

SOVEREIGN WEALTH FUND AS A SUBJECT OF THE PRIVATE INTERNATIONAL LAW

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Abstract

This article covers the problem of the legal status of sovereign wealth funds in private international law as a separate branch of the internal law in each jurisdiction.

Keywords: *sovereign wealth fund, private international law, cross-border investment fund.*

Public element in the structure-organizational component of the institutional investors legal status as a legal construction characterizes cross-border investment funds as truly universal tool of accumulation and movement of foreign direct and portfolio capital, which notion is invariably used in relation to legal persons of private and public law. It's inherent in the individual type of cross-border investment funds called as sovereign wealth funds. By their unique legal status in the private international law stipulated by the intensive implication into the resolution of public law problems they're subject of independent legal research.

We start studying it here from examining of the notion content. Sovereign wealth funds notion is widely used in doctrine and practice nevertheless it is not covered by law. Its legal definition is impeded by the fact that the so-called life goal of the sovereign wealth funds is mainly contained in the canvas of the state one. It's predetermined by the unique public policy and corresponding means for its realization. However its definition if holds, is made on the basis of thorough analysis of independent characteristics in certain private-law or public-law spheres of research or review of the terms used in the name of the notion. In line of the latter we will start our study.

The term "sovereignty" translated from the French means a set of sovereign rights that the state or its head is empowered of in accordance with the unique organizational structure of the political system. The term "fund" is primarily used to the capital for the particular purpose. "Wealth" – is a socio-political notion that determines the terms of sustainable human development. In result of their examine sovereign wealth fund is the public capital used for the sustainable development of the human, society and the state. By reason of its extremely abstract character such definition can't be exclusively used in the present paper. It will be later clarified but even in the present version there is characteristic of the individual type of cross-border investment funds. It's the direct state participation in its creation and realization through placing of certain amounts of all oil, gas and other revenues in corporate or contract form. In the latter case there's no legal capacity for the distinct legal and economic being. These are Equatorial Guinea Fund for Future Generations managed by the Bank of Central African States (BEAC), Macroeconomic Stabilization Fund regulated by the Board of the Central Bank of Venezuela. According to the data of the Sovereign Wealth Fund Institute¹, global organization designed to study government investors in certain commercial and non-commercial areas, there are presently 65 funds. The first (Texas Permanent School Fund) emerged in 1854 with the domicile of origin in United States of America.

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¹ Sovereign Wealth Institute Site. [Electronic resource]. URL: www.swfinstitute.org

Sovereign wealth funds as legal persons form the peculiar type of corporations the title on which exclusively belongs to the national governments, singly or jointly with others. For example, Emirates Investment Authority is the first sovereign wealth fund of seven states that form United Arab Emirates. Special members composition and public goals define their qualification but *de lege lata* in some jurisdictions, particularly in Estonia², the main criteria is determined by the character of interests. Such public corporations or as they're also called legal persons of public law are incorporated in public interests in accordance with the procedure prescribed by the law of the chartering state. Unlike legal persons of private law and this has to be underlined separately, in their regard there's a special incorporation procedure. It doesn't provide for a unified legal framework, that determines a uniform corporate-law form construction, but prescribes an issue of the individual legal act for the unique functional organization of the state property management. For example, State Capital Investment Corporation (SCIC), Vietnam sovereign wealth fund, is incorporated under Decisions No.151/2005/QĐ-TTg of the Prime Minister dated 20 June 2005 to pursue some commercial and non-commercial goals.

In absence of the uniform legal construction of the sovereign wealth fund such organization is characterized by individual set of criteria that determine or not the qualification mainly made in scientific goals. It is caused by the gap in regulating legal status of the persons equally capable in public and private law in collective investment area.

Thus sovereign wealth funds being ideal subjects of law are creatures of the national legal orders that exist starting from the moment their incorporation occasioned. That both characterizes legal persons of private and public law. But unlike the previous the European Union concept of corporate mobility, more precisely its sub-principle of reincorporation, is unusable in this case. The law applicable to the substance of the legal capacity is chosen by the close legal tie with the founder, not the place of incorporation or domicile. This forms another characteristic. Thereupon the tooling of the conflict-of-law rule, applied in the international private law dispute is formed not in traditional construction of the *lex societatis* but "state affiliation", that fixes the problem of the connecting factor choice. These are widely used incorporation and domicile connecting factors based on the like theories. In some cases - "the place of main activity" and others that are chosen as the most efficient connecting factors to apply to the legal status in an international context.

Irrespective to the terms of incorporation they act as persons distinct from the states in the property turn-over. It is reflected in the right to sue and be sued in court that is ascertained by the analysis of the way of incorporation, legal rights and their execution in regards to the state of national affiliation and third parties. The latter usually derives from such characteristics of corporations as legal capacity, ownership and limited liability of the members.

Nonetheless regardless to the distinct from the states legal and economic being such persons in doctrine and court practice are metaphorically called as arm of the states in the management of the state property and new investments abroad as in the case of SCIC. "Its creation is stipulated by the height of the economic reforms aimed at enhancing the efficiency of state capital utilization. Its main objective is the representation of the state interests in the entities and investment in key sectors and essential industries with a view to strengthening the dominant role of the state sector while respecting markets rules"³.

In this regards it is important to find out which concept is brought as the major in a certain jurisdiction. Sovereign wealth funds may be considered by the law as alter-ego of the

² Part II, Chapter I, § 5 of General Principles of the Civil Code Act. 1994. [Text]: [Electronic resource]: - Access regime: <http://www.legaltext.ee/text/en/X0015.htm>

³ State Capital Investment Corporation Site [Electronic resource]. URL: www.scic.vn

government that is characterized by the absolute immunity or persons which *jure imperii* are protected. The latter provides for the deviation from the absolute to the restricted immunity, that doesn't cover ordinary commercial transactions in an international context the other party of which is represented by the real or ideal private law subject. Such implementation of public interests in private-law field underlines specific legal status of sovereign wealth funds among other subjects of law in general and private law in particular.

Besides profit-making as the main aim to pursue in the management of the state property and the corresponding conformity to the competition rules, is decisive in the matter of qualification. Such aim in terms of the main strategy along with the conditions of its implementation characterizes commercial corporations under which category sovereign wealth funds fall in the present context.

Finally together with other legal entities controlled by the state, sovereign wealth funds as legal persons are widely used tools of the cross-border commercial turn-over that are positively or negatively characterized in foreign doctrine. This way they're sometimes characterized as "unique institutions". "Besides being large investors with an increasing amount of assets under management ... SWF invest in equities with the purpose of maximizing the return on their origin country's reserves...Firms with higher ownership by SWF have higher firm valuation and better operating performance..."⁴. But such positive views aren't always shared. By the use of the public funds as foreign direct investment they fulfill the role of the foreign policy instrument that causes concerns of the states that import private or public capital and international community in general. Lawrence Summers, that earlier held office of the United States Secretary of the Treasury said that "...cross-border activities of SWFs and other sovereign investment vehicles have reversed the trend toward privatization that swept over the globe in the past quarter century"⁵. What previously belonged to the real and ideal subjects of private law is presently accumulated in the investment portfolios of the government structures. It comes to the foreign equity securities which holding indicates the refusal from the conservative investment strategy of allocating funds in government securities. In the present context it's also noteworthy that the concerns come not from the simple fact of the equity securities concentration in foreign government structures but their ability to determine the destiny of the corporations and national economies in whole.

As a consequence sovereign wealth funds as legal persons are unique, both private and public law organizations. In the private international law these are independent investment entities established for the effective use of the state property for the sustainable human, society and state growth.

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⁴ Fernandes N. Sovereign Wealth Funds: Investment Choices and Implications around the World. IMD International. 2011. P. 1- 2.

⁵ Summers L. Sovereign Funds Shake the Logic of Capitalism // Financial Times, July 30, 2007.