentality;" or 3) an entity with separate legal personality not qualifying as "agency" or "instrumentality" of the State, the rules on immunity from jurisdiction will apply differently and the relevant SWF will be covered by immunity from jurisdiction or not.

---

81 Saudi Arabia v. Nelson, 507 U.S. 349, 359-60 (1993).

82 HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 240 (3d ed. 2013).

83 *Id.*

84 *See e.g.*, Wultz v. Islamic Republic of Iran, 755 F. Supp.2d 1, 28 (D.D.C. 2010).

85 Slawotsky, *supra* note 70, at 97. Slawotsky asserts that the legal structure of a SWF (a sovereign owning shares in a SWF with separate corporate personality versus the SWF being an organ of the sovereign) may determine the grant of immunity from jurisdiction. However, Slawotsky also argues that the purpose of a SWF will influence whether a U.S. Court grants immunity or not. *Id.* at 972 n. 28.

For example, if a SWF is just a fund without separate legal personality administered by a ministry of finance, the immunity rules applicable to the State proper would play a role. Conversely, if a SWF has separate legal personality, it may, under certain circumstances, be considered as an "agency" or "instrumentality." Accordingly, the immunity rules applicable to agencies or instrumentalities will apply. As a result, each SWF will be subject to the U.S. rules of sovereign immunity applicable to the relevant State entity. At the same time, they will be subject to the appropriate exceptions to such rules.

On the other hand, depending on their status as pool-of-assets-SWFs managed by a ministry of finance or pool-of-assets-SWFs managed by a central bank, U.S. law on State immunity from execution regarding foreign states or the rules regarding foreign central banks or other monetary authorities would apply. As for SWFs with separate legal personalities that qualify for a status as "agencies or instrumentalities," U.S. law rules on State immunity from execution regarding those type of entities will apply.

Therefore, this article explores the U.S. legal regime of sovereign immunity from jurisdictions applicable to: (1) SWFs that are pools of assets without separate legal personalities that are held by the State or by a central bank; and (2) SWFs with separate legal personalities from the State qualifying as "agencies or instrumentalities." At the same time, the analysis of SWFs with separate legal personalities from the State qualifying as "agencies or instrumentalities" will tacitly lead to the analysis of the case of SWFs with separate legal personalities not qualifying as "agencies or instrumentalities" of the State *vis-à-vis* the U.S. legal regime of sovereign immunity from jurisdiction.

B. Pool-of-Assets-SWFs and U.S. Law on Sovereign Immunity from Jurisdiction

Under the FSIA classification based on "status," those SWFs that are asset pools will, unless an exception applies, be immune from jurisdiction. SWFs that are pools of assets may be managed by ministries of finance or may be managed by central banks or monetary authorities, usually with separate legal personality. Each case has its own particularities. The two following subsections deal with the case of: (a) pool-of-assets-SWFs managed by ministries; and (b) pool-of-assets-SWFs managed by central banks.

a. Pool-of-Assets-SWFs Managed by a Ministry and Immunity from Jurisdiction

Under the FSIA regime, a SWF that is a pool of assets without separate legal personality which is managed by a ministry of finance will, in all likelihood, be analyzed under the regime of sovereign immunity applicable to the State proper.[86] Indeed, strictly speaking, the sovereign immunity rules would not apply to the SWF as such but to the State, precisely because the fund and the ministry do not have separate legal personality from the State. The fund is just a pool of assets that is invested by the ministry which, in turn, is a division of the State and is just a part of it. In simple terms, in this type of situation, it is the State that invests its own assets. Importantly, by virtue of § 1603(a) of the FSIA, the definition of "State" includes political subdivisions of foreign states, without any additional requirement. Thus, the case of SWFs that are pool of assets without separate legal personality that are managed by political subdivisions of foreign states will be akin to the case of those pool-of-assets-SWFs that are managed by the State proper.[87]

Pursuant to § 1604 of the FSIA, foreign states are entitled to a presumptive grant of immunity from suit.[88] That is, as a general rule, a foreign State shall be immune from the jurisdiction of the courts of the U.S. Then, FSIA Sections 1605, 1605A and 1607 provide for the exceptions to such general rule. The most relevant exception, for purposes of this article, is the "commercial activity" exception provided for under FSIA § 1605(a)(2). Hence, a State managing a SWF will enjoy its standard immunity from jurisdiction while it could also be subject to the "commercial activity" exception.

The "commercial activity" exception under FSIA § 1605(a)(2) has been characterized by the U.S. Supreme Court as the single most important exception to foreign sovereign immunity in the U.S.[89] The three prongs of FSIA § 1605(a)(2) provide for exceptions to sovereign immunity from jurisdiction where the action is based upon: (1) a "commercial activity" carried on in the U.S. by the foreign State; or (2) an act performed in the U.S. in connection with a "commercial activity" of the foreign State elsewhere; or (3) an act outside the territory of the U.S. in connection with a "commercial activity" of the foreign State elsewhere that causes a direct

---

86 There are various definitions of "State" in international law. The Third Restatement, indicates that "the 'state' is an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §201 (AM. LAW. INST. 1987).

87 For this reason, any reference in this thesis to the State proper in the context of the FSIA regime of sovereign immunity must be understood as including political subdivisions of foreign states.

88 GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 250 (5th ed. 2007).

89 Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992); *see also* BORN & RUTLEDGE, *supra* note 88, at 277, 280.

effect in the U.S. Thus, either the commercial activity has a jurisdictional nexus with the U.S. or it causes a direct effect in the U.S.

Section 1603 of the FSIA contains certain definitions that are useful to understand § 1605 and the relevant exceptions. In that connection, § 1603(d) indicates that: "'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act." At the same time, that provision clarifies that the commercial character of an activity shall be determined by reference to the "nature" of the course of conduct or particular transaction or act, rather than by reference to its "purpose." In other words, this provision favors the "nature" test over the "purpose" test. In many instances in practice, it may be difficult to separate the "nature" from the "purpose" of an activity so as to apply this nature/purpose test. That is why such a test has not been free from criticism. As indicated by the International Court of Justice Judge James Crawford, the notion that human activity can be classified, or even described, without referring to the purpose is a delusion.[90]

In *De Sanchez v. Banco Central de Nicaragua*,[91] the Fifth Circuit highlighted such difficulties in separating the "nature" from the "purpose" of an activity. The *De Sanchez* court stated that "[o]ften, the essence of an act is defined by its purpose" and unless "we can inquire into the purposes of such acts, we cannot determine their nature."[92] In *Republic of Argentina et al. v. Weltover, Inc.,* the U.S. Supreme Court acknowledged how "difficult it may be in some cases to separate 'purpose' (i.e., the reason why the foreign state engages in the activity) from the 'nature' (i.e., the outward form of the conduct that the foreign state performs or agrees to perform)."[93] However, the U.S. Supreme Court rejected the *De Sanchez* approach and established that the FSIA language forecloses the argument that the distinction between "nature" and "purpose" is neither useful nor warranted. According to the U.S. Supreme Court, the FSIA unmistakably commands to separate "nature" from "purpose."[94]

Commentator Joel Slawotsky, in his 2008 article on SWFs and jurisdiction under the FSIA, argued in favor of the *De Sanchez* reasoning as follows:

> While courts will evaluate the question of the activity by reference to its nature rather than its purpose, SWFs will likely argue that the SWFs' activity is inextricably linked

---

90 James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L LAW 75, 95 (1983).

91 De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (1985).

92 *Id*. at 1393.

93 *Weltover, Inc.,* 504 U.S. at 618.

94 *Id*.

> with basic essential public functions, and therefore, the nature of their activity is the same as the purpose—a sovereign governmental function. The very nature of the SWF investments may correlate with intrinsically public functions, such as adjusting or modifying core economic responsibilities of the sovereign. To the extent transparency and accountability are practiced, these may be useful in evaluating whether the nature of the SWFs' conduct really reflects a basic governmental duty to its citizens.[95]

As may be observed, Slawotsky somehow mingles the "purposes" with the "nature" of an act. As a result, this commentator suggests that a SWF conducting stabilization, savings, reserve investment or development activities cannot be stripped of sovereign immunity on the basis of the "commercial activity" exception.[96] That approach appears unjustified. On one hand, as indicated by the U.S. Supreme Court in *Weltover*, the FSIA clearly commands that the commercial character of an activity shall be determined by reference to the 'nature' of the course of conduct, rather than by reference to its 'purpose.'[97] Although, as recognized by the U.S. Supreme Court, it may be difficult in some cases to separate "purpose" from "nature," this formula must be applied even as a fiction where the "nature" of the act is analyzed in isolation of any external factor. Such fiction or isolation may be achieved through an exercise of "individuation." The method of "individuation," which will be analyzed in more detail below in the section corresponding to the "organ" prong in § 1603(b)(2) of the FSIA, may be very useful in isolating specific SWFs' activities, prior to their "commerciality" or "non-commerciality" assessment.

On the other hand, although SWFs will likely argue that the "nature" of their activities is the same as the "purpose" (a sovereign governmental function), that is an untenable generalization and each case involving a SWF would need to be analyzed individually. It is true that an inquiry into the "purpose" is often inevitable when looking for the "nature" of an activity. However, it is likely that in most SWF cases of "commercial activity exceptions" to immunity, the relevant activity's "nature" may be determined through a narrow analysis, which does not involve any inquiry into the ultimate purposes of the SWF. Additionally, a SWF financial activity may certainly have a sovereign "purpose" and yet, its "nature" will most likely be that of just a "financial activity." In terms of

---

95 Slawotsky, *supra* note 70, at 1000 (footnotes omitted).

96 *Id*.

97 28 U.S.C. §1603(d)(2006).

"individuation," the commercial or non-commercial character may be determined by isolating the relevant activity.

The legislative history of the FSIA is useful in understanding the scope of this provision. The House Report indicated:

> [S]ection 1603 defines the term 'commercial activity' as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if the activity is carried out for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction or act.'
>
> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity.[98]

The leading U.S. decision dealing with the concept of "commercial activity" for purposes of the FSIA was rendered in 1992 in the case of the *Republic of Argentina et al. v. Weltover, Inc.,* where the U.S. Supreme Court recognized that such FSIA definition of "commercial activity" leaves the critical term "commercial" largely undefined.[99] In that case, the U.S. Supreme Court was called upon to determine whether the issuance of bonds by the government of Argentina was a "commercial activity" as opposed to a "sovereign activity" for purposes of immunity from jurisdiction. In that connection, the U.S. Supreme Court ruled:

> [W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are

---

[98] H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614-6615.

[99] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992).

> 'commercial' within the meaning of the FSIA. Moreover, because the [FSIA] provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose', 28 USC § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, 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.' Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods . . . .
>
> The commercial character of the Bonods is confirmed by the fact that they are in almost all respects garden-variety debt instruments: they may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income.
>
> . . .
>
> Because the FSIA has now clearly established that the 'nature' governs, we perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states.[100]

The U.S. Supreme Court ruled: "[I]t is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so. We conclude that Argentina's issuance of the Bonods was a 'commercial activity' under the FSIA."[101]

Another important part of § 1605(a)(2) of the FSIA that was dealt with by the U.S. Supreme Court shortly after *Weltover* is the phrase 'based upon.'[102] In fact, § 1605(a)(2) lifts immunity only from suits that are

100 *Id.* at 614-15 (internal quotations omitted).
101 *Id.* at 617.
102 Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993).

"based upon" a commercial activity or that are "based upon" an act in connection with a commercial activity.[103] In the case of *Nelson*, the Supreme Court stated:

> Although the [FSIA] contains no definition of the phrase 'based upon', and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. <u>In denoting conduct that forms the 'basis', or 'foundation', for a claim . . . the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case</u>.[104]

More recently, in *OBB Personenverkehr AG v. Sachs*, the U.S. Supreme Court stated, "Nelson . . . teaches that an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit."[105]

In light of the above, three possible "commercial activities" scenarios could involve a SWF that is a pool of assets managed by a ministry. First, the funds will not be immune where an action by a claimant is based upon a commercial activity carried on in the U.S. Likewise, immunity from jurisdiction should not bar a claim against the State and involving its SWF if such claim is based upon an act performed in the U.S. in connection with a commercial activity elsewhere. Finally, even if a claim against the State and involving its pool-of-assets-SWF is based upon an act outside the territory of the U.S. and in connection with a commercial activity that also occurred outside of the U.S., the State's immunity from jurisdiction would not be an obstacle to pursue such claim before the U.S. courts as long as such activity causes a direct effect in U.S. territory.

In the case of the first prong of FSIA § 1605(a)(2), if the activities undertaken by the respective ministry of finances in the U.S. with the assets that compose the pool-of-assets-SWF are, pursuant to the "nature" test, considered "commercial," the U.S. courts will have jurisdiction to hear claims based upon such activities. This could be, for example, a case where a foreign ministry of finances buys securities in the New York Stock Exchange with funds composing a pool-of-assets-SWF. In fact, in *Weltover*, the U.S. Supreme Court characterized the issuance of debt by a foreign State as a "commercial activity" pursuant to the "nature" test.[106] Accordingly, if bond issuance is a "commercial activity" despite the fact that through the issuance of those instruments the State assumes debt, *i.e.*,

---

103 GARY B. BORN AND PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 288 (5th ed. 2007).

104 *Nelson*, 507 U.S. at 357 (emphasis added).

105 OBB Personenverkehr AG v. Sachs, 577 U. S. ____, 7 (2015).

106 Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 615-17 (1992).

it engages in legal obligations, pursuant to the "nature" test, State investment in securities should be readily classified as a "commercial activity" as well.

Lady Hazel Fox argued that the U.S. Supreme Court in *Weltover* adopted the Harvard Research in International Law's approach, which recommended defining commercial activity when a foreign State engages in industrial, commercial, financial or other business enterprise.[107] In this connection, Article 11 of the Harvard Research in International Law draft Convention on the "Competence of Courts in Regard to Foreign States" provided as follows:

> A State may be made a respondent in a proceeding in a court of another State when, in the territory of such other State, it engages in an industrial, commercial, <u>financial</u> or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.
>
> <u>The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt</u>.[108]

Lady Fox's observation is interesting. While the first paragraph of Article 11 certainly indicates that a foreign State may be made a respondent when it engages in a financial business, the second paragraph clearly indicates that the provision in the first paragraph shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt. The fact is that *Weltover* was a case precisely dealing with public debt. Indeed, the issuance of bonds by a State (Argentina in that case) is the kind of activity that may be encompassed in the category of public debt. Thus, it seems like the reference to the Harvard Draft was not so adequate for a case of bonds issuance. However, Article 11 is particularly relevant for a case of sovereign investment, *i.e.*, the typical activity of a SWF. While the second paragraph of Article 11 excluded pubic debt from the category of State activities that could be considered *iure gestionis*, the first paragraph expressly contemplated the possibility that states engage in other financial activities. In an implicit way, Article

---

107 HAZEL FOX & PHILIPPA WEBB: THE LAW OF STATE IMMUNITY 261 (3d ed. 2013).

108 Harvard Research in International Law, *Competence of Courts in Regard to Foreign States,* 26 A.J.I.L. SUPP. 451, 597 (1932) (emphasis added).

11's first paragraph recognized that those other State financial activities may be considered *iure gestionis*.

In any case, § 1603(e) of the FSIA is intended to clarify the meaning of the first prong of § 1605(a)(2). Section 1603(e) provides, "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States." Yet, in *Triple A v. Congo*, the U.S. Court of Appeals for the Sixth Circuit considered that "[t]he term 'commercial activity carried on by such state and having substantial contact with the United States[,]' as used in § 1603(e), is far from clear. The definition only confuses the statute's meaning."[109] The same Court observed that the first clause of § 1605(a)(2) comprises cases where the foreign State's commercial activity occurs in the U.S.[110] The FSIA legislative history explains that: "[t]his definition includes cases based on commercial transactions performed in whole or in part in the [U.S.]."[111]

In the case of the second prong of § 1605(a)(2), if the ministry of finances, *i.e.*, the foreign State engages in one such commercial activity even outside the territory of the U.S. and yet it performs an act in the U.S. in connection with such activity, the U.S. courts will have jurisdiction to hear claims based upon such act. Albeit succinctly, the *Nelson* case also referred to the phrase "in connection with" and indicated that a reasonable reading calls for "something more than a mere connection."[112]

For example, if the foreign State invests the funds of the SWF through the London Stock Exchange by acquiring certain securities outside of the U.S. but it then takes those securities to U.S. territory and puts them under custody of a custodian agent in the U.S., the U.S. courts will have jurisdiction to hear claims based upon such financial activity. Indeed, bringing the securities to the U.S. would most likely qualify as an act performed in the U.S. in connection with a commercial activity elsewhere.

The second prong of the "commercial activity" exception in § 1605(a)(2) was discussed by the U.S. Court of Appeals for the Second Circuit in *Kensington v. Itoua* where the court endorsed an earlier judgment by the Fifth Circuit which had indicated that the second prong "is generally understood to apply to non-commercial acts in the United States that relate to commercial acts abroad."[113] In a more recent judgment of the same court, it was held that certain e-mail sent to the plaintiff from

---

109 Triple A Intern., Inc. v. Democratic Republic of Congo, 721 F.3d 415, 417 (2013).
110 *Id.*
111 H.R. REP. NO. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615-616.
112 Saudi Arabia v. Nelson, 507 U.S. 349, 358 (1993).
113 Kensington Intern. Ltd. v. Itoua, 505 F.3d 147, 157 (2007) (referring to *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 390 (5th Cir.1999)).

the U.S. constituted notice to the plaintiffs of the alleged breach, rather than the actual mechanism of breach which occurred abroad. Thus, such act could not fall within the purview of the second clause.[114] In other words, such an e-mail was not considered to be an act performed in the U.S. in connection with a "commercial activity" of the foreign State elsewhere.

Finally, in the case of the third prong of § 1605(a)(2) of the FSIA, if for example, the foreign State invests the SWF funds outside of the U.S., then the U.S. courts will have jurisdiction to hear a claim based upon such financial activity as long as it causes a "direct effect" in the U.S. Importantly, such "direct effect" would have to be something more than a "purely trivial effect."[115] For example, if the securities' price is paid in the U.S., it would likely constitute an activity that causes a "direct effect" in the U.S.

The U.S. Supreme Court decision in *Weltover* is also useful in relation to the third prong of the "commercial activities" exception in § 1605(a)(2). *Weltover* serves to clarify in what occasion an act outside the territory of the U.S. in connection with a "commercial activity" of the foreign State elsewhere causes a "direct effect" in the U.S. The Supreme Court stated in relevant parts:

> [J]urisdiction may not be predicated on purely trivial effects in the United States. But we reject the suggestion [by the Court of Appeals] that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.' As the Court of Appeals recognized, an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'"[116]

The Supreme Court also stated the following:

> We nonetheless have little difficulty concluding that Argentina's unilateral rescheduling of the maturity dates on the Bonods had a 'direct effect' in the United States. Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. <u>Because New York was thus the place of performance for Argentina's</u>

---

[114] Rogers v. Petroleo Brasileiro, S.A., 673 F.3d 131, 138 (2d Cir. 2012).

[115] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992) ("Jurisdiction may not be predicated on purely trivial effects in the [U.S.].").

[116] *Id.*

> ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming.[117]

Thus, generally, where a contract states that the place of payment is in the U.S. and there is a lack thereof, it may be argued that such lack of payment causes a "direct effect" in the U.S.

In a 2014 case decided by the U.S. District Court for the Southern District of New York, involving, in fact, a SWF owned and operated by the Republic of Kazakhstan, the SWF *Samruk–Kazyna JSC*, the court discussed the "direct effects" prong of the commercial activity exception to immunity under § 1605(a)(2).[118] The *Samruk–Kazyna JSC* case dealt with certain securities acquired by plaintiffs and issued by an entity controlled by the defendant SWF. The Court acknowledged that there was no dispute that the nature of the activity engaged in by the SWF was "commercial," as opposed to "sovereign" and, instead, focused on the "commercial activity" exception.[119]

Plaintiffs had alleged that the entity issuing the securities defaulted on the securities at the direction of the defendant SWF.[120] The Court had no trouble in finding that the claim was based upon acts outside the U.S. in connection with a commercial activity of the SWF elsewhere, with "direct effects" inside the U.S. In consequence, the court considered the third prong of the commercial activity exception under § 1605(a)(2) satisfied.[121] Interestingly, the *Samruk–Kazyna JSC* court also referred to the Second Circuit case of *Kensington Int'l Ltd. v. Itoua*,[122] which, in line with *Weltover*, determined that the "direct effect" need not be substantial or foreseeable, but it must be something more than trivial or incidental.[123]

Also, the *Samruk–Kazyna JSC* court determined that, in any event, even if the "direct effects" exception did not apply, the SWF's alleged conduct within the U.S. would be sufficient to create jurisdiction under the first prong of the commercial activity exception under § 1605(a)(2) of the FSIA.[124]

---

117 *Id.* at 618-19 (emphasis added).

118 Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 2 F. Supp.3d 550, 551 (S.D.N.Y. 2014). The SWF Institute describes this SWF as a Joint Stock Company. *See Samruk-Kazyna JSC,* SOVEREIGN WEALTH FUND INSTITUTE, http://www.swfinstitute.org/swfs/samruk-kazyna-jsc/ (last visited July 11, 2016).

119 *Id.* at 556.

120 *Id.*

121 *Id.*

122 Kensington Int'l Ltd. v. Itoua, 505 F.3d 147, 157 (2d Cir. 2007).

123 *Atlantica Holdings, Inc.,* 2. F. Supp.3d at 555.

124 *Id.* at 557.

Therefore, where the State properly engages in an activity that, pursuant to the nature test, may be characterized as commercial and satisfies one of the three prongs of § 1605(a)(2), no immunity from jurisdiction will apply.

It can be concluded that immunity from jurisdiction will apply in all cases involving pool-of-assets-SWFs managed by a ministry of finance in the defendant's side. At the same time, three possible "commercial activity" scenarios could occur, enabling the "commercial activity" exception to immunity from jurisdiction. Thus, where any such pool-of-assets-SWF is engaged in one of the three "commercial activity" scenarios discussed above, the "commercial activity" exception to immunity from jurisdiction would operate and the U.S. courts will have jurisdiction to hear the case. In all these cases, the commercial character of the SWF activity will be determined by reference to the "nature" of the particular financial transaction, activity or act rather than by reference to its "purpose." Because they are governmental entities, the grant of immunity from jurisdiction to SWFs is reasonable and practical. At the same time, the "commercial activities" exception plays a key role in allowing courts to entertain cases against SWFs as a result of their commercial operations.

b. Pool–of–Assets–SWFs Managed by Foreign Central Banks or Monetary Authorities and Immunity from Jurisdiction

Instead of being managed by a ministry, a SWF that is a pool of assets may be managed by a foreign central bank or monetary authority. But, what are central banks or monetary authorities? Foreign central banks or monetary authorities are only mentioned in the FSIA in connection to their special regime of immunity from execution. Nevertheless, they are not defined. Yet, foreign central banks or monetary authorities are protected by a special regime of immunity from execution. Thus, this article elaborates on the definition and functions of foreign central banks and monetary authorities in the relevant section on pool-of-assets-SWFs managed by central banks and sovereign immunity from execution.

For now, it suffices to say that most modern central banks or monetary authorities have separate legal personality. Yet, if a central bank or monetary authority managing a pool-of-assets SWF does not have separate legal personality from the State (which is rare at present times), for purposes of immunity from jurisdiction, the case would be identical to that of a SWF managed by a ministry. Additionally, even if the central bank managing a pool-of-assets SWF has separate legal personality, the regime of immunity from jurisdiction will be similar although the entity ultimately covered by immunity would be the very central bank.

Indeed, the FSIA is structured in such a way that those State entities protected under its aegis are considered as the "foreign State" itself for purposes of such federal law. In other words, in order to extend sovereign immunity to certain foreign State entities, the FSIA extends the definition of "foreign State" so as to encompass those entities. As a result, as soon as a State entity, such as a central bank, falls within the definition of 'foreign State' under § 1603(a) FSIA, it will be covered by the rules on sovereign immunity from the jurisdiction. Accordingly, an asset-pool SWF managed by such central bank will be protected by immunity from jurisdiction. At the same time, a central bank may be subject to the "commercial activity" exception to immunity from jurisdiction.

The best example to illustrate this assertion is the case of *Weltover*, which involved a claim against the Republic of Argentina and its central bank: *Banco Central de la Republica Argentina*. Both the foreign State (Argentina) and its central bank were treated simply as the State with all accruing consequences, including the applicability of the "commercial activity" exception to the general rule of immunity from adjudication that they would have otherwise enjoyed.[125]

Although a pool-of-assets-SWF managed by a central bank can get involved in a legal dispute against it, technically, the defendant would not be the very pool-of-assets-SWF. These type of SWFs do not have separate legal personalities. As a result, the claimant would have to name the managing central bank as defendant (or the State if the central bank does not have its own separate legal personality either). Both entities, the SWF that is a pool of assets and the managing central bank would, in any event, be protected by the rules of sovereign immunity from jurisdiction discussed above.

As will be discussed in the next subsection, central banks and monetary authorities of the State with separate legal personality will invariably qualify as "agencies or instrumentalities." In consequence, they will be covered by the regime of immunity from jurisdiction applicable to such "agencies or instrumentalities," which in any event is similar to the one applicable to the State proper.

---

125 Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 609 (1992). A "Note" in the 2010 Harvard Law Review heavily criticizes *Weltover* and the application of the "commercial activity exception" to immunity, which emphasizes the transaction's nature to the exclusion of its purpose to central banks. The Note indicates that the "commercial activity" test is inaptly applied to central banks. *See* Note, *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 556 (2010).

aa. Central Banks or Monetary Authorities Qualifying as "Agencies or Instrumentalities"

The FSIA contains specific rules regarding "agencies or instrumentalities" of the State, which will be analyzed below in more detail. Under such rules, certain SWFs with separate legal personality may qualify as "agencies or instrumentalities" of their home or parent states. For now, it suffices to say that central banks and monetary authorities of the State with separate legal personality will invariably qualify as "agencies or instrumentalities," even though there is no express indication in the FSIA that they are to be regarded as such.[126]

Some well-known commentators opine that central banks or monetary authorities must be considered "agencies or instrumentalities." Paul Lee, for example, argues that the FSIA presupposes that a "foreign central bank" or "monetary authority" qualifies as an "agency or instrumentality." Clearly, in his view, in order for an entity to qualify as a foreign central bank or monetary authority, it must first meet the definitional requirements of an "agency or instrumentality" of a foreign State.[127] In support of his position, Lee quotes from the House Report where it is indicated that it is possible, but unlikely, that in a particular instance a foreign central bank may be deemed to be part of the foreign State itself comparable to the case of a ministry of finance or treasury.[128]

Another renowned commentator on the subject, Mr. Ernest Patrikis, has stated that most foreign central banks undoubtedly would qualify as agents or instrumentalities of the foreign states for purposes of the general provisions of the FSIA.[129] Thomas Baxter likewise opines that most central banks would be considered "instrumentalities" of their

---

126 *See* Tomas Baxter Jr., General Counsel and Exec. Vice President, The Fed. Reserve Bank of New York, Remarks at the Central Reserve Bank of Peru on the Foreign Sovereign Immunities Act and Central Bank Immunity in the United States, Speech: *Recent Developments in Key Legal Issues of International Reserves Investments* (Nov. 16, 2010) (transcript available at http://www.newyorkfed.org/newsevents/speeches/2010/bax101119.html) (stating that the FSIA contains no definition of the terms "central bank" or "monetary authority"). Baxter contends that, while the meaning of those terms seems obvious, there is considerable diversity from country to country, and that there are some unusual cases. Thus, certain U.S. courts have rejected arguments of some entities claiming to be central banks. *Id.* at n.29.

127 Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327, 350 (2003).

128 Lee, *supra* note 127, at 327 n.81 (quoting H.R. REP. NO. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 1604, 6614).

129 Ernest T Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. ILL. L. REV. 265, 272-73 (1982) (pointing to a Letter from the Department of Justice and Department of State to the President of the Senate, in which the organizations recognized that a foreign central bank fall within the definition of "agency or instrumentality of a foreign state.").

governments under the FSIA.[130] In *S & S Machinery Co. v. Masinexportimport* the Second Circuit held: "State-owned central banks indisputably are included in the § 1603(b) definition of 'agency or instrumentality.'"[131]

As a result, most foreign central banks or monetary authorities, will be subject to the regime of immunity from jurisdiction applicable to "agencies or instrumentalities."

C. SWFs with Separate Legal Personality from the State Qualifying as "Agencies or Instrumentalities" and Immunity from Jurisdiction

A key provision in the FSIA is § 1603 subsection (a), which states that a "foreign State" includes a political subdivision of a foreign State or an "agency or instrumentality of a foreign State." Pursuant to this provision, an entity that is able to demonstrate that it qualifies under the definition of "agency or instrumentality" will enjoy the immunity of jurisdiction that the FSIA affords to foreign states. Furthermore, § 1603 FSIA subsection (b) lists the requirements for an entity to qualify as such "agency or instrumentality of a foreign State." That entity would have to be: (1) a separate legal person, corporate or otherwise; (2) which is an "organ" of a foreign State or political subdivision thereof, or a "majority of whose shares or other ownership interest is owned" by a foreign State or political subdivision thereof; and (3) which is neither a citizen of a State of the U.S. nor created under the laws of any third country.

Pursuant to § 1603(b)(1), the entity must, under the law by which it was created, be capable of suing or being sued, contracting and holding property in its own name.[132] Secondly, § 1603(b)(2) has two prongs: (1) either the entity is an "organ" or political subdivision of the foreign State, or, (2) alternatively, a "majority of its shareholding must be owned" by the foreign State. Importantly, as was resolved by the U.S. Supreme Court in *Dole Food Co.*, only direct subsidiaries of a foreign State would qualify as "agencies or instrumentalities."[133] Thus, under the second prong, the shareholding must be direct. The case of *Dole Food Co.* will be discussed in more detail below.

Finally, as per § 1603(b)(3), a State entity claiming immunity as an "agency or instrumentality" must be incorporated under the laws of the home foreign State. Indeed, it is assumed that incorporation outside the home State would mean that such agencies are engaged in activities of a

---

130 Baxter Jr., *supra* note 126.
131 S & S Machinery Co. v. Masinexportimport, 706 F.2d 411, 414 (2d Cir. 1983).
132 HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 251 (3d ed., 2013).
133 Dole Food Co. v. Patrickson, 538 U.S. 468 (2003).

commercial or private law nature and hence are not protected by immunity.[134] So, as may be seen, under the FSIA, an "agency or instrumentality" of a foreign State must be a legal person which is an "organ" or the majority of its shares must be directly owned by that foreign State. In addition, that legal person or entity must have the nationality of the foreign State.

Because by virtue of § 1603 subsections (a) and (b) of the FSIA, certain SWFs with separate legal personality may qualify as "agencies or instrumentalities" of a foreign State, they will also be considered as the foreign State for purposes of immunity from jurisdiction. As such, § 1605 FSIA will be applicable to those SWFs and they will be subject to the exceptions to immunity from jurisdiction that apply to foreign states.

Pursuant to the three requirements of § 1603(b) FSIA, a number of SWFs with separate legal personality will qualify as "agencies or instrumentalities" of their parent states while others will not. For most of them, meeting the requirements of § 1603(b)(1) and § 1603(b)(3) will not be difficult. First, they are separate legal persons, corporate or otherwise, under their domestic laws. As such, those SWFs would meet the requirement set forth by § 1603(b)(1) FSIA. At the same time, most, if not all, SWFs are created or registered under the laws of their own home states. Therefore, for most SWFs, it will not be difficult to meet the citizenship requirement under § 1603(b)(3) FSIA.

The two alternative requirements of § 1603(b)(2) could be a bit more problematic, though. While it is possible that the foreign State "owns a majority of shareholding" (second prong), the U.S. Supreme Court judgment in *Dole Food Co.*, may be an obstacle for a number of SWFs to benefit from sovereign immunity under the FSIA. Pursuant to *Dole Food Co.*, indirect holding or "tiering" of State instrumentalities will not suffice.[135] The Supreme Court stated:

> The Dead Sea Companies, as indirect subsidiaries of the State of Israel, were not instrumentalities of Israel under the FSIA at any time. Those companies cannot come within the statutory language which grants status as an instrumentality of a foreign state to an entity a 'majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.' § 1603(b)(2). <u>We hold that only direct ownership of a</u>

---

[134] FOX & WEBB, *supra* note 132, at 252.
[135] *Id.*

> majority of shares by the foreign state satisfies the statutory requirement.[136]
>
> . . .
>
> The better rule is the one supported by the statutory text and elementary principles of corporate law. A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares.[137]

Therefore, any SWF that is not directly held by the State will not be considered as an "agency or instrumentality" under the "majority ownership" prong of § 1603(b)(2) FSIA. Yet, even if a SWF fails to qualify as an "agency or instrumentality" under the "majority ownership" (second prong), it may still qualify for sovereign immunity if it can establish that it is an "organ" of a foreign State or a political subdivision thereof (first prong).[138]

Nevertheless, as will be shown by the following account of the *Capital Trans Int'l v IPIC et al.* case,[139] decided by the U.S. District Court for the Middle District of Florida, qualifying as an "organ" of the foreign State may not be so easy for certain SWFs. As a result, should a SWF fail to qualify under both prongs of § 1603(b)(2) FSIA, it will not be considered as an "agency or instrumentality" of a foreign State. Accordingly, it will not be covered by immunity from jurisdiction. In other words, a SWF with separate legal personality that does not qualify for "agency or instrumentality" status will not be protected by immunity from jurisdiction.

a. The "Organ" Prong in § 1603(b)(2) FSIA: The Case of *Capital Trans Int'l*

The *Capital Trans Int'l* case is useful to illustrate the discussion on the "organ" prong under § 1603(b)(2) FSIA. That judgment is a relatively recent one, where the "organ" prong was approached in a less than orthodox way. At the same time, it will also serve to analyze in more detail the "direct ownership" requirement under *Dole Food Co.*

In 2010, Capital Trans International LLC ("CTI"), a company registered under the laws of Florida, filed a breach of contract claim

---

136 Patrickson, 538 U.S. at 474 (emphasis added).
137 *Id.* at 477 (emphasis added).
138 Slawotsky, *supra* note 70, at 995.
139 Capital Trans Int'l, LLC v. Int'l Petroleum Inv. Co., No. 8:10-cv-529-T-30TWG, 2013 WL 557236 (M.D. Fla. Feb. 14, 2013) (order granting motion to dismiss in part).

against three foreign corporate entities: International Petroleum Investment Company ("IPIC"), which happens to be one of Abu Dhabi's SWFs;[140] Aabar Investments PJSC ("Aabar"); and Tasameem Real Estate Company LLC ("Tasameem"). While, from the outset, IPIC was described as a wholly-owned instrumentality of Abu Dhabi, Aabar was referred to as a public joint stock company 75.5% owned by IPIC (the remaining 24.5% owned by the public). Tasameem, on the other hand, was described as a private company with no governmental involvement.

CTI alleged that the U.S. District Court had subject matter jurisdiction over IPIC and Aabar as instrumentalities of a foreign State (Abu Dhabi) that were engaged in commercial activity having a direct effect in the U.S.[141] Not surprisingly, IPIC and Aabar moved to dismiss the action based on lack of subject matter jurisdiction, invoking *inter alia* sovereign immunity under the FSIA.[142] The Court, in turn, started off by reviewing the "instrumentality" status of IPIC and Aabar under § 1603 FSIA.

IPIC was a separate legal person (§ 1603(b)(1) FSIA) and it was neither a citizen of the U.S. nor had it been created under the laws of any third country. That is, it was created under the laws of Abu Dhabi (§ 1603(b)(3) FSIA). Furthermore, IPIC's status as an entity wholly owned by the Abu Dhabi government was not contested. Thus, the Court readily concluded that IPIC also met the second prong of § 1603(b)(2) FSIA.[143] Accordingly, the Court determined that IPIC was an "instrumentality" of Abu Dhabi because it fulfilled all three criteria listed in § 1603(b) FSIA. However, the *Capital Trans Int'l* court did not discuss whether IPIC was directly or indirectly owned by Abu Dhabi. As was already stated, pursuant to the "direct ownership test" spelled out by the Supreme Court in *Dole Food Co.*,[144] in order to qualify as an "instrumentality" direct shareholding by the foreign State is required.

In a similar fashion, in another recent case involving a SWF with separate corporate legal personality and without much discussion, the U.S. District Court for the Southern District of New York readily accepted that the SWF *Samruk–Kazyna JSC* qualified as a "foreign State" for purposes of § 1603(a) FSIA. The Court simply recorded that there was no dispute

---

140 The SWF Institute describes IPIC as a Joint Stock Company SWF. *See International Petroleum Investment Company,* SOVEREIGN WEALTH FUND INSTITUTE, http://www.swfinstitute.org/swfs/international-petroleum-investment-company/ (last visited July 11, 2016).

141 Because Tasameem was not considered a State entity, CTI did not have to allege jurisdiction over Tasameem through the exceptions to sovereign immunity under FSIA. *See* Capital Trans Int'l, LLC, 2013 WL 557236 at *3.

142 Defendants also moved to dismiss on lack of personal jurisdiction, *forum non conveniens,* and failure to state a claim upon which relief could be granted. *See id*.

143 *Id.* at *7.

144 Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003).

from the parties in that connection.[145] As a result, it was not explained whether the *Samruk–Kazyna JSC* SWF was considered an "organ" or an entity meeting the "majority ownership" test under § 1603(b)(2) FSIA, in order to be considered an "instrumentality" of a foreign State.

Although the *Capital Trans Int'l* court considered IPIC an "instrumentality," it determined that it possessed subject matter jurisdiction. Indeed, because of the plaintiff's breach of oral contract allegations, the court determined that the third prong of the commercial activity exception under § 1605(a)(2) FSIA was satisfied. It concluded that entering into a contract—albeit elsewhere—was clearly commercial activity. Thus, failure to perform a contractual obligation to pay in the U.S. would qualify as a "direct effect" under the third prong of § 1605(a)(2) FSIA.[146] Importantly, one notable factor weighed by the court was that CTI alleged that the place of payment was the State of Florida and IPIC did not point to any contradictory evidence.[147]

In relation to Aabar, the Court considered that it plainly satisfied the requirements of § 1603(b)(1) and (b)(3) FSIA, being a corporation organized under the laws of the United Arab Emirates ("U.A.E."), not any third country. However, in the case of Aabar, the Court did refer to the *Dole Food Co.* "direct ownership" requirement. In that connection, the court determined that, because neither the government of Abu Dhabi nor the U.A.E. directly owned any stock in Aabar, the second—or direct ownership—prong of § 1603(b)(2) could not apply to draw Aabar within the reach of FSIA's instrumentality status.[148]

At the same time, CTI had alleged that, as per § 1603(b)(2) FSIA (first prong), Aabar was an "instrumentality" of the government of Abu Dhabi, being an "organ" of said government.[149] Confronted with such argument by CTI, the court regretted the lack of a clear test for determining "agency or instrumentality" status under the § 1603(b)(2) "organ" prong. In fact, quoting from the case of *USX Corp. v. Adriatic Ins. Co.*,[150] the court lamented that the FSIA and its legislative history were silent as to a definition of the term "organ," and that such term was inherently vague and did not have a well-established common law meaning. Also, the court indicated that neither the U.S. Supreme Court nor the Eleventh Circuit had

---

145 Atlantica Holdings, Inc. v. Sovereign Wealth Fund, No. 12 Civ. 8852 (JMF), 2014 WL 917055, at *5 (S.D.N.Y Mar. 10, 2014).
146 *Capital Trans Int'l, LLC*, 2013 WL 557236, at *12.
147 *See id.* at *12 n.9 (explaining that a declaration by an IPIC officer stating that IPIC never agreed to make payments in Florida would have sufficed to create a disputed fact).
148 *Id.* at *7.
149 *Id.* at *8.
150 USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 209 (3d. Cir. 2003).

articulated a standard for determining when an entity is an "organ." Therefore, the court looked to other circuits for guidance.[151]

The court then explained that four federal circuit courts had addressed the "organ" prong of § 1603(b)(2) FSIA and highlighted that three out of those four courts of appeals had applied identical standards: (1) the Second Circuit in *Filler v. Hanvit Bank*;[152] (2) the Ninth Circuit in *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*;[153] and (3) the Fifth Circuit in *Kelly v. Syria Shell Petroleum Dev. B.V*.[154] Interestingly, the court then emphasized that the "capstone of organ designation" is whether the entity engages in a public activity on behalf of a foreign government.[155] That is a clear indication that the court would favor the use of a "purpose-of-the-entity" test in order to determine whether an entity qualifies as an "organ" under § 1603(b)(2) FSIA.

Commentator Joel Slawotsky would probably agree with the application of that approach to a case involving a SWF. That author has argued that in evaluating whether a SWF may be considered as an "organ," its focus must be motivated by a public purpose. That is, if the entity engages in a public activity on behalf of the foreign government, it must be considered an "organ" under § 1603(b)(2) first prong.[156] Slawotsky's opinion was said to be based on *EIE Guam Corp.*[157] That author also suggested that the purpose motivating the creation of a SWF should be taken into account.[158] In other words, Slawotsky would probably support the use of a "purpose-of-the-entity" test in an "organ" determination.

The *Capital Trans Int'l* court then took into account that the three circuit courts in *Filler v. Hanvit*; *EIE Guam Corp.*; and *Kelly v. Syria Shell* considered the following five factors, in order to make their "organ" determination, immediately discarding the possibility that each of them were fulfilled by Aabar so as to qualify as an "organ:"[159]

> (1) whether the foreign State created the entity for a national purpose;[160]

---

151 *Capital Trans Int'l, LLC*, 2013 WL 557236, at *6.
152 Filler v. Hanvit Bank, 378 F.3d 213 (2d. Cir. 2004).
153 EIE Guam Corp. v. Long Term Credit Bank of Japan*, Ltd.*, 322 F.3d 635 (9th Cir. 2003).
154 Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841 (5th Cir. 2000).
155 *Capital Trans Int'l, LLC*, 2013 WL 557236, at *6.
156 Slawotsky, *supra* note 70, at 995.
157 *EIE Guam Corp.*, 322 F.3d at 635.
158 Slawotsky, *supra* note 70, at 996.
159 *Capital Trans Int'l, LLC,* 2013 WL 557236, at *8-10.
160 Once again, reference to the "purpose" of the entity is invoked in order to determine whether it qualifies as an "organ."

> (2) whether the foreign State actively supervises the entity;
>
> (3) whether the foreign State requires the hiring of public employees and pays their salaries;
>
> (4) whether the entity holds exclusive rights to some right in the foreign country; and
>
> (5) how the entity is treated under foreign State law.[161]

Interestingly, in conducting the analysis of those five factors or the five-prong "organ" test, the *Capital Trans Int'l* court emphasized, in connection to different factors, that the linchpin of the "organ" analysis is whether the relevant entity engages in a public activity on behalf of a foreign government.[162] The court also indicated that the key inquiry in order to determine whether an entity qualifies as an "organ" is whether it serves primarily a private interest, such as profit maximizing, or a public interest, such as industry protection or economic stabilization.[163] This is noteworthy on at least two accounts.

First, the reference to whether an entity serves primarily a private interest as opposed to a public interest, appears to be in line with a "purpose-of-the-entity" test. In other words, the *Capital Trans Int'l* court considered it necessary to apply a "purpose" test in order to decide whether Aabar was an "organ." Under a similar reasoning, Joel Slawotsky has argued that whether a particular SWF enjoys immunity depends on its purpose as demonstrated by its investments.[164] This commentator appears to advocate for a denial of immunity where the SWF's conduct truly constitutes a commercial activity, or conduct that can be exercised by private citizens, as opposed to sovereign activity.[165]

---

161 *Capital Trans Int'l, LLC*, 2013 WL 557236, at *6. This five-factor approach has been heavily criticized. *See* Michael A. Granne, *Defining "Organ of a Foreign State" Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1, 1-2 (2008). This commentator submits that the courts approaches fail under a number of grounds. He argues that in determining when an enterprise is an "organ," courts should focus on whether the denial of sovereign status has the potential to interfere with diplomatic relations between the US and the relevant foreign State. To measure the potential for interference with the conduct of foreign relations, courts must look at the extent to which the sovereign would be justifiably affronted if the entity were not treated as its organ. *Id.* at 1-2.

162 *Capital Trans Int'l, LLC*, 2013 WL 557236, at *10 (quoting *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003)).

163 *Id.* at *9.

164 Slawotsky, *supra* note 70, at 974.

165 This commentator does not openly say that SWFs' sovereign conduct should trigger a grant of immunity. Yet, that is the message that he seems to try to convey. *Id.*

Under that kind of reasoning, an entity qualifying as an "organ" on the basis of the "purpose" that it primarily serves, which also qualifies as an "instrumentality," could, notwithstanding, be hauled into U.S. courts as long as—by reference to the "nature" test—its course of conduct or particular transaction or act is of a commercial character (by virtue of the "commercial activity" exception to sovereign immunity). This result appears somehow paradoxical.

Secondly, as was previously indicated, the court referred to "public interest," mentioning, as it did, industry protection and economic stabilization as examples. The reference to economic stabilization as a public interest activity is very relevant in a SWF context. Indeed, one of the traditional purposes of SWFs is economic stabilization, and some SWFs have as their exclusive purpose economic stabilization. Thus, the reference to economic stabilization as a public interest activity suggests that the *Capital Trans Int'l* court would be readily inclined to characterize an economic stabilization SWF as an "organ" of the parent foreign State.

In the same sense, Joel Slawotsky appears to suggest that the five basic categories of SWFs identified by the IMF on the basis of their main objectives, *i.e.*, stabilization funds, savings funds, reserve investment corporations, development funds and contingent pension reserve funds,[166] should be all granted immunity.[167] Where courts are satisfied that the purpose of a SWF is one of, *e.g.*, reserve investment or one of stabilization, they should be covered by sovereign immunity.[168] That commentator argues that a record of investments would serve to corroborate whether a stated sovereign intended purpose is true. Conversely, if the SWF's investment record establishes a pattern of, *e.g.*, investing in highly speculative derivate transactions, that would serve to undermine the stated sovereign goal. As a result, such SWF should not be afforded immunity.[169]

At the same time, Slawotsky considers that where SWFs have more than one purpose, it is more difficult to determine whether the commercial activity exception to sovereign immunity applies.[170] Such reasoning shows that author's inclination to make the grant of sovereign immunity dependent on the purpose of the entity or SWF as a whole. In other words, Slawotsky's argumentation suggests that, in his view, a SWF conducting stabilization, savings, reserve investment or development activities could

---

166 Int'l Working Grp. of Sovereign Wealth Funds, *Generally Accepted Principles and Practices 'Santiago Principles'* SOVEREIGN WEALTH FUNDS 3 (October 2008), http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf (last visited July 11, 2016).

167 Slawotsky, *supra* note 70, at 981.

168 *Id.*

169 *Id.*

170 Slawotsky, *supra* note 70, at 999.

not be stripped of sovereign immunity on the basis of the "commercial activity" exception.

That result seems incorrect. It runs afoul to the "nature" test provided for by § 1603(d) FSIA and is contrary to the conclusions of the U.S. Supreme Court in *Weltover*. It is the submission of this article that, despite the purpose of a SWF, should it engage in any financial activity that meets the requisites of § 1605(a)(2) FSIA, such SWF could be brought to the courts of the U.S. on the basis of the "commercial activity" exception to sovereign immunity. On the other hand, the proposed focus in the "organ" prong fails to address the inequalities arising out of the "direct ownership" test. For example, a SWF that is directly held by the State would automatically qualify as an "agency or instrumentality," regardless of whether its "purpose" is not public, *i.e.*, entirely commercial.

In this connection, in order to solve complex problems of classification of transactions, which is useful to assess cases where the "commercial activity" exception is being dealt with, Judge James Crawford proposes the use of the method of "individuation" in order to isolate the particular act or transaction by virtue of which the State is said not to be immune.[171] This method requires the court to differentiate between, on the one hand, the immediate or proximate and, on the other, the remote or ulterior aspects of the claim.[172] Such isolation or differentiation will serve to identify the relevant transaction which will in turn be used for *iure imperii/iure gestionis* classifications.

The most obvious difficultly of the method of individuation is the aspect of remoteness. A particular act usually has ramifications forward in time and is part of some larger activity or purpose.[173] Even though Judge Crawford questions the terminology of the "nature/purpose" distinction, he submits that its intent to distinguish the narrower from the broader aspects or descriptions of a transaction can be legitimate. For that matter, Crawford recasts the "nature/purpose" distinction and submits that in assessing foreign State immunity with respect to a particular transaction, it is necessary first, to identify the relevant transaction as precisely and narrowly as is reasonably possible having regard to the factual and legal issues. Then, if so described, the transaction can fairly be classified as a "commercial transaction," then it will not lose that character or

---

171 James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions,* 54 BRIT. Y.B. INT'L LAW 75 94 (1983).

172 Stephan Wittich, *Article 2(1)(c) and (2) and (3)*, *THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, A COMMENTARY* 54, 67 (Roger O'Keefe et al. eds., Oxford University Press, 2013).

173 Crawford, *supra* note 171, at 95.

classification because extraneous facts or aspects surrounding the individual transaction suggest or would attract a different classification.[174]

To illustrate with an example, Judge Crawford referred to the U.S. judgment issued in *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, where the U.S. District Court for the Central District of California stated that:

> An act or activity can be defined broadly, such as 'hiring of employees,' an activity carried on by private parties, and thus, 'commercial,' or it can be defined narrowly, such as, 'employment of diplomatic . . . personnel,' a governmental activity.[175]

In the same vein, Judge Crawford argues that a single act might be described, for example, as publishing a journal, defaming the plaintiff, co-operating with the State authorities, or fulfilling the defendant's statutory mandate, or as striking at the enemy, giving one's own company a monopoly, stealing the property of another, returning to the people control over (part of) the economy, and so on.[176] All these different characterizations of a single event may be accurate, depending on the level of abstraction of the characterization.

Applying such method of "individuation" to the investments of a SWF, the closest or narrower aspects of a transaction, as opposed to the most remote aspects or even objectives, would be the ones to be taken into account for sovereign immunity determinations. As Lady Hazel Fox has recalled, the criterion of the "nature" of the act has been recently applied narrowly so as not to classify the whole transaction but to focus on individual provisions and to remove immunity in respect of those common to commercial transactions.[177]

Once the *Capital Trans Int'l* court referred to the five-factor test of *Filler v. Hanvit*; *EIE Guam Corp.*; and *Kelly v. Syria Shell*, for purposes of "organ" determination, it revealed its disagreement with the Third Circuit when it added an additional "ownership structure of the entity" factor in *USX Corp*. The *Capital Trans Int'l* court opined that the additional factor drastically alters the analysis in cases involving tiered corporate ownership and circumvents the reasoning of the U.S. Supreme Court in *Dole Food Co.* which discarded the "tiering" theory of sovereign

---

174 Crawford, *supra* note 171, at 96.

175 Int'l. Ass'n of Machinists v. Org'n of Petroleum, 477 F. Supp. 553, 567 (C.D. Cal. 1979).

176 Crawford, *supra* note 171, at 95.

177 HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 408 (3d ed. 2013).

immunity.[178] In this connection, the Third Circuit had articulated the additional "ownership structure of the entity" factor in *USX Corp.* as follows:

> Under the organ prong, as opposed to the majority ownership prong of section 1603(b)(2), a foreign state might own only 10% of an entity; it might own directly 50% of the entity; or it might own even 100% of a holding company that owns 100% of the entity. On the other hand it is possible that a foreign state might not own any portion of any entity that nevertheless is its organ as section 1603(b)(2) does not require a foreign state to have any ownership interest in an entity for it to be its organ. Courts should consider how these different ownership structures might influence the degree to which an entity is performing a function 'on behalf of the foreign government.'[179]

However, the *Capital Trans Int'l* Court stated that adherence to the extra prong of the Third Circuit would eviscerate the Supreme Court's careful analysis in *Dole Food Co.* of the Congressional intent behind § 1603(b)(2) FSIA.[180] Also, the *Capital Trans Int'l* court considered that the Third Circuit's view would nullify the particular terms Congress selected in the FSIA, thereby opening the "organ" prong for all minority held corporations to become instrumentalities when they do not qualify under the "majority ownership" prong because they are controlled through tiered corporate intermediaries.[181] Thus, the court indicated that it would adopt the five-prong test as articulated by the Second, Fifth, and Ninth Circuits.

It is important to note, nevertheless, that neither *Filler v. Hanvit*; *EIE Guam Corp.*; or *Kelly v. Syria Shell*, nor other judgments that have been issued by their respective circuits after *USX Corp.*, have rejected the "ownership structure of the entity" factor added by the Third Circuit in that judgment.[182] In fact, *Filler v. Hanvit* was issued by the Second Circuit after *USX Corp.* and it did not address the "ownership structure of the entity" factor. The Court of Appeals for the Ninth Circuit issued *e.g.*

---

178 Capital Trans Int'l, LLC v. Int'l Petroleum Inv. Co., No. 8:10-cv-529-T-30TWG, 2013 WL 557236, *6 (M.D. Fla. Feb. 14, 2013) (order granting motion to dismiss in part).

179 USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 209 (3d Cir. 2003).

180 *Capital Trans Int'l, LLC*, 2013 WL 557236, at *6.

181 *Id.* at *6 n.3.

182 *USX Corp.*, 345 F.3d at 209.

California v. NRG Energy Inc.[183] after *EIE Guam Corp.* and, of course, after *USX Corp.* and it did not address the "ownership structure of the entity" factor either. Likewise, the judgment of the Fifth Circuit in the case of *Board of Regents of University of Texas System v. Nippon Telephone and Telegraph Corp.*,[184] did refer to *USX Corp.* (rendered after *Kelly v. Syria Shell*) but did not disapprove the "ownership structure of the entity" factor.

In addition, adherence to the Third Circuit's "ownership structure of the entity" extra factor would not eviscerate, in reality, the Supreme Court's analysis in *Dole Food Co.* In fact, the "ownership structure of the entity" factor is just one among five other factors, which may serve as guidance to determine whether an entity is an "organ" under the § 1603(b)(2) FSIA first prong. Conversely, the Supreme Court's analysis in *Dole Food Co.* refers to the "majority ownership" or second prong of § 1603(b)(2) FSIA.

In any event, to require "direct ownership" so as to satisfy the "organ" prong of § 1603(b)(2) FSIA, seems rather redundant. The outcome would be that every "organ" would have to meet the "direct ownership" requisite. Should that be the case, the distinction between an "organ" and an entity a majority of whose shares were owned by the State would be meaningless. In other words, any "organ" with separate legal personality that were created under the laws of its parent State as per § 1603(b)(1) and (3) would also qualify under the second or "majority ownership" prong of § 1603(b)(2) FSIA. Such result would be contrary to the language of § 1603(b)(2), which uses the word "or" and distinguishes "organs" from corporate persons a "majority of whose shares is owned by a foreign State."

Commentators and case law have not required "direct ownership" in the case of "organs." Michael Granne, for example, has submitted that for those entities that do not or cannot satisfy the ownership requirements, "organ" is the only refuge.[185] This commentator argues that only with a definition of "organ" that fills in the gaps among the agencies and instrumentalities that a foreign government directly owns can § 1603(b)(2) properly reflect the congressional intent.[186] Granne even suggests that certain SWFs may qualify as "organs" of a foreign State.[187] Therefore, the

183 California v. NRG Energy Inc., 391 F.3d 1011 (9th Cir. 2004) (vacated in part by *Powerex Corp. v. Reliant Energy Services, Inc.,* 551 U.S. 224 (2007)).
184 *See* Bd. of Regents of Univ. of Tex. Sys. v. Nippon Tel. and Tel. Corp., 478 F.3d 274 (5th Cir. 2007).
185 Granne, *supra* note 72, at 3.
186 *Id.* at 17.
187 *Id.* at 2, 50.

Capital Trans Int'l judgment made a wrong interpretation of § 1603(b)(2) FSIA.

Be that as it may, consistent with its position, the *Capital Trans Int'l* court rejected what it called an "inaccurate equation" of IPIC with the Abu Dhabi government. It appears like, in the court's view, CTI had argued, and for purposes of obtaining subject matter jurisdiction, that IPIC's ownership of up to 95.3% shareholding in Aabar constituted an indirect acquisition by Abu Dhabi. Yet, the court concluded that IPIC and the Abu Dhabi government were not interchangeable with regards to § 1603 FSIA because: "IPIC does not become a 'foreign state;' rather, IPIC is subsumed within the term 'foreign state' but does not possess the ability to confer instrumentality status on other corporate entities."[188] This approach has obvious consequences for SWFs with separate legal personality. Unless they are directly held by the State, they will not qualify for State immunity under either prong of § 1603(b)(2) FSIA.

In the case of *Wultz v. Iran*, another case where one of the defendants was connected to SWFs, the U.S. District Court for the D.C. Circuit determined that an indirect subsidiary of a State (China) could not qualify as an instrumentality under the FSIA. Indeed, defendant Bank of China, which was a subsidiary of China's SAFE (State Administration of Foreign Exchange),[189] also known in Chinese as Central Huijin Investment Company, did not qualify as an instrumentality of China because such bank was not directly owned by China. In consequence, the Court ruled that the Bank of China was not entitled to immunity.[190]

As may be observed from the judgment, not only the Bank of China was owned by SAFE but also SAFE was indirectly owned by the State. SAFE was, in fact, a subsidiary of China's SWF: China Investment Corporation ("CIC"). This judgment suggests that, had both SAFE and CIC been co-defendants, only CIC would have been entitled to sovereign immunity as an "instrumentality."[191] In addition, this judgment of *Wultz v. Iran* is relevant on two accounts. First, the Court indicated that it follows

---

188 Capital Trans Int'l, LLC, 2013 WL 557236, at *9 (order granting motion to dismiss in part) (citing *Filler v. Hanvit Bank,* 378 F.3d 213, 219 (2d Cir. 2004)).

189 The *Wultz v. Iran* judgment is a little confusing in that it refers to China SAFE Investments Limited as if it were the same entity as the State Administration of Foreign Exchange (SAFE). Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 30 (D.D.C. 2010). (It is assumed that the Court is referring to SAFE Investment Company as SAFE Investments Limited). However, the Sovereign Wealth Funds Institute, which qualifies SAFE Investment Company as a SWF, indicates that such company is a subsidiary of SAFE. SOVEREIGN WEALTH FUNDS INSTITUTE, *Safe Investment Company,* http://www.swfinstitute.org/swfs/safe-investment-company/ (last visited July 11, 2016). This would mean that Bank of China would be yet another layer below China.

190 *Wultz*, 755 F. Supp.2d at 30.

191 *Id.*

a "categorical approach when" determining whether a foreign governmental entity should be considered "a foreign state or political subdivision" rather than an "agency or instrumentality of the nation."[192]

Under such categorical approach, if the core functions of the entity are governmental, it is considered the foreign State itself. However, if the core functions are commercial, the entity is considered as an agency or instrumentality of a foreign State. Upon finding that an entity's core functions are commercial, a district court must determine whether the entity constitutes an agency or instrumentality as per § 1603(b) FSIA.[193] That approach was certainly not shared by the *Capital Trans Int'l* judgment nor it is supported by the judgments quoted therein, *i.e.*, *Filler v. Hanvit*; *EIE Guam Corp.*; and *Kelly v. Syria Shell.*

The second interesting feature of the *Wultz v. Iran* judgment is that the court did not even mention the possibility that Bank of China could qualify as an "organ" under the first prong of § 1603(b)(2) FSIA. Such lack of mention to the first prong of § 1603(b)(2) gives the impression that, for the court, only entities directly owned by the State could qualify as instrumentalities.[194]

The rationale behind the "direct ownership" rule is not entirely clear. Such rule provides for a difference in the treatment of SOEs merely based on whether they are directly as opposed to indirectly held by the State, without more. That "direct ownership" rule has obvious consequences for those cases involving SWFs with separate legal personality as defendants. Indeed, if any such SWF is directly held by the State or by a political subdivision, it will automatically qualify as an "agency or instrumentality" and it may be covered by sovereign immunity under the FSIA. Conversely, if an identical SWF is not directly held by the State or by any political subdivision thereof, it will not qualify as an "agency or instrumentality" under the second prong of § 1603(b)(2) FSIA. And, if the *Capital Trans Int'l* approach is adopted, such SWF will in no case qualify as an "agency or instrumentality."

The "direct ownership" rule spelled out by the U.S. Supreme Court in *Dole Food Co.* was very much based on a literal interpretation of the FSIA. The Supreme Court said:

> In issues of corporate law structure often matters.

---

[192] *Id.* at 29.
[193] *Id.*
[194] Bank of China certainly did not allege being an organ of China. However, it did not allege being covered by immunity under the FSIA and yet the Court delved into such analysis *sua sponte*. *Id.* at 28.

> . . .
>
> The language of § 1603(b)(2) refers to ownership of 'shares,' showing that Congress intended statutory coverage to turn on formal corporate ownership.
>
> . . .
>
> A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities.[195]
>
> . . .
>
> The text of the FSIA gives no indication that Congress intended us to depart from the general rules regarding corporate formalities.[196]

Then, the Supreme Court continued:

> The Dead Sea Companies would have us read 'other ownership interest' to include a state's 'interest' in its instrumentality's subsidiary. The better reading of the text, in our view, does not support this argument.
>
> . . .
>
> The statute had to be written for the contingency of ownership forms in other countries, or even in this country, that depart from conventional corporate structures. The statutory phrase 'other ownership interest' is best understood to accomplish this objective.
>
> . . .
>
> Control and ownership . . . however, are distinct concepts.
>
> . . .
>
> Majority ownership by a foreign state, not control, is the benchmark of instrumentality status.[197]

To apply such "direct ownership" requirement to the case of SWFs appears rather problematic. In fact, to make the grant of sovereign

---

195 Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003).
196 *Id.* at 476.
197 *Id.* at 476-77.

immunity dependent upon the position of a SWF in the State chain of ownership does not follow an obvious logic. Regardless of the policy choice on whether or not SWFs, as modern forms of State financial activities that behave as merchants, should be afforded immunity, the determinant factor should be other that the mere position of a SWF in the corporate chain of State ownership. The potential result of applying the "direct ownership" rule would be rather random and would not contribute to obtain uniform outcomes. Indeed, if the policy were to make SWFs immune, then to deny immunity to SWFs held through other State entities and yet afford immunity to SWFs that are directly held by the State would fall short of a clear rationale. The practical results of that kind of differential treatment may suggest the need for specific immunity rules applicable to SWFs. Obviously the FSIA was crafted at a time when SWFs had no role in the transnational litigation scenario. Yet, and amendment to the FSIA, particular to the case involving SWFs, may be in order.

In any event, Justice's Breyer dissenting opinion in *Dole Food Co.*, joined by Justice O'Connor, show certain concerns in connection to the "direct ownership" rule. They stated:

> Does this type of majority-ownership interest count as an example of what the statute calls an 'other ownership interest'? The Court says no, holding that the text of the FSIA requires that '*only direct ownership* of a majority of shares by the foreign state satisfies the statutory requirement.' . . . I disagree.
>
> . . .
>
> [T]he words 'other ownership interest' might, or might not, refer to the kind of majority-ownership interest that arises when one owns the shares of a parent that, in turn, owns a subsidiary.
>
> . . .
>
> [T]here is no reason to read the phrase '*shares or other'* as if those words meant to exclude from the scope of 'other' any kind of mixed, say, debt/equity, ownership arrangement that might involve shares only in part.[198]

Justice Breyer and Justice O'Connor then concluded by asserting that their interpretation was in line with what they deemed as the purposes of the U.S. Congress by enacting the FSIA. They stated:

198 *Id.* at 481-83.

> [W]hat might lead Congress to grant protection to a Foreign Nation acting through a Corporate Parent but deny the same protection to the Foreign Nation acting through, for example, a wholly owned Corporate Subsidiary? The answer to this question is: In terms of the statute's purposes, *nothing at all* would lead Congress to make such a distinction.[199]
>
> . . .
>
> To hold, as the Court does today, that for purposes of the FSIA 'other ownership interest' does not include the interest that a Foreign Nation has in a tiered Corporate Subsidiary 'would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose.'[200]

This conclusion of Justices Breyer and O'Connor is absolutely sound and plainly applicable to the case of the SWFs. It makes no sense to discriminate among the different SWFs, affording immunity to some of them while denying it to others, solely based on the circumstance that they are, or they are not, directly owned by the State.

To wrap-up the analysis of the *Capital Trans Int'l* judgment, it is convenient to say that it appears as though the "non-direct ownership" of Aabar alone would have sufficed for the court to stop the inquiry and rule out Aabar's status as an instrumentality of the Abu Dhabi government. Indeed, by rejecting the Third Circuit's "ownership structure of the entity" factor in *USX Corp.*, the court implicitly stated that, in order to qualify as an "organ" under the first prong of § 1603(b)(2) FSIA, there must be direct ownership by the State. Because Aabar was not directly owned by the government of Abu Dhabi, under the court's rationale, it would not have been possible that Aabar qualified as an "organ," even if it met the five factors identified by the Second, Fifth, and Ninth Circuits. However, on the basis that the jurisdictional challenge was factual instead of facial, the Court delved into an analysis of each of those five factors. Such course of action appears to be contradictory.

In any event, as was already mentioned, the *Capital Trans Int'l* Court discarded the possibility that each and all of the abovementioned five factors were fulfilled by Aabar so as to qualify for "organ" status under

---

199 *Id.* at 485.
200 *Id.* at 486 (quoting *Danciger v. Cooley,* 248 U.S. 319, 326 (1919)).

§ 1603(b)(2) (first prong) FSIA.[201] As a result, Aabar could not be considered an "agency or instrumentality." Accordingly, the court declared that it lacked subject matter jurisdiction with regard to Aabar. At the same time, even though the *Capital Trans Int'l* court had considered satisfied the "commercial activity" exception to sovereign immunity from jurisdiction with respect to IPIC, it ultimately declined to hear the case on the basis of the *forum non conveniens* doctrine.[202] Therefore, the case was entirely dismissed.

Other cases involving SWFs, have dealt with less traditional exceptions to the general rule of sovereign immunity from jurisdiction under the FSIA than the "commercial activity" exception. Although the most important exception is the "commercial activity" one, other important exceptions to the general rule of immunity from jurisdiction include, for example, expropriation cases under § 1605(a)(3) or dispute settlement through arbitration under § 1606(6). Coincidentally, one of Abu Dhabi's SWFs: ADIA, one of the largest SWFs in the world and the largest in the Middle East,[203] has been involved in at least one case before the U.S. courts dealing with the "commercial activity" and "expropriation" exceptions to the FSIA. Indeed, although unsuccessfully, ADIA has been brought to U.S. courts in connection to the alleged property taking in violation of international law as an exception to the general rule of State immunity under the FSIA.[204] At the same time, the case of *Citigroup, Inc. v. Abu Dhabi Inv. Authority*[205] shows how the "headline-grabbing" deal of ADIA's US $7.5 Billion investment in Citigroup,[206] gave rise to arbitration as well as to litigation in the U.S. involving both ADIA and Citigroup.

As may be grasped from this section, under the U.S. legal system, not all SWFs with separate legal personality will automatically enjoy sovereign immunity from jurisdiction. Only those SWFs that qualify as "agencies or instrumentalities" of a foreign State will qualify for such immunity. In other words, under the "status" classification of the FSIA, SWFs with separate legal personality that do not qualify as "agencies or instrumentalities" will not be covered by immunity from jurisdiction. This result appears ill-founded. Because of practical considerations, it makes

---

201 Capital Trans Int'l, LLC v. Int'l Petroleum Inv. Co., No. 8:10-cv-529-T-30TWG, 2013 WL 557236, *8-10 (M.D. Fla. Feb. 14, 2013) (order granting motion to dismiss in part).

202 *Id.* at *19.

203 SOVEREIGN WEALTH FUNDS INSTITUTE, *Abu Dhabi Investment Authority,* http://www.swfinstitute.org/swfs/abu-dhabi-investment-authority/ (last visited July 11, 2016).

204 Zappia Middle East Const. Co. Ltd. v. Emirate of Abu Dhabi, 215 F.3d 247 (2d Cir. 2000). Although incidentally, this case also discussed the "commercial activity" exception to the FSIA. *Id.* at 251.

205 *See* Citigroup, Inc. v. Abu Dhabi Inv. Authority, 776 F.3d 126 (2d Cir. 2015).

206 Gordon & Niles, *supra* note 7.

sense to grant immunity from jurisdiction to "agencies or instrumentalities." However, the characterization of a SWF as an "agency or instrumentality" must be consistent. Most importantly, the "commercial activity" exception to immunity from jurisdiction should also apply in a uniform way.

2. The U.S. Legal Regime of Sovereign Immunity from Execution and SWFs

Section 1609 of the FSIA declares a general principle of immunity of the property of a foreign State from attachment and execution in the U.S. At the same time, § 1610 provides for the exceptions to such regime. On those premises, this section explores the U.S. legal regime of sovereign immunity from execution applicable to: (1) pool-of-assets-SWFs managed by the State proper; (2) SWFs with separate legal personality that qualify for a status as "agencies or instrumentalities" (this analysis will tacitly address the case of SWFs with separate legal personality not qualifying as "agencies or instrumentalities" *vis-à-vis* the regime of immunity from execution); and (3) pool-of-assets-SWFs managed by a central bank.

Thus, as will be observed in the next pages, depending on their "status" as: (1) pool-of-assets-SWFs managed by a ministry of finance; or (2) pool-of-assets-SWFs managed by a central bank, the U.S. law on State immunity from execution regarding foreign states or the rules regarding foreign central banks or other monetary authorities would apply. As for SWFs with separate legal personality that qualify for a status as "agencies or instrumentalities," the U.S. law on State immunity from execution regarding those type of entities will apply. In this connection, depending on the "status" of a SWF as a pool-of-assets-SWFs managed by the State, a pool-of-assets-SWFs managed by a central bank or an "agency or instrumentality," the rule of immunity from execution will vary and the outcomes will be somehow divergent.

A. Pool-of-Assets-SWFs Managed by Ministries and Immunity from Execution

As long as a SWF is managed by the State proper, its assets will be immune from execution under the FSIA. Technically, the property, funds or assets of a pool-of-assets-SWF managed by a ministry of finance (a SWF with "State" status) will be the property of the State proper. Because neither the SWF nor the ministry of finance that manages it will have separate legal personality from the State, the funds composing the pool will not be the property of the SWF but will be the property of the very State.

At the same time, § 1610(a)(2) FSIA provides for the applicable "commercial activity" exception to immunity from execution. It states that property in the U.S. of a foreign State (which would cover the case of those SWFs with "State" status), used for a commercial activity in the U.S., shall not be immune from execution, upon a judgment entered by a U.S. court if the property is or was used for the "commercial activity" upon which the claim is based. Therefore, a creditor may execute a judgment against the funds of a pool-of-assets-SWF managed by the State, used for a commercial activity in the U.S., as long as such creditor can establish that those funds were used in the very commercial activity that was the basis of the dispute that resulted in the judgment sought to be executed. A financial investment, for example, would be the typical SWF commercial transaction. Thus, if the funds of a pool-of-assets-SWF are invested in the capital markets of the U.S., it may be considered that those funds are being used for a commercial activity in the U.S.

As may be surmised, in this case, a U.S. court would have already conducted a positive assessment on whether there was a "commercial activity" by the State. That court would conduct such assessment on the basis of the "nature" test. Thus, the claimant will only have the burden to demonstrate the required nexus between the property to be executed and the commercial activity upon which the claim was based. Basically, if it may be shown that the property has been used for such commercial activity, the "commercial activity" exception to immunity from execution will operate.

Section 1603(d) dictates that "commercial activity" includes a particular commercial transaction or act. Accordingly, where a judgment creditor seeks to execute a judgment against the funds of a pool-of-assets-SWF, used for a financial investment or commercial activity in the U.S., he/she would be able to do so, as long as he/she can establish that those funds were used in the very financial investment or commercial activity that was the basis of the dispute that resulted in the judgment sought to be executed. In other words, the creditor would have to have obtained the judgment from a U.S. court against the SWF home State and based upon the financial investment accomplished in the U.S. Yet, because of the need of a nexus between the activity and the property to be executed, that judgment creditor would not be able to execute the same judgment against other funds or assets of the State or even the pool-of-assets-SWF. That a SWF creditor cannot execute against other funds of the pool-of-assets-SWF is an undesirable consequence of the "nexus" requirement, and may be discriminatory with respect to creditors of SWFs that are "agencies or instrumentalities."

By the same token, the need of a nexus between the property to be executed and the commercial activity upon which the claim is based will be an obstacle for a creditor of the State who holds a judgment that is not related to the activities of the SWF. That is; such creditor will not be able to execute his or her judgment through the SWF's assets. However, as will be observed when analyzing SWFs with separate legal personality, a creditor against those entities would be able to execute against any of their assets in the U.S. without the need of a nexus between the property and the activity upon which the judgment was obtained. That is the most salient difference between the situation of a pool-of-assets-SWF and the situation of a SWF with separate legal personality from the State *vis-à-vis* the regime of immunity from execution in the U.S. As may be seen, there will be an obvious inequality between the creditors of different SWFs depending on the status of the relevant SWF.

B. SWFs Qualifying as "Agencies or Instrumentalities" and Immunity from Execution

Like the State proper, "agencies or instrumentalities" are also subject to the general principle of immunity from execution provided for under § 1609 FSIA. Thus, a SWF that has "agency or instrumentality status" will be covered immune from execution. Conversely, SWFs with separate legal personality that do not qualify as "agencies or instrumentalities" will not be covered immune from execution at all.

Section 1610(b) FSIA sets forth an exception which is particular to the case of "agencies or instrumentalities," consisting on the possibility of execution against any property in the U.S. of an "agency or instrumentality" of a foreign State if the "agency or instrumentality" is engaged in commercial activity in the U.S.[207] Unlike the case of the regime of immunity from jurisdiction, "agencies or instrumentalities," are subject to a less stringent regime of immunity from execution than the State proper. In the words of Lady Fox, the exceptions to immunity from execution under the FSIA are more liberal with respect to the property of "agencies or instrumentalities" than to that of the foreign states.[208]

Indeed, § 1610(b)(2) creates a broader exception to immunity from execution for the case of the "agencies or instrumentalities." Basically, the nexus between the property to be executed and the commercial activity upon which the claim is based, which is needed in the case of the State proper, is not required in the case of "agencies or instrumentalities." Thus, any property (whether or not used for a commercial activity)[209] in the U.S. of an "agency or instrumentality" of a foreign State engaged in commercial activity in the U.S. shall not be immune from execution, upon a judgment

---

207 Lee, *supra* note 127, at 345.
208 HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 278-79 (3d ed. 2015).
209 Lee, *supra* note 127, at 346.

entered by a U.S. court, if the judgment relates to a claim for which the "agency or instrumentality" is not immune from jurisdiction, regardless of whether the property is or was involved in the act upon which the claim is based.

Therefore, any property in the U.S. of a SWF that qualifies as an "agency or instrumentality" of a foreign State and is engaged in commercial activity in the U.S. shall not be immune from execution, upon a judgment entered by a U.S. court if the judgment relates to a claim for which the relevant SWF is not immune from jurisdiction, regardless of whether the property is or was involved in the act upon which the claim is based. Such SWF will not be immune from jurisdiction by virtue, for example, of the "commercial activity" exception under § 1605(a)(2) FSIA or of any other exception to immunity such as those provided under FSIA § 1605(a)(3), or (5) or § 1605(b). Moreover, there will be no need of a nexus between the SWF property and the activity upon which the claim was based.

Conversely, a pool-of-assets-SWF creditor will not be able to execute a judgment against funds of the pool other than those used for the activity upon which the relevant claim was based. This creates a differential treatment among creditors of SWFs that is unjustified and lacks coherence.

No U.S. judgment dealing with a SWF qualifying as an "agency or instrumentality" and the exception to immunity from execution provided for under § 1610(b)(2) FSIA has been found. However, some U.S. judgments have dealt with other exceptions such as "waiver." In that context, it is useful to refer once again to the *Capital Trans Int'l* case. As may be recalled, the *Capital Trans Int'l* court declined to hear the case on the basis of the *forum non conveniens* doctrine.[210] The doctrine of *forum non conveniens* will not be analyzed here. However, the dismissal of the *Capital Trans Int'l* case on that basis brought about an important element for the purposes of IPIC's potential immunity from execution.

In fact, in conducting its *forum non conveniens* assessment, the court considered that execution of a U.S. judgment issued against another sovereign would be uncertain, as the court could only attach properties that IPIC owned in the U.S. At the same time, the court took into account the unlikelihood of success of any attempt to enforce an adverse judgment against IPIC in the U.A.E.[211] Thus, the court required a written stipulation by IPIC consenting to the domestication (*i.e.*, recognition) and execution in the U.S. of any final judgment entered in the U.A.E. Such stipulation

---

[210] Capital Trans Int'l, LLC v. Int'l Petroleum Inv. Co., No. 8:10-cv-529-T-30TWG, 2013 WL 557236, at *19 (M.D. Fla. Feb. 14, 2013) (order granting motion to dismiss in part).

[211] *Id.* at *18.

was ordered "[t]o ameliorate the problem of not receiving enforcement power of a judgment against IPIC in the UAE." The case was then dismissed against IPIC based on the doctrine of *forum non conveniens*.[212]

The requirement of such a stipulation as a condition to dismiss the case on *forum non conveniens* is somehow equivalent to a demand that IPIC waives its immunity from execution in the U.S. In fact, having been characterized as an "instrumentality," pursuant to § 1609 FSIA, IPIC would be entitled to immunity from attachment and execution. Naturally, IPIC would be also subject to the exceptions contemplated in § 1610, including the possibility of a "waiver." Nevertheless, the abovementioned condition imposed on IPIC by the *Capital Trans Int'l* Court could cast doubts on the voluntariness of such a "waiver" from IPIC. That solution may give IPIC some ammunition to resist execution in the U.S. IPIC could, for example, challenge the validity of the waiver."

Another fairly recent U.S. case involving a SWF which dealt with its immunity from attachment or execution was *Janvey v. Libyan Investment Authority* ("LIA"), decided by the U.S. Court of Appeals for the Fifth Circuit.[213] The judgment referred to LIA's immunity from attachment. The claimant was seeking a preliminary injunction and the court considered that such injunction would serve the same purpose of an attachment. For that reason, the court concluded that the general rule of immunity from attachment of property belonging to a foreign sovereign provided for under § 1609 FSIA would prevent it from entering a preliminary injunction.[214]

While the purpose of the injunction sought by *Janvey* was likely to secure the satisfaction of a judgment, the court did not even get to consider this requisite because there had not been a "waiver" on the part of LIA.[215] It is important to bear in mind that § 1610(d) FSIA, which provides for an exception to immunity from attachment prior to entry of judgment, requires two cumulative requisites: (1) "waiver;" and (2) that the attachment is sought in order to secure satisfaction of a judgment. Because one of those requisites was not present, the court stayed its analysis and denied claimant's request for an injunction.

C. Pool-of-Assets-SWFs Managed by Central Banks or Monetary Authorities and Immunity from Execution

Under the FSIA, foreign central banks or monetary authorities are protected by a special regime of immunity from execution. Thus, SWFs

---

212 *Id.* at *19.
213 Janvey v. Libyan Inv. Auth., 478 F.App'x. 233 (5th Cir. 2012).
214 *Id.* at 236.
215 *Id.*

that are pools of assets managed by those public financial institutions are covered by such regime, which in any event, applies to all central banks or monetary authorities of all legal forms and regardless of whether those central banks or monetary authorities have separate legal personality.

As was mentioned before, there is no definition of central banks or monetary authorities in the FSIA. Ernest T. Patrikis, former General Counsel of the Federal Reserve Bank of New York, has stated that there is not a simple definition of "central bank" that readily fits all these institutions.[216] Patrikis argues that a precise definition of a "central bank" is not possible because the structures and activities of central banks vary from country to country.[217] In general, central banks have custody of, and administer their nation's monetary reserves. They have authority to issue legal tender; control credit; or exercise supervisory powers over commercial banks.[218]

In connection to central banks, the FSIA favors function over form.[219] Thus, they are defined by their activities more than by their legal structures. In applying the special regimen of immunity from execution consistently with that approach, the U.S. District Court for the Southern District of New York recently stated: "[I]mmunity [under § 1611(1)(b) FSIA] protects central bank property regardless of the bank's independence from the sovereign state."[220] Hence, when faced with issues of central bank or monetary authority status, U.S. courts make their assessment as a *ratione materiae* issue rather than one *ratione personae*.

a. Central Banking Activities

Where a foreign State entity alleges its status as a central bank or monetary authority, it has the burden of proof that it is charged with typical duties of central banks. In other words, the evidence will have to demonstrate that it conducts "central banking activities." In this connection, Mr. Paul Lee's considers that the most significant determinant functions of central bank status, for purposes of the FSIA, should be the issuance or holding of the country's currency and precious metal reserves.[221]

---

216 Patrikis, *supra* note 129, at 274.
217 *Id.* at 265 n. 1.
218 *Id*.
219 Ernest Patrikis, *Sovereign Immunity and Central Bank Immunity in the United States,* CURRENT LEGAL ISSUES AFFECTING CENTRAL BANKS. 159, 162 (Robert C. Effros ed., International Monetary Fund, 1992).
220 Thai Lao Lignite (Thailand) Co., Ltd. v. Gov't of Lao People's Democratic Republic, 924 F. Supp. 2d 508, 522 (S.D.N.Y. 2013).
221 Lee, *supra* note 127, at 354.

Some U.S. court cases have dealt with the issue of "central bank" status in order to determine whether a foreign institution qualifies as a central bank or monetary authority for purposes of the FSIA. Those cases have been decided using the "central banking activities" criteria. In that connection, in *NML, Capital, Ltd.*, the U.S. Court of Appeals for the Second Circuit indicated there is no definitive list of activities "normally understood" to be central banking functions. The court determined that the definition of a "central bank activity" is likely to change over time. It indicated that, as the *NML Capital, Ltd.* case shown, even in unusual circumstances it is not difficult to tell whether a central bank is engaged in a function characteristic of central banks.[222]

Yet, the *NML, Capital, Ltd.* Court of Appeals ultimately relied on Ernest T. Patrikis' enumeration of functions of central banks and considered them equivalent to "traditional activities of central banks."[223] In that regard, in his 1982 paper, Patrikis had identified the following as central bank functions or activities: (1) issuance of notes, coins, and legal tender; (2) custody and administration of the nation's monetary reserves through the holding of gold, silver, domestic and foreign securities, foreign exchange, acceptances and other credit instruments, and IMF Special Drawing Rights; (3) establishment and maintenance of reserves of depository institutions; (4) discounts and advances to depository institutions; (5) receipt of deposits from the government, international organizations, depository institutions; (6) open market operations; (7) credit controls; and (8) licensing, supervision, and inspection of banks.[224]

In addition, Patrikis submitted that when a central bank acts as a bank for its parent foreign State and its agencies and instrumentalities, it engages in a central banking and governmental function.[225] Thus, for that commentator, "central banking activities" appears to be an open-ended notion.

---

[222] NML Capital, Ltd. v. Banco Central de la República Argentina*,* 652 F. 3d 172, 194 n.20 (2d Cir. 2011).

[223] *Id.* at 192.

[224] *See* Patrikis, *supra* note 129, at 274. Patrikis based this enumeration in that of M.H. DeKoch of 1974 (M.H. DeKoch, Central Banking 14 (4th ed. 1974)). In a later speech published as a paper in 1992, Mr. Patrikis identified the following as activities that would characterize a central bank or monetary authority: (1) issuing legal tender currency, (2) holding the reserves of the country's depository institutions, (3) making loans to depository institutions or acting as lender of last resort, (4) holding the deposits of the government, (4) acting as the government's bank, (5) engaging in open-market operations in the country, (6) implementing monetary policy through market operations, imposing credit controls and exchange restrictions and licensing and supervising banks. *See* Ernest Patrikis: Sovereign Immunity and Central Bank Immunity in the United States in Current Legal Issues Affecting Central Banks. Vol. 1 (Robert C. Effros. International Monetary Fund, 1992), pp. 159-167, p. 165.

[225] Patrikis, *supra* note 129, at 277.

In *EM Ltd. v. Republic of Argentina*, the U.S. Court of Appeals for the Second Circuit took into consideration the arguments of Argentina and *Banco Central de la República Argentina* in the sense that such central bank was charged by statute with the power and responsibility of issuing and monitoring the stability of the Argentine peso, establishing and implementing monetary policy, and regulating the Argentine banking system and financial sector.[226] As a result, *Banco Central de la República Argentina* was regarded as a central bank.

In *Olympic Chartering, S.A. v. Ministry of Industry and Trade*, the same U.S. District Court for the Southern District of New York took into account that the Central Bank of Jordan performed activities understood as central banking activities. In that connection, the central bank was responsible for maintaining monetary stability in that middle-eastern country; it had the sole right to issue currency; it maintained cash reserves collected from commercial banks and maintained the gold and foreign exchange reserves of the Kingdom of Jordan; and it was the banker and fiscal agent for the Jordanian government. Therefore, the court concluded that the Central Bank of Jordan was clearly a 'foreign central bank' for purposes of § 1611(b)(1) FSIA.[227]

Another important case, which was decided by the same court in 2000, was *LNC Investments, Inc. v. Republic of Nicaragua*.[228] This case involved *Banco Central de Nicaragua*, the central bank of Nicaragua, a government corporation incorporated under the laws of the Republic of Nicaragua, as its central bank and wholly owned by it. It was routinely engaged in both governmental and private banking activities. The central bank was created by an enabling statute which required it to formulate and administer Nicaragua's monetary policies. In order to formulate and administer policies, it was given the authority to print and issue currency, establish interest rates, purchase and sell financial instruments, and monitor Nicaragua's external debt.[229]

Banco Central de Nicaragua regularly facilitated monetary transfers and business transactions between Nicaraguan entities and entities abroad by opening its accounts at the Federal Reserve Bank of New York to Nicaraguan and foreign entities who then utilized the central banks' accounts to make and receive payments to and from one another. *Banco Central de Nicaragua* also acted as a servicing agent to facilitate loans made by international creditors to Nicaraguan entities. Additionally, it

---

226 EM Ltd. v. Republic of Argentina, 473 F.3d 463, 479 n.15 (2d Cir. 2007).

227 Olympic Chartering, S.A. v. Ministry of Indus. and Trade, 134 F. Supp. 2d 528, 534 n.3 (S.D.N.Y. 2001).

228 LNC Invs., Inc. v. Republic of Nicaragua, 115 F. Supp. 2d 358 (S.D.N.Y. 2000).

229 *Id.* at 364.

acted as a banker for commercial banks and other financial institutions.[230] All these activities were clearly those ordinarily conducted by central banks. As a result, the court did not hesitate for a moment that *Banco Central de Nicaragua* was, indeed, the central bank of that State.

In the 1984 case of *Banque Compafina v. Banco de Guatemala*, the U.S. District Court for the Southern District of New York took note that *Banco de Guatemala* was a bank created pursuant to the laws of Guatemala and was also owned by that foreign State.[231] It had the exclusive authority in the country to issue currency, to have custody of and to administer the Republic of Guatemala's monetary reserves, to engage in open-market transactions in Guatemalan government securities so as to regulate the money supply, and to act as depository for the funds of the Republic and its agencies.[232] On that basis, the court readily considered it a central bank under § 1611(b)(1) FSIA.

As was noted by Paul Lee in his thorough analysis on "central bank" status,[233] *Banque Compafina* presented a clear case for central bank status under § 1611(b)(1).[234] The functions of *Banco de Guatemala* covered in one entity many of the functions conventionally associated with central banks and monetary authorities.[235]

From this analysis of some of the most relevant and recent U.S. cases in connection to central bank status under § 1611(b)(1) FSIA, it is apparent that what matters, for purposes of assessing central bank or monetary authority status, it is not so much the legal structure of the entity. It is the functions that an entity claiming to be a central bank or monetary authority deploys what will be key for a U.S. court's determination. Where an entity performs "central banking activities," it is likely to be considered as a central bank or monetary authority by a U.S. court. Therefore, the notion of a foreign "central bank or monetary authority," for purposes of the FSIA, is one that, regardless of their legal structures, covers those institutions that deploy central banking activities for a foreign State.

b. The Particular Regime of Immunity from Execution Applicable to Central Banks

As was previously stated, pool-of-assets-SWFs managed by central banks or monetary authorities are protected by the FSIA special regime of immunity from execution applicable to central banks or monetary

230 *Id.*
231 Banque Compafina v. Banco de Guatemala, 583 F. Supp. 320, 321 (S.D.N.Y. 1984).
232 *Id.*
233 Lee, *supra* note 127, at 354-60.
234 *Id.* at 357.
235 *Id.*

authorities. Those FSIA rules on immunity from execution protect foreign central banks or other monetary authorities in a very singular way. Indeed, § 1611 FSIA provides for a regime of virtually absolute immunity from execution for certain State property, including property of foreign central banks or monetary authorities, held for their own account.[236]

In that connection, subsection (b)(1) indicates that the property of a foreign central bank or monetary authority held for its own account is immune from execution. Importantly, § 1611(b)(1) FSIA makes such property immune from execution, regardless of whether it is devoted to a commercial activity or not or whether the property in question is devoted to the activity that was the object of the dispute or not. That rule of absolute immunity from execution provides for an exception: where there is an explicit "waiver." Also, the modern terrorism exception to immunity from execution under FSIA § 1610(f)(1)(A) or Terrorism Risk Insurance Act ("TRIA") applies to central banks and monetary authorities. However, both exceptions are beyond the scope of this research.

As may be seen, § 1611(b)(1) FSIA is more restrictive than the general rules of immunity from execution regarding property of the State proper or property of "agencies or instrumentalities." Section 1611(b)(1) FSIA provides a highly potent protection for central bank property in the U.S.[237] That rule reflected the Congressional concern for the foreign policy implications that would be presented by execution in the U.S. against the reserves of foreign States. It also reflected a more pragmatic concern that the risk of execution in the absence of an explicit waiver might lead foreign States to withdraw their funds from the U.S.[238]

Although it may seem obvious, in order for § 1611(b)(1) FSIA to play any role, the property sought to be attached must be that of a foreign central bank or monetary authority, *i.e.*, not of any other entity or third party. As was pointed out by Patrikis, assets, such as securities, received by the central bank as a custodian and held in the U.S. by a sub-custodian might not be regarded as property of the central bank.[239] However, when it comes to cash deposits, the situation is different. Hence, most cash deposits with banks, become their property: the amounts on deposit

---

[236] Patrikis, *supra* note 129, at 271. For an account in favor of the absolute regime of immunity from execution of central banks, *See* Note, *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550 (2010).

[237] Tomas Baxter Jr., Speech: 'Recent Developments in Key Legal Issues of International Reserves Investments,' delivered at the Central Reserve Bank of Peru on the Foreign Sovereign Immunities Act and Central Bank Immunity in the United States (Nov. 16, 2010) (text accompanying footnote 27). Available at http://www.newyorkfed.org/newsevents/speeches/2010/bax101119.html (last visited July 11, 2016).

[238] Lee, *supra* note 127, at 349; *see also id.* at n.80 (referring to H.R. REP. NO. 94-1487, at 31 (1976), *as reprinted* in 1976 U.S.C.C.A.N. 6604, 6630).

[239] Patrikis, *supra* note 129, at 275.

represent an indebtedness by the bank towards its client or State-entity-depositor.[240] Thus, funds composing an asset pool SWF deposited with its managing central bank, would in all likelihood be considered the property of the central bank. In addition, unless other assets composing a pool-of-assets-SWF were held by a central bank merely in a custodian, trustee or agency capacity, they would, most likely, be also considered property of the central bank.

In any event, a different question to ask in order to understand the scope of the immunity from execution that the FSIA affords to foreign central banks and monetary authorities is whether the property of a foreign central bank or monetary authority that is not held for its own account would be immune from execution. An interpretation *a contrario* of § 1611(b)(1) suggests that if the property of a foreign central bank or monetary authority is not held for its own account, then such property would presumably be subject to the provisions of § 1610(b) FSIA, relating to post-judgment attachment and execution.[241] In other words, such property would be attachable where the central bank qualifying as an "agency or instrumentality"—as most central banks will do—is engaged in commercial activity in the U.S. Perhaps the most important question to ask then, is what is the meaning of the phrase "held for its own account" in § 1611(b)(1) FSIA.

c. The Meaning of the Phrase "Held for Its Own Account" In § 1611(b)(1) FSIA

The key to understand the scope of the regime of immunity from execution of central banks and other monetary authorities under § 1611(b)(1) FSIA lies on the phrase "held for its own account." The problem though is that the FSIA does not contain a definition of such phrase.[242] What that phrase means is not a simple question.[243] Not only the FSIA does not elaborate on the meaning of that phrase but the legislative history of the FSIA demonstrates that Congress' intent was to provide for a regime of immunity from execution for property of central banks or monetary authorities with a broader coverage than the plain language in § 1611(b)(1) suggests. As a result, different judgments of lower courts

240 *See id*. at 276.

241 Lee, *supra* note 127, at 376.

242 Tomas Baxter Jr., Speech: 'Recent Developments in Key Legal Issues of International Reserves Investments', delivered at the Central Reserve Bank of Peru on the Foreign Sovereign Immunities Act and Central Bank Immunity in the United States (Nov. 16, 2010) (text accompanying footnote 30). Available at http://www.newyorkfed.org/newsevents/speeches/2010/bax101119.html (last visited July 11, 2016).

243 *See* Weston Compagnie de Finance Et D'Investissement, S.A. v. La Republica del Ecuador, 823 F. Supp. 1106, 1112 (S.D.N.Y. 1993).

have pointed into, broadly, two different directions. Some of them have determined that central bank property is "held for its own account" if such property is used for traditional "central banking activities" and are not used in "commercial activities."[244] Others, have concluded that property "used for commercial activity" and property held by a central bank "for its own account" are not mutually exclusive categories.

The first approach is based on a literal reading of a statement in the FSIA legislative history in connection to § 1611(b)(1). The relevant House Report stated:

> [§ 1611(b)(1) FSIA] applies to funds of a foreign central bank or monetary authority which are deposited in the United States and <u>'held' for the bank's or authority's 'own account' *i.e.*, funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the *commercial transactions of other entities or of foreign states*</u>. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.[245]

This statement may suggest a deliberate intent to distinguish between "central banking activities" from "commercial activities." Thus, the abovementioned approach, that considers central bank property "held for its own account" as property used for activities normally understood to be the functions of central banks and not used in commercial activities, is not unreasonable. For example, in *Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C.*, the District Court distinguished between property "used or held with central banking activities" from "funds used solely to finance the commercial transactions of other entities or of foreign states." The court held that because the funds in an account of Peru's

---

[244] *See* Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan, 46 F. Supp. 2d 231, 239 (S.D.N.Y. 1999), *vacated on other grounds*, 273 F.3d 241 (2d Cir. 2001); Banque Compafina v. Banco de Guatemala, 583 F. Supp. 320, 322 (S.D.N.Y. 1984); Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C., 919 F. Supp. 13, 17 (D.D.C. 1994).

[245] H.R. REP. No. 94-1487, at 31 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6630 (emphasis added). As was observed in *Tex. Trading & Mill. Corp. v. Fed. Republic of Nigeria*, "[t]he House and Senate Committees filed identical reports, and references [herein] to the House Report may be deemed to represent the views of the Senate Committee as well." Tex. Trading & Mill Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 306 n.18 (2d Cir. 1981), *overruled on other grounds by* Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Repub.*,* 582 F.3d 393 (2d Cir. 2009). (*See* NML Capital, Ltd. v Banco Central de la República Argentina*,* 652 F.3d 172 n.18 (2d Cir. 2011)).

central bank were being used to guarantee loans to commercial banks, those were not central banking activities.[246]

Even a Federal Court of Appeals (the U.S. Court of Appeals for the Ninth Circuit), in the case of *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems*, seems to have favored that first approach.[247] The court's conclusion suggests that, as per the House Report, funds "held for its own account" means funds used or held in connection with central banking activities to the exclusion of "commercial activities."[248] The Court of Appeals dispatched the immunity argument of the Iranian Ministry of Defense on the basis that the Iranian Ministry could not show that the asset to be attached (a judgment confirming an arbitration award) was "used or held in connection with central banking activities."[249]

The language in the House Report regarding § 1611(b)(1) FSIA, may certainly reveal a confusion—deliberate or involuntary—or a treatment of two different activities of central banks as equivalent: to hold funds for their own account, on the one hand; and to conduct "central banking" activities, on the other. In other words, this language of the House Report almost reveals a conception that central banks can only properly hold funds if those funds are devoted to central banking activities. All other funds held by the central bank will be held on behalf of other entities and for purposes of commercial transactions. At the same time, this statement suggests a conception that central banks cannot hold assets for their own account as individual entities and for their own profit. Hence, all assets purportedly held by the central bank "for its own account" would be ultimately held to accomplish activities for the benefit of the State and other State entities.

In any event, other courts have adopted a different approach. In *Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*,[250] the U.S. District Court for the Southern District of New York considered flawed the argument by plaintiff, which was formulated on the basis of a dichotomy between, on the one hand, the property of a central bank "used for commercial activity" and, on the other hand, the property of a central bank "held for its own account."[251] Indeed, the court

---

[246] Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C., 919 F. Supp. 13, 17 (D.D.C. 1994).

[247] Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, 385 F.3d 1206, 1223–24 n. 21 (9th Cir. 2004), *vacated on other grounds sub nom.,* Ministry of Def. & Support for Armed Forces of Islamic Repub. of Iran v. Elahi*,* 546 U.S. 450 (2006).

[248] *Id.*

[249] *Id.*

[250] Weston Compagnie de Finance Et D'Investissement, S.A., 823 F. Supp. at 1112.

[251] *Id.* at 1111-12.

reasoned that property "used for commercial activity" and property held by a central bank "for its own account" are not mutually exclusive categories.[252] This approach was later endorsed by the same court in 2001 in the case of *Olympic Chartering, S.A. v. Ministry of Industry and Trade*.[253]

According to the *Weston* Court, the structure of the FSIA makes clear that property of a central bank held for its own account is a category of property used for commercial activity.[254] In that connection, it pointed that § 1609 FSIA provides for a general rule of immunity of foreign States' property in the U.S. while § 1610 provides for certain exceptions to such general rule. At the same time—concluded the *Weston* Court—§ 1611(b)(1) is an exception to § 1610, providing for immunity from attachment that would otherwise be allowed. Section 1610, however, allows attachment only of property "used for a commercial activity." Therefore, the property referred to in § 1611(b)(1) must be property used for a commercial activity.[255]

At the same time, the *Weston* Court quoted with approval the position of Ernest T. Patrikis, who submits that property of a central bank is immune from attachment if the central bank uses such property for central banking functions as such functions are normally understood, irrespective of their commercial nature. Conversely, if an activity is to be regarded as commercial, as distinguished from a central bank activity, it should be an activity of the foreign central bank not generally regarded as a central banking activity.[256] Patrikis considers that distinguishing between commercial and non-commercial property of central banks presents serious difficulties.[257] In that sense, another commentator, Mr. Thomas Baxter, stated that the power of § 1611(b)(1) FSIA is that it does not depend on the distinction between commercial, on the one hand, and governmental, on the other.[258]

It was not until 2011 that the Court of Appeals for the Second Circuit in *NML, Capital, Ltd.* adopted the *Weston* approach and, with that,

---

252 *Id.* at 1112.

253 Olympic Chartering, S.A. v. Ministry of Industry and Trade, 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001).

254 Weston Compagnie de Finance Et D'Investissement, S.A., 823 F. Supp. at 1112.

255 *Id.*

256 Patrikis, *supra* note 129, at 277-78.

257 *See id.*

258 Tomas Baxter Jr., Speech: 'Recent Developments in Key Legal Issues of International Reserves Investments', delivered at the Central Reserve Bank of Peru on the Foreign Sovereign Immunities Act and Central Bank Immunity in the United States (Nov. 16, 2010) (text accompanying footnote 29). Available at http://www.newyorkfed.org/newsevents /speeches/2010/bax101119.html (last visited July 11, 2016).

Patrikis' position.[259] While the Court of Appeals acknowledged that the "central banking activities test" is not without difficulty,[260] it concluded that if certain funds are used for central banking activities or functions, as they are commonly understood, they must be immune from attachment, even if they are used for commercial purposes.[261]

In any case, it is undeniable that the text of § 1611(b)(1) could have been clearer in addressing the scope of the intended immunity from execution for central banks' property.[262] "Held for its own account" is troublesome language.[263] Apart from the abovementioned conclusions by certain U.S. courts, a literal reading of § 1611(b)(1), for example, may lead the interpreter to the conclusion that only property for which a foreign central bank is the beneficial owner will be covered by immunity from execution. Indeed, central banks routinely hold property of the State or other State entities. The interpreter could argue that property of the State or other State entities held by a central bank or monetary authority is not property held for its own account. Therefore, such property of the State or other State entities would be susceptible of execution.

Although that interpretation could at first glance seem to be in line with a literal reading of § 1611(b)(1), it does not appear to arrive at logical results. In fact, such reading of § 1611(b)(1) would lead to the illogical result that creditors against a central bank would be able to collect, not against the assets of the very debtor central bank, but against other entities' assets that happen to be in custody or possession of such central bank. Nevertheless, by definition, property in custody of a central bank would not be its own property but the property of a third party. As such, it could not be attached to cover the debts of the central bank.

A somewhat similar interpretation was argued by the plaintiffs in the case of *NML, Capital, Ltd.* The court stated that: "Relying on a 'grammatical and syntactical construction of Section 1611(b),' plaintiffs suggest a third definition of property of a central bank 'held for its account': '[p]roperty of a central bank is 'held for its own account' when it is held for [the central bank's] own profit or advantage.'"[264] But the

---

259 NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172 (2d Cir. 2011).
260 *Id.* at 193.
261 *Id.* at 194.
262 One commentator considers that the term "held for its own account" is ambiguous. *See* Reagan Reynolds, *NML Cap., Ltd., v. Banco Cent. de la Republica Arg.: The Second Cir. Reinforces Immunity Protection Over Foreign Cent. Banks,* 20 TUL. J. INT'L & COMP. L. 519, 523 (2011-2012). *See also* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327 (2002-2003).
263 Patrikis, *supra* note 219, at 166.
264 NML Capital, Ltd., 652 F.3d at 192.

Court of Appeals disagreed with that proposition.[265] In a 2003 law review article, Mr. Paul Lee, one of the leading commentators on topic, identified four alternative readings of the phrase "held for its own account."[266] The arguments of plaintiffs in *NML* seem consistent with the first alternative identified in Lee's article.

Such first alternative, identified by Lee as the most natural reading of the phrase "held for its own account" in § 1611(b)(1) FSIA, would encompass only property held by or for the central bank as the beneficial owner. That reading would exclude from the protection of immunity from execution those assets held by a central bank merely as the record owner for the account of another party in a custodian, trustee or agency capacity. Bank deposits, on the other hand, become, in general terms, property of the bank and they are regarded as debts of the bank with the depositor. Thus, funds deposited with a central bank by another party would presumptively be deemed to be property of the central bank held for its own account unless the deposit were denominated as a custody, trust or other special deposit.

Lee argues that a deposit made by a central bank with another bank would be deemed to be property of the central bank held for its own account unless the deposit itself were denominated as being made by the central bank in a custodial, trustee, or other special capacity for another party, *e.g.* the State or a State entity.[267] This may be true from the depositor central bank's perspective. From the receiving bank's point of view, however, such deposit could be also considered as its property. Thus, Lee's explanation on this issue may be a bit difficult to grasp.

The second possible meaning of the phrase "held for its own account" in § 1611(b)(1) FSIA identified by Lee, gives a liberal reading to the language in the House Report relating to "central banking activities." Under that reading, § 1611(b)(1) would provide immunity from execution for any central bank property used for the account of the central bank or indirectly for the account of its parent State or any agency or instrumentality.[268] According to Lee, this second interpretation, would protect central bank funds used for any activities of the foreign State and its other agencies and instrumentalities albeit it would arguably conflict with the language of the House Report that excludes from protection "funds used solely to finance the commercial activities of other entities or of foreign states."[269]

---

265 *Id.*
266 Lee, *supra* note 127, at 377-82.
267 *Id.* at 377.
268 *Id.* at 381.
269 *Id.* at 382.

It appears as though this second option proposed by Lee is in line with that of Ernest Patrikis, who submits that property of a central bank is immune from attachment if the central bank uses such property for central banking functions irrespective of their commercial nature.[270] Lee argues that this reading does not wholly comport with the language of the House Report,[271] which appears to make a distinction between funds of a foreign central bank "held" for the bank's "own account" and funds used solely to finance commercial transactions.[272]

Importantly, the House Report refers to funds used *solely* to finance the commercial transactions.[273] Thus, Patrikis' position may not be so much in contradiction with the language of the House Report. In fact, Patrikis may be referring to property of a central bank, which is used for a central banking function which is, at the same time, a commercial one. However, if the property is used *solely* for commercial transactions, *i.e.*, not for central banking activities, then it should not be covered by immunity from execution under § 1611(b)(1) FSIA.

Lee's third interpretation, relies on the House Report language relating to funds used for "commercial transactions of other entities or of foreign states." Under this reading, § 1611(b)(1) would provide immunity to central bank property used for the account of the central bank or for a public or governmental activity of the foreign State or its "agencies or instrumentalities," but not for commercial transactions of a foreign State or its "agencies or instrumentalities."[274] This third interpretation would leave unprotected those funds used to finance commercial transactions of other public entities.[275]

---

270 Patrikis, *supra* note 129, at 277.

271 Lee, *supra* note 127, at 380.

272 H.R. REP. NO. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630. As was observed in *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria,* "[t]he House and Senate Committees filed identical reports, and references [herein] to the House Report may be deemed to represent the views of the Senate Committee as well." Tex. Trading & Mill Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 306 n.18 (2d Cir. 1981), *overruled on other grounds by Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Repub.,* 582 F.3d 393 (2d Cir. 2009). (*See* NML Capital, Ltd. v Banco Central de la República Argentina*,* 652 F.3d 172 n.18 (2d Cir. 2011)).

273 H.R. REP. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630. As was observed in *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria,* "*[t]he House and Senate Committees filed identical reports, and references [herein] to the House Report may be deemed to represent the views of the Senate Committee as well*." 647 F.2d 300, 306 n.18 (2d Cir.1981), *overruled on other grounds by Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Repub.,* 582 F.3d 393 (2d Cir.2009). (*See NML Capital, Ltd. v Banco Central de la República Argentina,* 652 F.3d 172 n.18 (2d Cir. 2011)).

274 Lee, *supra* note 127, at 381.

275 *Id.* at 382.

The fourth interpretation, which relies on the commercial activity exception to limit the meaning of "central banking activities," would provide protection only for property of the central bank used for a public or governmental activity and not for property used for "commercial transactions" for the account of the central bank.[276] This interpretation construes the language of the House Report relating to "central banking activities" to mean those that are governmental in nature.[277] The judgments in the cases of *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*; *Banque Compafina v. Banco de Guatemala*; *Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C.* and even *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems* adopted certain approaches that pivot around Lee's third and fourth approaches.

In any case, among these four alternatives, the Second Circuit in *NML, Capital, Ltd.* favored the second approach which was the one proposed by Ernest Patrikis. Indeed, more than ten years earlier than Lee, Patrikis had stated that the property of a central bank is immune from attachment if the central bank uses such property for central banking functions as such functions are normally understood, irrespective of their commercial nature. Conversely, if the property is used for commercial, as opposed to central banking, purposes, then it is not immune.[278] Put differently, if an activity is to be regarded as commercial, as distinguished from a central bank activity, it should be an activity of the foreign central bank not generally regarded as a central banking activity.[279] This approach was endorsed in 2011 by the *NML, Capital, Ltd.* judgment.[280] A key issue in any case involving the attachment of foreign central bank assets, therefore, is whether the property is used in a central banking or a non-central banking activity.[281]

The *NML, Capital, Ltd.* court indicated that the structure of the FSIA suggests that property used for commercial activity and property of a central bank held for its own account are not mutually exclusive categories, because some property of a central bank held for its own account is a category of property used for commercial activity.[282] Thus, a showing that property of a central bank is used for a commercial activity

---

276 *Id.* at 381; *see also* Note: *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 564 (2010).

277 Lee, *supra* note 127, at 382.

278 *See* Patrikis, *supra* note 129, at 277.

279 *Id*. at 277-278.

280 NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172, 194 (2d Cir. 2011).

281 *See* Patrikis, *supra* note 129, at 277.

282 *NML Capital, Ltd.,* 652 F.3d at 193.

does not, of itself, exclude it from the immunity granted by § 1611(b)(1).[283]

According to two more contemporaneous commentators, the phrase "held for its own account" is intended and taken to mean that the funds "are used for central bank functions as these are normally understood," even if this means that they are "used for commercial purposes."[284] This approach is consistent with that of Mr. Ernest T. Patrikis discussed above and, ultimately, with the 2011 *NML, Capital, Ltd.* judgment also discussed above. The U.S. Supreme Court has not yet acknowledged its agreement with this approach, but it is fair to say that this is the prevailing approach at present.

As a result, whether the funds or assets composing a SWF are considered held for the central bank's own account would depend on whether managing those funds, *i.e.*, investing the pool-of-assets-SWF is considered as a "central banking activity." Indeed, on the basis of the 2011 *NML, Capital, Ltd.* judgment, one may wonder whether the management of a pool-of-assets-SWF by a central bank would be considered as a "central banking activity." That would ultimately depend on the relevant court's appreciation. Only if the court determines that management of a pool-of-assets-SWF is not a "central banking activity," they would be considered not to be held for the central bank's own account. In that case, the funds or assets composing the SWF will not be covered by immunity from execution.

At this juncture, it is interesting to refer to an editorial "Note" published in the 2010 Harvard Law Review, *i.e.*, prior to the Second Circuit judgment in *NML, Capital, Ltd.* Such Note advocated for a stringent regime of immunity concerning central banks and proposed a reading of the phrase "held for its own account" in FSIA § 1611(b)(1) that made such phrase mean "used for sovereign purposes."[285] Under that reading, property of a central bank shall be immune from enforcement if it is "used for a sovereign purpose."

The "Note" indicates that courts should investigate the "purpose" for which a transaction occur.[286] If that purpose-driven test shows that the central bank assets are used for a sovereign activity, they would be immune from execution. The "Note" proposes that courts should take the view that property of a foreign central bank is not commercial in nature,

---

[283] *Id.* at 194.

[284] Chester Brown and Roger O'Keefe, *Article 21,* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES & THEIR PROPERTY, A COMMENTARY 334, 343 (Philip Alston and Vaughan Lowe eds., Oxford University Press, 2013).

[285] Note, *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 568 (2010).

[286] *Id.*

at least when the property is used for central banking functions.[287] This is not in contradiction with Patrikis' position, as endorsed by the *NML, Capital, Ltd.* Court of Appeals.

At first glance, it may seem as though the "Note" proposed a reading of § 1611(b)(1) FSIA that departed from the text of the statute. However, a closer look reveals that what the "Note" submits is that "central banking activities," as stated in the House Report,[288] are "sovereign activities." At least the practical outcome of the Note's proposal would make the notion of "central banking activities"—in the *NML, Capital, Ltd.* judgment terms—equivalent to "sovereign activities." As a result, in order to determine whether certain property of a central bank shall be immune, it may be of good use to conduct a "purposes" test. That would be: if the purpose of the activity to which the property were used for were sovereign, then such property shall be immune. In that hypothesis, the determination of whether property of a central bank is "held for its own account," would be a purpose-driven one.

An *a contrario* interpretation of the Note's proposal could lead to the preliminary conclusion that if the property of the central bank were not used for a sovereign activity, it would not qualify for immunity. That is perhaps too farfetched, in particular, if the language in the House Report is taken into account, where it indicates that: "[i]f execution could be levied on [central banks'] funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged . . . caus[ing] significant foreign relations problems."[289] In other words, that result would seem to contradict the Congressional policy behind § 1611(b)(1) FSIA. Thus, there could be "central banking activities" that are not "sovereign activities."

Lastly, it is convenient to mention that the "Note" heavily criticizes the application to central banks of the "commercial activity exception" to immunity, which, as per *Weltover*, emphasizes the transaction's nature to the exclusion of its purpose.[290] Nevertheless, the "Note" fails to recognize that *Weltover* was a case that only dealt with immunity from jurisdiction, *i.e.*, not immunity from execution. The Note's critics are mostly based on the separate protections that Congress afforded to central banks. The reality, though, is that the FSIA certainly afforded extra protections to central banks but only in connection to the regime of immunity from execution. The regime of immunity from jurisdiction applicable to central

[287] *Id.*; *see also* Patrikis, *supra* note 129.
[288] H.R. REP. NO. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630.
[289] *Id.*
[290] Note, *Too Sovereign to Be Sued: Immunity of Cent. Banks in Times of Fin. Crisis*, 124 HARV. L. REV. 550, 556 (2010).

banks is the same regime that would apply to the State proper as well as to its "agencies or instrumentalities."

Having in mind the "Note," in the context of asset-pool SWFs managed by central banks, the U.S. District Court for the Southern District of New York judgment in *Banco Nacional de Cuba v. Chase Manhattan Bank*,[291] may shed some light. *Banco Nacional de Cuba* acted as agent for a Currency Stabilization Fund created by law and had the power to make loans to such fund as well as the purpose to assist the Currency Stabilization Fund in the exercise of its duty to protect the national currency in international trade.[292] The judgment suggests that these were governmental functions.[293]

A central bank could, for example, have the funds of the pool-of-assets-SWF that it manages, deposited in banks in the U.S. Should a creditor seek to attach those funds, the central bank might argue that management of a SWF is as a "sovereign activity." If the court follows *Banco Nacional de Cuba*, and considers that managing a SWF is a governmental or sovereign activity, it will conclude that the funds composing the pool-of-assets-SWF are considered to be held by the central bank "for its own account" and are, therefore, immune from execution. This conclusion would be in line with Patrikis, who argues *inter alia*, that no other activities of a sovereign are more inherently characteristic of sovereignty than the custody and management of a country's financial reserves, regardless of the sources of the financial assets comprising those reserves.[294] Thus, Patrikis' conclusions would seem to be relevant, in particular, in the case of a SWF composed of excess reserves.

One could think that, if a court concludes that the management of a SWF is not a sovereign activity, the funds or assets would then be exposed to execution by the creditor seeking to execute a judgment against those funds or assets. However, that would not be in line with the Congressional policy behind § 1611(b)(1) FSIA. Indeed, even if not a sovereign activity, managing the SWF could still be a central banking activity. As such, the funds and assets composing the SWF would be covered by immunity from execution.

---

291 Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412 (S.D.N.Y. 1980), *reversed by* 658 F.2d 913 (2d Cir. 1981), *reversed in turn by* First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983).

292 Because such central bank acted only as an agent, it is not apparent whether the funds composing the Currency Stabilization Fund would be considered as property of the central bank so as to qualify for immunity under §1611(b)(1) FSIA. The judgment does not discuss that aspect.

293 *Banco Nacional de Cuba*, 505 F. Supp. at 421.

294 *See* Patrikis, *supra* note 129, at 286.

III. BY WAY OF CONCLUSION: DEPENDING ON THEIR STATUS, THERE WILL BE DIVERGENT IMMUNITY OUTCOMES FOR SWFS

The rules of immunity from jurisdiction to be applied in all cases and to all types of State entities are the same. They will be uniformly applied to the State proper, to "agencies or instrumentalities," to central banks or monetary authorities and even to SWFs not protected by sovereign immunity. Naturally, the immunity from jurisdiction recipient (or non-recipient) will vary depending on the relevant legal structure.

If a pool-of-assets-SWF is managed by a ministry of finance, the regime of sovereign immunity that will come to play will be the one applicable to the State proper. That is, the SWF (or rather the State) will, in all cases, be immune from jurisdiction, subject to the relevant exceptions. The most important exception, for purposes of this article, is the "commercial activity" exception. There are three possible "commercial activity" scenarios that could allow the applicability of the "commercial activity" exception to immunity from jurisdiction. Where the pool-of-assets-SWF is engaged in any of the three "commercial activity" scenarios, the "commercial activity" exception to immunity from jurisdiction would operate and U.S. courts will have jurisdiction to hear the case. In all these cases, the commercial character of the SWF activity will be determined by reference to the "nature" of the particular financial transaction, activity or act rather than by reference to its "purpose."

SWFs with separate legal personality, will enjoy the immunity from jurisdiction that the FSIA affords to foreign states, as long as those SWFs may be characterized as "agencies or instrumentalities." At the same time, a SWFs with separate legal personality that does not qualify for "agency or instrumentality" status, will not be covered by the regimes of sovereign immunity provided for under the FSIA. In other words, not all SWFs with separate legal personality will automatically enjoy sovereign immunity from jurisdiction under the U.S. legal system. This lack of consistency under U.S. law, results in unequal treatment of SWFs which generates injustice for the very SWFs, their contractual partners and their creditors.

In order to be characterized as an "agency or instrumentality," a SWF with separate legal personality needs to be registered or created under the laws of its parent State and, either qualify as an "organ" or a majority of its shares must be directly owned by the State. Should a majority shares of a SWFs with separate legal personality be directly owned by the State, it will automatically be considered as an "agency or instrumentality" and will qualify for immunity from jurisdiction, subject to the relevant exceptions. Moreover, a SWF with separate legal personality which is not directly held by the State, or which a majority of its shares is not owned by the State, will not be considered as an "agency or instrumentality" under the "majority ownership" prong of § 1603(b)(2) FSIA. The "majority and direct ownership" requirement makes the grant of immunity from jurisdiction depend upon the position of a SWF in the State chain of ownership. This requirement creates contradictory results which do not follow any logic and generates unequal treatment among SWFs, their contractual counterparties and creditors.

Yet, even if a SWF fails to qualify as an "agency or instrumentality" under the ownership (or second) prong, it may still qualify for sovereign immunity if it can establish that it is an "organ" of a foreign State or a political subdivision thereof (first prong of § 1603(b)(2) FSIA). A SWF may qualify as an "organ" as long as it engages in a public activity on behalf of a foreign government, *i.e.*, its purpose is one of public interest. Whether a SWF qualifies as an "organ" will be determined through certain judicial tests. The "purpose-of-the-entity" test may have certain bearing on that "organ" determination. The "organ" criteria do not balance out the inequalities generated by the "direct ownership" requirement. At the same time, such "organ" criteria also has its own potential to generate unequal treatment among SWFs, their contractual counterparties and creditors.

On the other hand, in the case of pool-of-assets-SWFs managed by central banks or monetary authorities, they will be subject to the regime of immunity from jurisdiction applicable to the State and its "agencies or instrumentalities." Although a pool-of-assets-SWF managed by a central bank can get involved in a legal dispute against it, technically, the defendant would not be the very asset-pool SWF. This type of SWFs do not have separate legal personality. As a result, the claimant would have to name the managing central bank (or the State if the central bank does no ta have separate legal personality) as defendant. The regime of sovereign immunity from jurisdiction would apply in the same way regardless of which State entity is the defendant.

FSIA § 1609 contains a general rule of immunity of the property of a foreign State from attachment and execution in the U.S. Yet, depending on the status of a SWF as a pool-of-assets-SWFs managed by the State, an "agency or instrumentality" or a pool-of-assets-SWFs managed by a central bank, the outcomes will be divergent.

A creditor may execute a judgment against the funds of a pool-of-assets-SWF managed by the State, used for a commercial activity in the U.S., as long as such creditor can establish that those funds were used in the very commercial activity that was the basis of the dispute that resulted in the judgment sought to be executed. In other words, in order for the "commercial activity" exception to the rules of immunity from execution play a role, it is necessary to establish a "nexus" between the property to be executed and the commercial activity upon which the claim has been based.

Any property in the U.S. of a SWF that qualifies as an “agency or instrumentality” of a foreign State and is engaged in commercial activity in the U.S. shall not be immune from execution, upon a judgment entered by a U.S. court if the judgment relates to a claim for which the relevant SWF is not immune from jurisdiction. In other words, the exceptions to the rules of immunity from execution may apply to SWFs that are considered “agencies or instrumentalities,” without the need to establish a “nexus” between the property to be executed and the commercial activity upon which the claim has been based. The need of such a “nexus” between property and activity in the case of SWFs without separate legal personality managed by the State proper and the lack thereof in the case of “agencies or instrumentalities,” is the most salient difference between the situation of those two types of SWFs. In addition, SWFs with separate legal personality that do not qualify as “agencies or instrumentalities” will not be covered by immunity from execution at all under the FSIA. Those differential treatments raise inequalities between the relevant stakeholders.

However, the assets of a pool-of-assets-SWFs managed by a central bank will be subject to the special regime of immunity from execution applicable to central banks or monetary authorities, as long as they are considered to be the property of any of those official financial institutions and are held by them for “central banking purposes.” Only those funds or assets composing a pool-of-assets-SWF that are held by a central bank, not in a custodian, trustee or agency capacity, will be considered property of the central bank.

Moreover, the special regime of immunity from execution applicable to central banks and monetary authorities will cover the assets of a pool-of-assets-SWF managed by a central bank, solely if the relevant U.S. court considers that management of the SWF is a “central banking activity.” Only if the court determines that management of a pool-of-assets-SWF is not a “central banking activity,” it will be considered that the funds or assets composing the pool-of-assets-SWF managed by a central bank are not held for the central bank’s own account. Accordingly, the regime of sovereign immunity from execution regarding central banks will not apply. In practice, this possibility is rather remote. Yet, the case will be akin to that of an “agency or instrumentality” with all accruing consequences. This somehow “activity-based” approach of the FSIA regarding SWFs managed by central banks is preferable than a rule of absolute immunity of central banks. Yet, it is not fully satisfactory because it does not provide consistency in the treatment of SWFs.

APPENDIX[295]

State	SWF
Algeria	Revenue Regulation Fund
Angola	Fundo Soberano de Angola
Australia	Australian Future Fund
	Western Australian Future Fund
Azerbaijan	State Oil Fund
Bahrain	Mumtalakat Holding Company
Bolivia	FINPRO
Botswana	Pula Fund
Brazil	Sovereign Fund of Brazil
Brunei	Brunei Investment Agency
Canada (Alberta)	Alberta's Heritage Fund
Chile	Social and Economic Stabilization Fund
	Pension Reserve Fund
China	SAFE Investment Company
	China Investment Corporation
	National Social Security Fund
	China-Africa Development Fund
China (Hong Kong)	Hong Kong Monetary Authority Investment Portfolio
East Timor	Timor-Leste Petroleum Fund
Equatorial Guinea	Fund for Future Generations
France	Strategic Investment Fund
Gabon	Gabon Sovereign Wealth Fund
Ghana	Ghana Petroleum Funds
Iran	National Development Fund of Iran
Iraq	Development Fund of Iraq
Indonesia	Government Investment Unit
Ireland	Ireland Strategic Investment Fund
Italy	Italian Strategic Fund
Kazakhstan	Kazakhstan National Fund
	National Investment

295 *See* Sovereign Wealth Fund Rankings, http://www.swfinstitute.org/sovereign-wealth-fund-rankings/ (last visited Apr. 26, 2016).

	Corporation
	Samruk-Kazyna JSC
Kiribati	Revenue Equalization Reserve Fund
Kuwait	Kuwait Investment Authority
Libya	Libyan Investment Authority
Malaysia	Khazanah Nasional
Mauritania	National Fund for Hydrocarbon Reserves
Mexico	Oil Revenues Stabilization Fund of Mexico
	Fondo Mexicano del Petroleo
Mongolia	Fiscal Stability Fund
New Zealand	New Zealand Superannuation Fund
Nigeria	Nigerian Sovereign Investment Authority
Nigeria (Bayelsa)	Bayelsa Development Investment Corporation
Norway	Government Pension Fund – Global
Oman	State General Reserve Fund
	Oman Investment Fund
Palestine	Palestine Investment Fund
Panama	Fondo de Ahorro de Panamá
Papua New Guinea	Papua New Guinea Sovereign Wealth Fund
Peru	Fiscal Stabilization Fund
Qatar	Qatar Investment Authority
Russia	National Welfare Fund
	Russian Direct Investment Fund
	Reserve Fund
Senegal	Senegal FONSIS
Singapore	Government of Singapore Investment Corporation
	Temasek Holdings
Saudi Arabia	SAMA Foreign Holdings
	Public Investment Fund
South Korea	Korea Investment Corporation
Trinidad and Tobago	Heritage and Stabilization Fund
Turkmenistan	Turkmenistan Stabilization

	Fund
United Arab Emirates (Federal)	Emirates Investment Authority
United Arab Emirates (Abu Dhabi)	Abu Dhabi Investment Authority (ADIA)
	International Petroleum Investment Company
	Mubadala Development Company
	Abu Dhabi Investment Council
United Arab Emirates (Dubai)	Investment Corporation of Dubai
United Arab Emirates (Ras Al Khaimah)	RAK Investment Authority
USA (Alabama)	Alabama Trust Fund
USA (Alaska)	Alaska Permanent Fund
USA (Louisiana)	Louisiana Education Quality Trust Fund
USA (New Mexico)	New Mexico State Investment Council
USA (North Dakota)	North Dakota Legacy Fund
USA (Texas)	Texas Permanent School Fund
USA (Texas)	Texas Permanent University Fund
USA (Wyoming)	Permanent Wyoming Mineral Trust Fund
USA (West Virginia)	West Virginia Future Fund
Vietnam	State Capital Investment Corporation
Venezuela	FIEM