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NEW YORK

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MEMORANDUM FOR NORGES BANK

Re: Sovereign Immunity and Proposed Restructuring of Fund

You have asked for our views concerning a contemplated restructuring of Norway's sovereign wealth fund, the Government Pension Fund Global (the "**GPFG**" or the "**Fund**"), and the effect such a restructuring might have on sovereign immunity protections currently available to the GPFG in seven countries.

This memorandum provides a general explanation of the concept of sovereign immunity and examines the sovereign immunity protections available to the GPFG. In particular, it analyzes the sovereign immunity laws of seven jurisdictions (the United States, England, France, Germany, China, Switzerland, and Japan[1]) where the Fund has the largest concentration of assets, and considers how those laws would treat the Fund under its current governance model (the "**current structure**") and the alternative governance model (the "**proposed structure**") described by the Norges Bank Law Commission in its June 28, 2016 letter provided to us by legal counsel to Norges Bank Investment Management ("**NBIM**").

BACKGROUND

The GPFG was created to safeguard Norway's petroleum wealth for future generations. The GPFG is capitalized with all of the Norwegian State's petroleum revenue, less current expenditures. Pursuant to the Government Pension Fund Act enacted by Norway's parliament (the Storting), the Ministry of Finance is entrusted with managing the GPFG for the benefit of Norway.

Current Structure. We understand that the Storting has assigned the Ministry of Finance the formal responsibility of managing the GPFG, and that the Norwegian government is the beneficial owner of the Fund's assets. The Ministry has issued general investment guidelines to Norges Bank, the central bank of Norway, which acts as the operational manager and legal owner of the Fund. To perform its role as operational manager, Norges Bank has established a separate asset management unit within the bank—NBIM—which manages the Fund on behalf of the Ministry of Finance.

The name that appears on a GPFG account varies by jurisdiction. NBIM prefers the Fund's accounts to be in the name of Norges Bank. Some jurisdictions, however, require such accounts to bear the name of the beneficial owner. In all seven jurisdictions reviewed in this memorandum, NBIM's GPFG account is under the name of the Norwegian government, and not Norges Bank. This is true notwithstanding the fact that when the Fund makes purchases, it is

[1] The Swiss and Japanese law sections of this memorandum were prepared by Homburger AG and Kojima Law Offices, respectively, and appear in Addendum A.

Norges Bank that acts as the buyer, and when the Fund sues or is sued, Norges Bank is the named party (presumably in its capacity as manager of the Fund). The GPFG lacks legal personhood in that it itself has no rights or obligations to or against public or private entities and cannot sue or be sued. The GPFG is not a separate legal entity and does not have its own executive board or administrative staff.

Proposed Structure. While the Norges Bank Law Commission, tasked with considering alternative corporate models for the Fund, has neither decided to restructure the Fund nor what form such a restructuring might take, we understand that the Commission is currently reviewing one alternative structure in particular. Under this proposed structure, the Norwegian government would remove the Fund from the aegis of Norges Bank and place it under the management of a new statutory entity. This entity would have a Board of Directors independent from Norges Bank and would be wholly directly owned by the Norwegian state. The Fund, which would retain its current name, would appear on the new entity's balance sheet as a capital deposit and as an asset on the government's. Management of the Fund would be the new entity's sole responsibility.

EXECUTIVE SUMMARY

In sum, the Proposed Structure will weaken sovereign immunity protections of the Fund in some jurisdictions, and have no effect on sovereign immunity in other jurisdictions. This is because sovereign immunity laws are based on international law principles as adopted and interpreted by the local laws of each jurisdiction, and some jurisdictions, including the United States and the United Kingdom, offer enhanced legal protection for the assets of central banks. As a result, in those jurisdictions separation of the Fund from the central bank of Norway could result in weaker immunity from asset seizure. In the jurisdictions that do not recognize this enhanced legal protection for the assets of central banks, the proposed restructuring would not have a material impact on the Fund's sovereign immunity position.

A. Foreign Sovereign Immunity

Many countries—including the seven surveyed here—limit the circumstances in which a foreign state and its political subdivisions and agencies can be sued. The legal doctrine known as foreign sovereign immunity reflects the principle of equality among nations and the corollary right of a sovereign to conduct its own affairs free from the interference of judicial review by its peers.

The doctrine has evolved from an absolute prohibition on suits to the so-called "restrictive theory" under which sovereign nations continue to enjoy immunity for their strictly sovereign acts but, in many jurisdictions, can no longer claim immunity in connection with their commercial activities. For example, a foreign government likely could not be sued for regulating its currency, regardless of the effect such action might have, because currency regulation is a paradigmatically sovereign activity and one in which a private actor could not engage. By contrast, the same government likely could be sued in many countries for breaching a contract for the purchase of industrial equipment. In the latter example there is nothing specifically sovereign about the government's activity. A private actor could enter into the same contract for

the same supplies, and sovereign immunity is unlikely to protect a nation from suit or seizure in connection with private commercial activity.

Importantly, sovereign immunity includes both immunity from suit—which protects a sovereign from the burdens of litigation—and immunity from attachment or execution—which protects a sovereign's property from restraint prior to trial and from seizure following the rendering of a verdict.[2] Many sovereign immunity regimes offer greater protection against judicial seizure of a foreign nation's property as opposed to protection from litigation, meaning that even when a nation can be sued its property might still be immune from prejudgment attachment or post-judgment execution. A plaintiff, in other words, may be able to secure a judgment against a sovereign and yet be unable to enforce that judgment (*i.e.*, have a right, but no remedy).

In addition, and as mentioned above, many countries accord greater protection still to the property of foreign central banks, as opposed to the property of a foreign government or its ministries.

B. The GPFG's Current Structure

1. Immunity from Suit

Under the current structure, Norges Bank, in its capacity as manager and legal owner of the GPFG, is unlikely to be immune from suit in connection with Fund management activity. Of the seven jurisdictions considered by this memorandum, only one—the People's Republic of China—affords Norges Bank, as a governmental branch of the Norwegian state, absolute immunity. Even China, however, applying the doctrine of reciprocity, may decline to extend immunity to Norges Bank in the event that Norway permits China's central bank to be sued. Broadly speaking, in the remaining jurisdictions, Norges Bank would be entitled to immunity from claims related to its sovereign activity and not immune from suits related to its private or commercial activity. Courts in each jurisdiction will determine on a case-by-case basis what qualifies as commercial activity, but in most jurisdictions GPFG investments are likely to qualify as commercial activity and suit to be permitted, to the extent the activity in question has some meaningful connection to the jurisdiction.

2. Immunity from Attachment and Execution

All surveyed jurisdictions—excluding China, which again abides by absolute immunity (subject to reciprocity)—grant sovereign assets immunity from attachment or execution, except where, generally speaking, a plaintiff can show that the assets were used or are in use for a private or commercial activity. In five of the seven jurisdictions, it makes a difference that the GPFG is currently held and managed by a foreign central bank. Under English, French, and Japanese law, the Fund's assets, by virtue of Norges Bank's legal ownership and management, are absolutely immune from attachment and execution. In the United States, Norges Bank's management of the GPFG, too, provides the ground for arguments that absolute immunity

[2] In this memorandum we refer to prejudgment restraints on property as "attachment" and post-judgment enforcement remedies as "execution."

granted to central bank assets should extend to the Fund's assets. Finally, Chinese courts may be more likely to recognize the Fund's entitlement to immunity under the current structure given Chinese statutory law concerning central banks. As a practical matter, however, a Chinese court would likely recognize the sovereign immunity of any government actor, assuming satisfaction of the reciprocity principle.

In contrast to these five jurisdictions, in Germany and Switzerland the GPFG's assets potentially are subject to execution when used in commercial or other non-sovereign activity in connection with the claim for which enforcement is sought, regardless of Norges Bank's legal ownership or management.

C. The Proposed Structure

1. Immunity from Suit

In the context of immunity from suit the analysis remains largely the same under both the current and proposed structures in all seven jurisdictions surveyed. Other than in China, this analysis will depend, generally speaking, on whether the activity in question is sovereign or commercial, with caveats for Switzerland and France. In Switzerland, a court may be more hesitant to accept a case against the Norwegian central bank than against a state-owned entity, but immunity from suit will depend on whether and to what extent the underlying claim arose from sovereign or commercial acts and not on Norges Bank's involvement. Under French law, Norges Bank (unlike a governmental agency) is presumptively immune from suit and removing the Fund from the central bank would eliminate the presumption, shifting the burden of proof from the plaintiff to the management entity to be created under the new structure.

2. Immunity from Attachment and Execution

Courts in three of the seven jurisdictions surveyed—China, Germany, and Switzerland—are likely to grant the same attachment and execution protections to the GPFG and Norges Bank (or some other managing entity) under both the current and proposed structures. Without reference to China's central bank immunity statute it might be more cumbersome to invoke sovereign immunity under the proposed structure, but the absolute immunity of Norway's property will, under the principle of reciprocity, depend more on Norway's treatment of Chinese assets than on the statute. In Germany and Switzerland, the execution immunity arguments that can be made on behalf of the GPFG are available whether the Fund is held and managed by Norges Bank or some other governmental entity.

The GPFG's immunity from attachment and execution, however, could be adversely affected by the proposed structural change in the United States, England, France, and Japan. Each of these four countries confers enhanced protections on central bank assets and removing the GPFG from Norges Bank would likely diminish its eligibility for these protections in England, France, and Japan, and could potentially do so in the United States as well. The extent of eligibility, as with the current structure, depends on the specifics of each jurisdiction as described in more detail in the body of this memorandum.

ANALYSIS

I. Sovereign Immunity

English law, at least since the time of Edward the First, held that *rex non potest peccare*—the King can do no wrong. Practically speaking this meant that the Crown of England could not be sued without its consent, *i.e.*, the sovereign was immune from suit. Many governments continue to adhere, in one form or another, to this basic principle. Even where monarchies have fallen out of fashion, national governments have strictly constrained the conditions under which they can be sued in their own courts.

Sovereigns have long extended a parallel right to their fellow sovereigns, in recognition of the well-established canon of international law, *par in parem non habet imperium*, meaning "an equal has no power over an equal." If the King could do no wrong at home, nor could he do so in the territories of his peers. The concept of foreign sovereign immunity is reciprocal, and sovereigns have tended to grant each other immunity as a matter of grace and comity—that is, both out of respect for sovereign dignity and in the hope that their fellow sovereigns will extend the same protections to them.

Historically, this has meant until after the Second World War that sovereign nations operating abroad have enjoyed absolute immunity from suit. In most countries, under no circumstances could a foreign sovereign be hauled into court without its consent. Over time and in response to the increased presence of sovereign governments in the commercial sphere, however, this absolute theory of sovereign immunity has been replaced by various restrictive approaches. In its most basic form, the restrictive theory grants immunity to sovereign acts of a public or governmental nature (*acta iure imperii*) only, and does not protect a sovereign from suit for acts of a commercial or private nature (*acta iure gestionis*).

The displacement of the absolute theory of sovereign immunity by variations on the restrictive theory has taken two different forms. Some countries, like the United States and England, have codified a restrictive approach, defining the contours of sovereign immunity by way of statute. Others have relied on public international law principles and treaties, including U.N. and E.U. conventions, to develop a restrictive theory of sovereign immunity.

II. Jurisdiction-by-Jurisdiction Analysis

A. U.S. LAW

1. Basic Principles

The Foreign Sovereign Immunities Act. In the United States a restrictive theory of sovereign immunity developed as a matter of common law. In 1976, the U.S. Congress endorsed and codified the restrictive theory in the Foreign Sovereign Immunities Act (the "**FSIA**"), which delimits the extent of immunity of sovereigns. The FSIA provides the sole basis for jurisdiction over a foreign state in U.S. courts. Accordingly, the FSIA sets the terms for both immunity from suit and from attachment and execution.

Under the FSIA, Norway and its ministries qualify as a "foreign state." A second category of state entities, so-called agencies and instrumentalities, are also entitled to immunity from suit, attachment, and execution, albeit in slightly more limited form. 28 U.S.C. §§ 1603, 1610. Foreign sovereign agencies and instrumentalities include state organs and corporate entities majority directly owned by the parent state.[3]

Immunity from Suit. Under the FSIA, the Ministry of Finance and Norges Bank are immune from suit unless one of the exceptions to sovereign immunity set out in Section 1605 of the statute applies. Two exceptions are likely to be of most relevance. First, a foreign sovereign may waive its immunity either explicitly (*e.g.*, contractually) or by implication (*e.g.*, by appearing in a U.S. court without asserting its immunity). 28 U.S.C. § 1605(a)(1)-(2). Second, the FSIA grants U.S. courts jurisdiction over suits based on commercial activity undertaken by foreign sovereigns either in the United States or that causes a direct effect in the United States.[4]

In a foundational case, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 615-17 (1992), the Supreme Court of the United States held that the issuance of foreign sovereign bonds, without more, qualifies as "commercial activity" under the FSIA, as the bonds in question were "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 . . . ; and they promise a future stream of cash income." The Court noted that, under the FSIA, whether an act is commercial depends not on its purpose but on its nature. Thus, a foreign government's regulation of its currency 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." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992).

Given the breadth of the definition of commercial activity, we believe that a dispute concerning a GPFG investment in the United States would likely satisfy the FSIA's commercial activity exception to sovereign immunity, either because the action is deemed to be based on commercial activity in the United States or commercial activity having a direct effect in the

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[3] The FSIA defines an "agency or instrumentality of a foreign state" to be any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (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 . . . and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603. The proposed structure is likely to qualify as an agency or instrumentality of the Norwegian government.

[4] A third but uncommon exception applies in suits brought to determine rights in real estate in the United States. 28 U.S.C. §1605(a)(4). When a resulting judgment establishes rights in the property, it is not immune from execution if it is used for a commercial activity in the United States. 28 U.S.C. §1610(a)(4). These exceptions do not apply to diplomatic or consular property, which are covered by the Vienna Convention on Diplomatic Relations.

United States. This is true for both the existing and proposed structure of the Fund. Common investment activity that would fall under these exceptions includes the purchase of assets in the United States or transactions made on behalf of the Fund with a U.S. counterparty.

Immunity from Attachment and Execution. In such a case, upon initiating a suit a plaintiff may seek prejudgment attachment. However, absent an explicit waiver of immunity to prejudgment attachment, the Fund is absolutely immune from such attachment under the FSIA.[5] Immunity from post-judgment execution, on the other hand, is not absolute. A foreign state may waive immunity from execution of its property in the United States being used for a commercial activity in the United States. Absent a contractual waiver of immunity, the only foreign state assets subject to post-judgment execution are those used in the commercial activity on which the claim in the lawsuit was based. 28 U.S.C. § 1610(a)(2).

Importantly, the same cannot be said for a sovereign's agencies and instrumentalities, to which the FSIA provides fewer protections. In the case of a foreign state agency or instrumentality that engages in commercial activity in the United States, a plaintiff's recovery is not limited to agency or instrumentality property used for the commercial activity on which the plaintiff's judgment is based. Instead, the judgment creditor can execute upon any of the property of the agency or instrumentality located in the United States, regardless of the use to which the property has been put (reflecting the Congressional understanding that agencies and instrumentalities are most frequently created to engage in commercial activity), and regardless of whether the property was involved in the activity on which the claim is based. 28 U.S.C. § 1610(b)(2).[6]

Central Bank Immunity. To encourage sovereign holdings in the United States and harmonious relations abroad, the FSIA provides additional protections against execution to the assets of foreign central banks. When the asset in question is the property of "a foreign central bank or monetary authority held for its own account," then "notwithstanding" the arguable commercial use of such an asset, the Section 1610 exceptions to immunity from attachment and execution do not apply. The assets are per se immune, unless the sovereign has explicitly waived its immunity. 28 U.S.C. § 1611(b)(1). The commercial nature of the activity is irrelevant.

Interpreting the phrase "held for its own account," the Court of Appeals for the Second Circuit has held that funds "held in an account in the name of a central bank or monetary

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[5] Apart from the limitations on jurisdiction and enforcement remedies provided by the FSIA, the availability of attachment and execution remedies is governed by the different attachment and judgment enforcement laws of the 50 states. A discussion of the specific requirements for prejudgment attachment and post-judgment execution in each state is beyond the scope of this memorandum.

[6] As noted above, the statutory entity to be created under the new structure would likely qualify as an agency or instrumentality of the Norwegian government. For this reason, as discussed below, in the event the contemplated restructuring takes place we recommend that the government—rather than the management entity to be created—continue to beneficially own the Fund's assets.

authority . . . are presumed to be immune from attachment." In other words, a central bank is entitled to a presumption that accounts bearing its name are "held for its own account" and therefore absolutely immune under Section 1611. In such cases it falls to a plaintiff to prove that the funds are not, in fact, held for the central bank's own account. To do this, the plaintiff must show that the funds "are not being used for central banking functions as such functions are normally understood." *NML Capital, Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 194 (2d Cir. 2011) ("***BCRA***"). Funds not used by a central bank for paradigmatic banking functions are not, under U.S. law, "held for [the central bank's] own account," and merit only the less robust protections available to all sovereign entities.

In *BCRA*, the Second Circuit also recognized that "the property of a central bank, immune under § 1611, might also be the property of that central bank's parent state," pointing out, for example, "that while the funds of foreign central banks are managed through those banks' accounts in the United States, those funds are, in fact, the reserves of the foreign states themselves." *BCRA*, 652 F.3d at 188-89 (quotations and alterations omitted). The court went on to reject the narrow reading urged by the plaintiffs that would limit the phrase "held for its own account" to property held for the central bank's "own profit or advantage." *Id.* at 192-93.

2. The Government Pension Fund Global

a. Current Structure

Immunity from Suit. As noted above, a U.S. court will likely treat GPFG investment activity as commercial activity under the FSIA. Accordingly, if the GPFG invests in the United States, or if its investment activity has a direct effect in the United States, the Fund will be subject to U.S. jurisdiction for claims based on this activity.

Immunity from Attachment and Execution. As the property of a foreign sovereign, the GPFG's U.S. assets, absent a waiver, cannot be attached prior to judgment. The protections to which the Fund's assets are entitled post-judgment depend on whether the assets are Norges Bank's property held for its own account. At a minimum, absent a waiver execution will be limited to assets that were used in the commercial activity on which the claim is based. If, however, a court finds that Norges Bank owns the Fund's assets and holds them for its own account, the assets will be absolutely immune from execution under the central bank section of the FSIA.

We understand that the GPFG's assets in the United States, although managed and legally owned by Norges Bank, are held in the name of the government of Norway. Because the assets are not held in Norges Bank's name, it is uncertain whether they would qualify for the presumption of immunity recognized by the Second Circuit in *BCRA*. Lacking this presumption, in the event of a lawsuit Norges Bank or the Norwegian government would bear the burden of demonstrating the Fund's entitlement to central bank asset immunity, *i.e.*, that the funds are the property of Norges Bank held for its own account.

Given the Second Circuit's recognition that assets entitled to Section 1611 protection may be property of both a central bank and its parent state, a court may agree that Norges Bank's management and legal ownership of the GPFG in the United States is enough to warrant treating

the Fund's assets as the bank's property under Section 1611. Norges Bank could argue that to require that the GPFG account bear the bank's name would be an exercise in mere formalism that misunderstands the structure of the GPFG and the purpose of a sovereign wealth fund.

Assuming a court agreed that the GPFG should be treated as the property of Norges Bank, the bank would still need to show that the Fund's assets were being held for the bank's own account. That is, the assets would enjoy the protections of Section 1611 only if used for paradigmatic central banking functions, like the accumulation of dollar reserves to facilitate currency regulation or the custody of cash reserves of commercial banks pursuant to central banking regulations. *BCRA*, 652 F.3d at 194-95. It is an open question whether the activity undertaken by the GPFG specifically, or sovereign wealth funds generally, qualifies as paradigmatic central banking activity. However, if a plaintiff sought to execute on GPFG assets held under the current structure, the GPFG could point to its position inside the central bank to support an argument that the Fund's activities further paradigmatic central banking functions. How a court might rule on these issues, however, remains to be seen.

b. Proposed Structure

Immunity from Suit. Under the new structure, assuming no waiver of immunity, Norway and the new entity—like Norway and Norges Bank under the current structure—could be sued only for commercial activity undertaken in the United States or that causes a direct effect in the United States.

Immunity from Attachment and Execution. The proposed restructuring would preclude arguments that, based on Norges Bank's legal ownership and management, the GPFG should be absolutely immune from execution. U.S. courts have yet to consider such arguments in the context of sovereign wealth funds, and their strength and outcome are uncertain. Nonetheless, by eliminating these arguments the proposed restructuring could increase the risk of suit. Under the current structure, a potential plaintiff might feel confident that the GPFG's commercial activities make it amenable to suit but still be discouraged from bringing suit by the prospect of confronting arguments that the Fund's property is absolutely immune. In other words, further potential barriers requiring additional litigation at the enforcement stage might dissuade a plaintiff from suing in the first place. Under the proposed structure, however, there would be no argument that the assets were absolutely immune from execution. Instead, a judgment creditor could execute upon any Fund assets used in the commercial activity upon which it based its suit.

It bears emphasizing that assets beneficially owned by the Norwegian state will enjoy greater protection in the United States than assets owned by a wholly-owned agency or instrumentality of the government. In the case of a foreign state, and in the absence of a waiver of immunity from execution, only property used for the commercial activity on which a plaintiff bases its claim is available for execution. By contrast, any property of an agency or instrumentality of a foreign state engaged in commercial activity in the United States is available for execution. We understand that, under the proposed structure, the statutory entity to be created and wholly-owned by the Norwegian government would only manage GPFG's assets, which would remain in the government's name. This is the more advantageous arrangement. If the entity were to own the assets, rather than the government, a plaintiff who successfully sued

the entity could execute on any of its property located in the United States, irrespective of the use to which the property had been put or the nature of the successful claim.

B. ENGLISH LAW

1. Basic Principles

Immunity from Suit. English law gives wide-ranging immunity from the jurisdiction of the courts of England and Wales to sovereign States by virtue of the State Immunity Act 1978 (the "**Act**"). That immunity may also extend to entities separate from the State if the entity is acting in the exercise of sovereign authority and the State would have been immune had it carried out the relevant acts (s.14(2)).

However, this immunity from suit is subject to a number of potential exceptions, including, among others, where:

- the entity with *prima facie* immunity submits to the jurisdiction of the English courts by taking part in court proceedings (other than simply to contest jurisdiction) or by contractual agreement (*i.e.*, a jurisdiction clause) (s.2(1));

- the entity with *prima facie* immunity entered into a commercial transaction, a contract which is to be partly or wholly performed in the UK (s.3(1));

- the proceedings relate to any interest or obligation that the entity with *prima facie* immunity has in (or a right to possession or use of) immovable property in the United Kingdom (s.6(1)).

General Immunity from Execution. The Act generally enables execution of a judgment against a State's assets (or those of a separate entity meeting the test described above) only with the written consent of the State (s.13(3)) or where the relevant property is exclusively in use or intended for use for commercial purposes (s.13(4)).

The State's immunity also extends to protection from pre- and post-judgment injunctive relief, orders for specific performance and orders for the recovery of land or property (s.13(2)) – absent express consent, consent cannot be implied.

Central Bank Immunity. The Act provides that a central bank and its assets have absolute immunity from enforcement. The Act expressly states that the property of the central bank shall not be regarded for the purposes of the Act as in use or intended for use for commercial purposes with regard to the rule in section 13(4) above, and the central bank is also made explicitly immune from injunctive relief or enforcement as if it were a State (s.14(4)).

In addition, the definition of a central bank's assets has been broadly construed, and has been held to include any asset in which the central bank had some kind of property interest, irrespective of the capacity in which the central bank held the assets or the purpose for which the assets were held. It does not matter what the central bank does with its assets; so long as it has some kind of proprietary interest such assets will be immune from attachment.

2. The Government Pension Fund Global

a. Current Structure

Immunity from Suit. Norges Bank is a separate entity from the Norwegian State. In order to determine if it has prima facie immunity from suit, the question is whether or not Norges Bank is acting in the exercise of Norway's sovereign authority in relation to the Government Pension Fund Global (s.14(2)). This is a question of fact that an English Court will have to decide.

English case law provides some guidance. The issue of a letter of credit or of a promissory note have been held to be private commercial actions of a central bank and therefore do not attract immunity. In contrast, the issue of banknotes and the regulation of foreign exchange reserves by a central bank have been held to be governmental and immune.

The High Court recently held that the management of the economy and government revenues were sovereign activities, and a sovereign wealth fund which was actively invested to secure "*high profitability levels ... in the long term outlook at reasonable risk levels*" was consistent with the fund being used for sovereign purposes. *AIG Capital Partners Inc v Kazakhstan* [2005] EWHC 2239 (Comm). It is therefore likely that Norges Bank is exercising sovereign authority in its management of the GPFG, and has *prima facie* immunity from suit.

However, Norges Bank's *prima facie* immunity from suit is subject to a number of potential exceptions, as referred to above. This is relevant to an assessment of whether Norges Bank will be immune from prejudgment attachment as it is perhaps more likely that prejudgment attachment orders will be made in the course of ongoing litigation in the English court (although the English court can also issue such orders in support of foreign proceedings).

Immunity from Attachment and Execution. Norges Bank's assets are likely to be immune from attachment or enforcement for the reasons outlined below.

As referred to above, the Act generally enables execution of a judgment against a State's assets (or those of a separate entity meeting the test described above) only with the written consent of the State (s.13(3)) or where the relevant property is exclusively in use or intended for use for commercial purposes (s.13(4)). In the *AIG Capital Partners Inc v Kazakhstan* case referred to above, which had similar facts, the Court found that the assets of the sovereign wealth fund were not in use or intended for use for commercial purposes at any stage.

Further, as referred to above, the Act provides central banks and their assets an additional layer of protection by expressly enshrining their absolute immunity from enforcement. So long as the central bank has some kind of proprietary interest in the assets, these assets will be immune from execution.

A prejudgment (or post-judgment) attachment of assets under English law may therefore be granted against Norges Bank only where it has explicitly consented or waived its immunity, usually by explicit wording to that effect in contractual documentation. *See, e.g., Thai-Lao Lignite (Thailand) Co Ltd & Anor v Government of the Lao People's Democratic Republic* [2013] EWHC 2466 (Comm).

Where Norges Bank has explicitly consented, relief may be available in the form of freezing orders, anti-suit injunctions (*i.e.*, injunctions prohibiting a party from starting proceedings in another jurisdiction) or any other form of injunctive relief. However, the court will construe any such consent very narrowly, so that, for example, consent by Norges Bank to an anti-suit injunction may not necessarily be read to include consent to an attachment over Norges Bank assets.

If a third party sought an *ex parte* attachment order from the English court against Norges Bank, it would have a duty to disclose to the court that Norges Bank is Norway's central bank (although the court may be well aware of this). The court would then of its own motion have to give effect to the immunity provisions in the Act (s1(2)). If the court wrongly grants an order enforcing against Norges Bank assets, the Bank would have the right to challenge that order at a "return hearing" which could take place almost immediately after the initial order was made. In these circumstances, the court should overturn the decision and discharge the order.

Norges Bank is also likely entitled to immunity from post-judgment attachment. Broadly, judgment creditors may seek the assistance of the English court in getting a judgment satisfied through the issue of a variety of orders against a judgment debtor including an order for the attachment of earnings, an order of sale in respect of real property and chattels, an order for the seizure of monies in a bank account and a third party debt order. As with prejudgment attachments, a judgment creditor would only be able to obtain such an order in respect of Norges Bank's assets with the explicit consent of the central bank.

b. Proposed Structure

Immunity from Suit. Under the proposed structure, the analysis regarding immunity from suit is unchanged. The new entity is a separate entity from the State and the management of GPFG is likely to be found to be the exercise of sovereign authority.

Immunity from Attachment and Execution. Under the proposed structure, there are more risks regarding immunity from enforcement. While the analysis regarding immunity from enforcement has the same conclusion, the section 14(4) protections for a central bank and its assets do not apply:

- The new entity, as an asset of the Norwegian Ministry of Finance, would benefit from the immunity accorded to sovereign States by virtue of section 1 of the Act. The Norwegian Ministry of Finance falls within the definition of 'State' as per section 14(1)(c) of the Act. Therefore the Ministry of Finance would remain immune from injunctive relief whether pre- or post-judgment (s13(2)).

- However, the Act generally enables execution of a judgment against a State's assets where the relevant property is exclusively in use or intended for use for commercial purposes (s.13(4)). Under the current structure, there is very minimal risk of this due to the section 14(4) protections for a central bank and its assets. Under the new assumed structure, however, while this is unlikely given the similar facts of the *AIG Capital Partners Inc v Kazakhstan* case referred to above, there is a risk that the Court may come to a different finding in a different case.

- A possible way of mitigating this risk is by describing the new entity (in the statute creating it) as a "monetary authority." This may allow the entity to come within the protections of section 14(4) of the Act or, in the alternative, fortify the argument that the new entity's assets are not used for commercial purposes but are rather analogous to managing the reserves of a central bank.

C. FRENCH LAW

1. Basic Principles

Immunity from Suit. France has not enacted any statute relating to sovereign immunity from suit, which instead is governed by French case law. Under French case law, foreign States (including their organs), as well as organisms acting under the orders and on behalf of foreign States, are immune from suit for acts of public authority or made in the interest of public service.[7]

Accordingly, as a legal entity distinct from the State a central bank is immune from suit for activities delegated to it by the sovereign. These include activities related to the sovereign's monetary policy[8] and management of the sovereign's foreign exchange reserves.[9]

Which party bears the burden of proof with respect to sovereign immunity depends on whether the defendant is the State (or its organs) or a distinct entity to which the State has delegated sovereign power. On the one hand, when the State or an organ of the State raises its immunity from suit, the claimant bears the burden of proving that the State's activity does not qualify as sovereign.[10] On the other hand, when the defendant is a legal entity, distinct from the State, it bears the burden of proving that it has acted on the orders and on behalf of the State in a matter relating to sovereign activities.[11]

General Immunity from Attachment and Execution. As a general rule under French law,[12] a judgment creditor can use self-help mechanisms to restrain or attach assets without prior judicial authorization. Absent an enforceable title, a claimant can still obtain ex parte judicial authorization to restrain a defendant's assets by demonstrating that its claim has some merit on its face and that there is a risk that the claim will go unpaid.

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[7] French Supreme Court, First Civil Section, 3 November 1952, Rev. crit. DIP 1953, p. 425; and more recently French Supreme Court, First Civil Section, 28 May 2002, *Consorts Daninos v. Société tunisienne de banque, la Banque Centrale de Tunisie, la société Banque franco-tunisienne, l'État tunisien*, No. 99-19.247, RCDIP, 2003, p. 296.

[8] French Supreme Court, First Civil Section, 3 November 1952, Rev. crit. DIP 1953, p. 425, granting immunity to the Spanish central bank acting on behalf of the Spanish State for the stamping and exchange of banknotes.

[9] T. civ. Seine, 16 June 1955, D. 1956, p. 39, granting immunity to the Japanese central bank controlling foreign exchange under powers delegated by the State.

[10] French Supreme Court, *Société Sonatrach v. Migeon*, 1st October 1985.

[11] D. Bureau, H. Muir Watt, *Droit international Privé*, 3rd edition, PUF, Vol.1, No. 92.

[12] As explained below, this general rule does not apply with respect to foreign central bank assets.

In both cases, the attached funds or assets are frozen. However, the debtor must be formally notified before the creditor can appropriate the funds in satisfaction of the judgment. Once notified, the debtor can request that the court lift the attachments, including by asserting any available immunity-related defenses.

Absent a waiver of immunity, a State's assets are in principle immune from any enforcement measure unless (i) the assets attached are being used or intended for use for a civil, commercial or economic activity arising out of private law and (ii) the assets attached are connected to the activity on which the claim in the lawsuit is based.[13]

Additionally, you should be aware that the French Parliament is currently debating a draft bill applicable to attachments of sovereign assets.[14] As currently drafted, the bill prohibits the attachment of foreign state assets without prior judicial authorization. These rules will not be applicable until the bill is voted on and enacted by the French Parliament.

Central Bank Immunity. Article L. 153-1 of the French Monetary and Financial Code ("**Article L. 153-1**") exempts foreign central bank assets from all forms of attachment and execution, subject only to an exception for assets that a creditor can show are "*allocated to a principal activity arising out of private law.*"

> This article provides that:
>
> "*Assets of any kind, including exchange-reserve assets, which foreign central banks or foreign monetary authorities hold or manage for their own account or on behalf of the foreign State or foreign States which govern them, cannot be attached.*
>
> *As an exception to the provisions of the first paragraph, a creditor holding an enforceable title establishing a certain and payable debt may request the enforcement judge to authorize enforcement in accordance with the Law Act No. 91-650 of 9 July 1991 reforming the civil enforcement procedures, if the creditor can establish that the assets held or managed by a foreign central bank or monetary authority for its own account form part of assets allocated to a principal activity arising out of private law.*"

In its 2nd Paragraph, Article L. 153-1 carves out a limited exception to the otherwise broad immunity provided to central bank assets under the statute. In cases where a French enforcement judge finds that the creditor has established that (i) the central bank has allocated "*assets to pursue a principal activity arising out of private law*" and (ii) the assets to be seized are included among those assets, the assets will be subject to execution.

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[13] French Supreme Court, *République Démocratique du Congo c. Syndicat des copropriétaires de l'immeuble Résidence Antony Châtenay*, 25 Jan. 2005.

[14] *Projet de Loi* No. 3939, *relating to the Transparency, the Fight against Bribery and the Modernization of the Economy*, Article 24.

This exception is limited to assets held or managed by a foreign central bank for its own account and used for an activity arising out of private law.[15] Importantly, it does not apply to assets held or managed by a foreign central bank on behalf of its parent State, which enjoy absolute immunity from attachment. In other words, such assets are immune from attachment regardless of whether they are used for a private activity governed by private law.[16] The "private activity" exception is relevant only in the context of assets held by foreign central banks for their own account.

Because central bank immunity is statutory, a sovereign's waiver of immunity is unlikely to be imputed to the sovereign's central bank. In apparent acknowledgment of the differences between the immunity afforded to central bank assets under Article L 153-1 and the general customary immunity from execution afforded to foreign States by French courts, French case law has held that a foreign State's waiver of general immunity should not affect the immunity of the State's central bank.[17]

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[15] While the scope of the "private activity" exception set forth in the 2nd paragraph of Article L. 153-1 remains unclear due to the small number of cases that have addressed this issue, both earlier case law and the few decisions addressing Article L. 153-1 suggest that the exception should be construed narrowly. For instance, the Paris Court of appeals (Paris Court of Appeals, *Noga v. Russian Federation's Central Bank*, 17 September 2009, No. 08/05950) ruled that Russia's Stabilization Fund assets invested in France, being part of the federal budget of the Russian Federation and used in order to pay off its deficit, were immune from attachment under Article L. 153-1. In another decision rendered in a case against the BEAC (Bank of Central African States), the Paris Court of Appeals (Paris Court of Appeals, 17 January 2012, No. 11/12878) decided that the central bank's assets in France were aimed at ensuring the functioning of the Parisian bureau of the bank, and thus fell under the scope of private law.

It has generally been acknowledged that central bank activities fall within the State's exercise of its sovereignty and are therefore presumed to be of a public nature. (*See* B. Audit, *Droit international privé* (2006), at § 414). French courts have ruled that the assets of a central bank are "*presumed to be allocated to a public non-commercial activity*" and it is for the creditor requesting the attachment to "*provide evidence that these [the bank's] funds are used for a private or commercial activity.*" (Paris Court of Appeals, 16 October 2014, No. 12/20142).

[16] Paris Court of Appeals, *Noga v. Russian Federation's Central Bank*, 17 Sept. 2009, No. 08/05950.

[17] *See* two decisions involving the Russian Central Bank, Noga c. Banque centrale de Russie, Paris enforcement judge, March 7, 2008 *and* Noga c. Banque centrale de Russie, Nanterre enforcement judge, May 6, 2008. Despite the fact that the Russian Federation had waived its immunity, the French judges decided that, pursuant to Article L. 153-1, the attachments on the funds held by the Russian central bank on behalf of the Russian Federation should be lifted, and that, "*under these conditions, it [was] not necessary to address the issue of the waiver by the State of its immunity of execution.*" The decisions were upheld by the Paris Court of Appeals and the Versailles Court of Appeals respectively.

The procedural rules governing attachments of foreign central bank assets are much stricter than the general rules described above. A creditor may attach a foreign central bank's assets in France only if:

(i) The creditor obtains authorization from a French enforcement judge by proving that the assets to be attached are owned by the foreign Central Bank for its own account and are allocated to an activity falling within the scope of private law; and

(ii) The creditor holds an enforceable title (for instance, a French judgment, a foreign judgment or an arbitral award having been granted enforceability in France) establishing a certain and payable debt.

2. The Government Pension Fund Global

a. Current Structure

Immunity from Suit. Under both the current and contemplated structures, the GPFG would qualify as an "*organism acting under the orders and on behalf of the State.*"[18] A court may consider some of the GPFG's activities, however, such as the purchase of assets or other commercial transactions, to be of a private or commercial nature. Whether the GPFG is ultimately entitled to immunity from suit will depend on this analysis. Accordingly, the GPFG's immunity will be determined on a case-by-case basis.

Immunity from Attachment and Execution. We understand that Norges Bank holds the GPFG's assets and, through its division NBIM, manages them on behalf of the Ministry of Finance, which is inseparable from the Norwegian State itself. (See supra Section II). As a result, the GPFG's assets enjoy the statutory immunity from execution granted by French Law to foreign central banks. Furthermore, because Norges Bank manages the assets on behalf of the Norwegian state, the Article 153-1 "private activity" exception does not apply, and in principle the statute would prevent a creditor from obtaining authorization to attach the funds. Finally, a general waiver of Norway's immunity is unlikely to affect the immunity afforded to the GPFG's assets pursuant to Article L. 153-1.

b. Proposed Structure

Immunity from Suit. As explained above, a change from the current structure to the proposed structure would affect only which party bears the burden of proof with respect to the Fund's immunity. Currently, as an organ of the Norwegian State, Norges Bank is presumptively immune from suit, and it would fall to a creditor to prove the contrary. In the case of a distinct statutory entity, the presumption would be reversed and the GPFG would bear the burden of

[18] While under the new structure the GPFG would be a separate entity managed by a distinct fund manager instituted by a special statute, this new management vehicle would be wholly owned by the Norwegian State and ownership of the assets would remain with the Government of Norway. We therefore understand that the Norwegian Government would continue to control the activities of the Fund and that its assets would still be managed on behalf of the State.

proving that its activities relate to acts of public authority or are being carried out in the interest of public service.

Immunity from Attachment and Execution. Under the new structure contemplated by Norges Bank, the GPFG would be segregated from the central bank, and the central bank would no longer hold or manage the Fund on behalf of the Norwegian State. As a result, the GPFG would no longer benefit from the statutory immunity granted to the central bank's assets.

Since the GPFG's assets would still be wholly-owned by the Norwegian State, and not by the distinct statutory management entity to be created, the assets would however benefit from the general protection from execution afforded to sovereigns.

This protection is less favorable to the GPFG than the central bank's immunity for the following reasons:

- Under the general legal regime, prejudgment attachments are available;

- In the event of a lawsuit, a creditor could try to demonstrate that the assets it wants to attach are related to an activity characterized as "*a transaction governed by private law.*" The activities of the Fund would therefore be analyzed on a case-by-case basis by a French judge with discretion to decide whether the assets linked to the activity at hand should benefit from the immunity; and

- Any waiver of the Norwegian State's general immunity could affect the immunity of the Fund's assets.

In view of the above, we are of the opinion that removing the Fund from Norges Bank in order to make it a separate legal entity is likely to negatively affect the sovereign immunity protections available to the Fund in France.

D. GERMAN LAW

1. Basic Principles

Unlike in certain other jurisdictions, there is no specific legislation in Germany regarding sovereign immunity. German law on sovereign immunity is based on general principles of public international law regarding sovereign immunity, which form part of German law pursuant to Article 25 of the German Constitution (*Grundgesetz*).

Immunity from Suit. A court must determine *ex officio* whether immunity bars an action.[19] Unless waived, a foreign State enjoys immunity from suit for its sovereign acts (*acta iure imperii*). A foreign State does not enjoy immunity from suit for *acta iure gestionis* such as commercial activity (irrespective of a waiver of immunity).[20] The distinction between acts *iure imperii* and *iure gestionis* is made based on the nature of the act or the legal relationship at issue, not pursuant to the motive or purpose of the State act.[21] For instance, the Federal Court of Justice (*Bundesgerichtshof*) recently held in a case involving the Kingdom of Saudi Arabia that the negotiation and conclusion of a contract for urban planning does not constitute a sovereign act, even though urban development could easily be qualified as a sovereign task.[22]

We are not aware of any German case law specifically discussing immunity from suit of foreign central banks. The prevailing view in German doctrine is that sovereign immunity does not depend on the organization but on the substance, and concludes that a central bank would enjoy immunity from suit for its sovereign acts (unless waived), *e.g.*, issuing banknotes, whereas any business or other commercial activity of a central bank would not be protected by immunity from suit.[23]

Investment in shares, bonds or other securities, or business ventures, do not typically involve the exercise of sovereign power or sovereign prerogatives—in theory, any private individual could enter into the same transaction—and therefore a dispute over a GPFG investment would likely be deemed commercial in nature, for which neither the Kingdom of

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[19] Established practice of the courts, see only Federal Court of Justice, decision of May 28, 2003 in NJW-RR 2003, 1218; Federal Court of Justice, decision of March 24, 2016 (VII ZR 150/15).

[20] Established practice of the courts, see only Federal Court of Justice, decision of March 24, 2016 (VII ZR 150/15) with further references; Geimer, Internationales Zivilprozessrecht, 7th ed. 2015, para. 576 with further references.

[21] Established practice of the courts, see only Federal Court of Justice, decision of March 8, 2016 (VI ZR 516/14); Federal Court of Justice, decision of March 24, 2016 (VII ZR 150/15); Geimer, Internationales Zivilprozessrecht, 7th ed. 2015, para. 580 with further references.

[22] Federal Court of Justice, decision of March 24, 2016 (VII ZR 150/15).

[23] *See* Geimer, Internationales Zivilprozessrecht, 7th ed. 2015, para. 626a with further references.

Norway nor Norges Bank nor any new entity under the proposed new structure would enjoy immunity from suit before a German court.[24,25]

Immunity from Execution. German law allows for both post-judgment enforcement remedies and prejudgment restraints on property; the latter typically requires a two-step process of (i) a court order allowing restraint of a debtor's property in general[26] and (ii) an execution measure restraining a specific asset. The first element serves as a substitute for an enforceable judgment, and the immunity analysis therefore follows the principles of immunity from suit discussed above. The second element, which looks to the specific asset in question, is governed by the principles of immunity from execution.

It is a key feature of German law of execution that the courts rely on the factual allegations of the creditor and do not hear the debtor prior to taking an execution measure against a specific asset.[27] German law instead provides for subsequent judicial control. As a result, an asset can effectively be restrained on the basis of an unlawful execution measure, and often remains blocked pending the subsequent proceedings which the debtor must initiate to have the unlawful execution measure lifted. Experience shows that immune assets are no exception in this respect.

Under German law, absent the State's consent, immunity prohibits enforcement against an asset owned by a foreign State if the asset serves a sovereign purpose. To the extent public international law does not provide criteria for determining whether an assets serves a sovereign or a non-sovereign purpose, German courts revert to German law to draw this distinction.[28] The burden of establishing that an asset serves a sovereign purpose rests on the debtor, who has to show (*glaubhaft machen*), but not fully prove (*den Vollbeweis erbringen*), that an asset serves a sovereign purpose.[29]

German courts have recognized the sovereign purpose of a broad range of assets, including Embassy and consular bank accounts, State vessels and aircraft, material of the armed

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[24] German court jurisdiction depends on the dispute in question and cannot be determined in the abstract, but typically requires some connection to Germany.

[25] We understand that the Fund is an accumulation of assets devoid of legal personality. As German law only allows suits to be brought against a person, the Fund cannot be sued.

[26] *E.g.,* an arrest order pursuant to sections 916 *et seq.* of the German Code of Civil Procedure or, prior to the recognition of an arbitral award, a court order allowing provisional enforcement of an arbitral award pursuant to section 1063 para. 3 of the German Code of Civil Procedure.

[27] Section 834 of the German Code of Civil Procedure expressly provides that the debtor is not to be heard in advance of an attachment of a specific asset.

[28] *See* Federal Court of Justice, decision of July 4, 2013 (VII ZB 30/12).

[29] *See* Federal Court of Justice, decision of July 4, 2007 (VII ZB 6/05); Federal Court of Justice, decision of October 1, 2009 (VII ZB 37/08).

forces,[30] and government grants intended to cover personnel and other expenses of a Greek school in Germany.[31] In contrast, the Federal Constitutional Court held that the mere fact that proceeds from a business transaction or funds on a bank account are intended to be transferred to the national budget at some later point in time does not suffice to establish immunity protection before German courts if the asset does not serve a sovereign purpose at the time of the initiation of the enforcement measure.[32] In that specific case, a creditor of the National Iranian Oil Company, a State company wholly owned by the Islamic Republic of Iran and entrusted to explore, develop, produce and market Iranian oil and natural gas pursuant to the Iranian Petroleum Act, was allowed to enforce against funds held in a bank account in the name of the National Iranian Company, even though the funds ultimately had to be transferred by the Company to the Iranian treasury under Iranian law.

Similarly, central bank assets enjoy immunity from execution when in sovereign use (absent a waiver), not when in commercial or other non-sovereign use. Currency reserves of a foreign State held in an account of the German Central Bank have been found to serve a sovereign purpose and therefore enjoy immunity from execution.[33]

Other German Legal Principles of Enforcement. German law allows prejudgment attachment and post-judgment execution against the judgment or award debtor's assets, but not against the assets of a third person, including third persons wholly owned and/or controlled by the judgment debtor. German law generally does not recognize *alter ego* concepts for enforcement purposes.

2. The Government Pension Fund Global

a. Current Structure

Immunity from Suit. The Fund's investment activity is likely considered commercial in nature, and therefore not protected by immunity from suit irrespective of the Fund's structure and management organization.

Immunity from Attachment and Execution. There is no German case law on immunity as it applies to sovereign wealth funds and their investments, and the Fund assets do not appear to fall within one of the recognized categories of protected assets such as, *e.g.*, currency reserves of a central bank. Accordingly, a German court would have to revert to the general principles pursuant to which the Fund's assets enjoy immunity, *i.e.*, if they serve a sovereign purpose either

[30] *See* Federal Constitutional Court, decision of December 6, 2006 (2 BvM 9/03).

[31] Federal Court of Justice, decision of June 25, 2014 (VII ZB 236/13).

[32] Federal Constitutional Court, decision of April 12, 1983 (2 BvR 678, 679, 680, 681, 683/81).

[33] *See* Federal Court of Justice, decision of July 4, 2013 (VII ZB 63/12).

under public international law or German law. The test is whether the asset is intended to be used for a sovereign activity.[34]

A German court might draw a parallel from a ruling of the Federal Court of Justice in which a creditor sought to attach concession fees for overflight and transit rights of the Russian Federation against a German debtor.[35] The Court accepted the Russian Federation's argument that those fees were intended to be used for running the State's aviation administration and held that this was a sovereign task conferring immunity protection.[36] Here, an argument may be made that the Fund and its assets serve the sovereign purpose of "support[ing] government saving to finance the National Insurance Scheme's expenditure on pensions and support long-term considerations in the use of petroleum revenues" (article 1 of the Government Pension Fund Act); a State pension scheme is a sovereign task.

In addition, a German court may seek guidance from foreign court decisions, as well as legal doctrine. In this context, the ruling by the English High Court in *AIG Capital Partners Inc v. Kazakhstan* ([2005] EWHC 2239 (Comm)) discussed above could be helpful: The High Court held that the management of the economy and government revenues are sovereign activities, and hence assets intended to further that sovereign purpose are in sovereign use. The Court reasoned that the Kazakh sovereign wealth fund was managed in accordance with the law set out in the Kazakh Budget Code and noted that all the fund's activities are part of the "overall exercise of sovereign authority by the Republic of Kazakhstan." A German court might conclude that the rationale of the High Court's decision applies equally to the GPFG.

While we believe that the argument in favor of the sovereign purpose of the Fund assets is strong and should prevail, it can be expected that this issue, if it has to be litigated before German courts, may have to be litigated through all instances up to the Federal Constitutional Court. A creditor seeking to enforce against Fund assets will likely point to the ruling of the Federal Constitutional Court in the National Iranian Oil Company case described above,[37] which is, however, based on a different fact pattern (a creditor of the National Iranian Oil Company was allowed to enforce his claim against a bank account held in the name of the National Iranian Oil Company) and therefore distinguishable; a creditor might also point to the—unsubstantiated—view expressed in German legal literature that participations in business enterprises and bank

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[34] *See* Federal Constitutional Court, decision of April 12, 1983 (2 BvR 678, 679, 680, 681, 683/81); Federal Court of Justice, decision of October 4, 2005 (VII ZB 9/05).

[35] Federal Court of Justice, decision of October 4, 2005 (VII ZB 9/05). In a similar case involving execution measures against Argentine tariff claims against a German debtor, the Federal Court of Justice left open whether immunity barred the execution measure because Argentina had waived immunity to a large extent; Federal Court of Justice, decision of November 25, 2010 (VII ZB 120/09).

[36] The Court also held that German courts lack international jurisdiction for this execution measure.

[37] Federal Constitutional Court, decision of April 12, 1983 (2 BvR 678, 679, 680, 681, 683/81).

accounts held in the name of the State and used to settle commercial transactions do not serve a sovereign purpose and are therefore not protected by immunity.[38]

German law limits measures of constraint strictly to the assets of the judgment debtor, and therefore (irrespective of the immunity analysis) Fund assets are not available for enforcement by a creditor of the Kingdom of Norway if they are legally owned by a third person separate and distinct from the Kingdom of Norway, *e.g.*, Norges Bank, which holds certain bank accounts in its own name under the current structure. Furthermore, if a creditor of Norges Bank were to seek enforcement against a Fund asset legally owned by Norges Bank and beneficially owned by the Kingdom of Norway, German law would not allow enforcement if the Kingdom of Norway has a "right preventing disposal" (*ein die Veräußerung hinderndes Recht*)[39] of the asset in question. Whether such a right exists is a question of the legal relationship between the State and Norges Bank; should the relationship confer a right preventing disposal (or an equivalent thereof under applicable law) upon the Kingdom of Norway, that asset would be shielded from enforcement by a creditor of Norges Bank.

In a structure in which the Kingdom of Norway has a beneficial interest in but does not directly own the GPFG assets, the Kingdom of Norway likely has a claim against the entity which holds the assets for remittance of funds and/or profits generated through GPFG investments (for inclusion into the State budget). We are not aware of any case law addressing the question of immunity of such a claim for remittance (an argument in favor of a sovereign purpose appears strong). However, the immunity question is of little practical relevance because German courts are highly unlikely to have (international) jurisdiction for ordering an enforcement measure against a claim for remittance of the Kingdom of Norway against the Norwegian entity.

b. Proposed Structure

Immunity from Suit. Both under the current and the proposed structure, immunity is unlikely to bar litigation before German courts, *e.g.*, over a specific investment.[40]

Immunity from Attachment and Execution.

The forgoing issues, in our view, would be largely the same both under the Fund's current and contemplated new structure, so that a restructuring should not have a material impact on sovereign immunity protection.

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[38] Geimer, Internationales Zivilprozessrecht, 7th ed. 2015, para. 592.

[39] *See* section 771 of the German Code of Civil Procedure.

[40] Jurisdiction of German courts is a separate question. *See supra* footnote 24.

E. CHINESE LAW

1. Basic Principles

The Principle of Absolute Immunity. The People's Republic of China (the "**PRC**" or "**China**," for the purpose of this memorandum, excluding the Hong Kong Special Administrative Region (the "**Hong Kong SAR**"), the Macau Special Administrative Region and Taiwan) has not enacted any state immunity code, and there have been very few judicial precedents in the PRC regarding state immunity. However, it is broadly recognized that the PRC asserts the doctrine of absolute immunity when any branch of the Chinese central or local governments is sued in foreign courts. In addition, China respects foreign states' assertion of state immunity. There is no precedent where a PRC court has accepted a lawsuit against a foreign state or has ruled to execute any orders or judgments against properties of a foreign state.

The issue of which doctrine of state immunity China adopts was discussed in *FG Hemisphere Associates LLC v. Democratic of Congo & Ors* ("***FG v. Congo***"). In this case, FG Hemisphere Associates LLC, a U.S. company specializing in investments in distressed assets, sought execution of two arbitration awards against the assets of the Democratic Republic of Congo before courts of the Hong Kong SAR. Throughout the hearings in the High Court, the Court of Appeal and the Court of Final Appeal in the Hong Kong SAR, the Office of the Commissioner of the PRC Ministry of Foreign Affairs (the "**OCMFA**") in the Hong Kong SAR issued three letters to the Constitutional and Mainland Affairs Bureau of the Hong Kong SAR on November 20, 2008, May 21, 2009 and August 25, 2010, respectively. The first OCMFA letter stated that "the consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and [China] has never applied the so-called principle or theory of 'restrictive immunity.'"[41] The second OCMFA letter further explained China's position of absolute immunity, which stated that China has not ratified the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (the "**Convention**"), that the Convention has no binding force on China, and that the Convention cannot be the basis of assessing China's principled position on state immunity.[42] The third OCMFA letter rebutted the Hong Kong Court of Appeal's suggestion that adoption of a divergent policy on state immunity by the Hong Kong SAR would cause no prejudice or embarrassment to the PRC. The OCMFA letters constituted the rationale of the ruling of *FG v. Congo*.

Further to the OCMFA letters, on August 24, 2011, Mr. Li Fei, the Deputy Director of the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC (the "**SCNPC**"), reiterated China's position through the *Explanations on the Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong*

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[41] *Democratic Republic of the Congo & Ors v. FG Hemisphere Associates LLC* [2011] 4 HKC 151, para 44.

[42] Ibid., para 46.

Kong Special Administrative Region (the "**Explanations**") during the 22nd Session of the SCNPC.[43] The Explanations stated that:

> China firmly adheres to the important legal doctrine of state immunity which protects the normal development of the relations among states. It means that PRC courts have no jurisdiction over, nor in practice have they entertained, any case in which a foreign state is sued as a defendant or any case involving the properties of a foreign state. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State of China is sued as a defendant, or over any cases involving the properties of the State of China. This position on state immunity adopted by China is usually referred to as 'absolute immunity.' China's position on state immunity is manifested in the formal public statements and the practice of our Government. This is a legal fact and has been widely understood by the international community.[44]

Central Bank Immunity. So far as a foreign central bank is concerned, the *Immunity Law of the PRC on Judicial Compulsory Measures on Properties of Foreign Central Banks* (which was promulgated by the SCNPC on October 25, 2005 and became effective as of the same date) (the "***Immunity Law on Foreign Central Banks***") applies. Although this law only contains four short articles, it generally grants immunity from execution of orders or judgments against properties of foreign central banks, including immunity from both prejudgment attachment and post-judgment execution.

Pursuant to the *Immunity Law on Foreign Central Banks*, properties of a foreign central bank include cash, notes, bank deposits, securities, foreign exchange reserves, gold reserves, real properties and other properties of a foreign central bank. However, such judicial immunity is subject to two exceptions: (i) if a foreign central bank or its government waives the immunity in writing, or a property has been specifically designated by a foreign central bank or its government for execution; or (ii) if a foreign government does not grant judicial immunity to the property of China's central bank or that of the financial administrative institutions of the Hong Kong SAR or the Macau SAR to the same degree as that which China grants to the foreign state, in which case China will adopt the doctrine of reciprocity.

Beyond Domestic Law. Both China and Norway are signatory states to the Convention. Norway ratified the Convention in 2006. However, China has not ratified the Convention and therefore the Convention does not have force of law in the PRC. In addition, there are no bilateral treaties regarding sovereign immunity between Norway and China. Therefore, there is not much beyond China's domestic law, and PRC courts should still rely on the aforementioned

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[43] The National People's Congress of the PRC is the legislative body in the PRC. As the standing committee of the NPC, the SCNPC has the authority to conduct legislative interpretation, which has the same legal effect as law pursuant to the *Legislation Law of the People's Republic of China*.

[44] The Explanations are in Chinese. Source: http://www.basiclaw.gov.hk/gb/materials/doc/2011_08_24_c.pdf

principle of sovereign immunity and the *Immunity Law on Foreign Central Banks* in adjudicating cases against foreign states or foreign central banks and/or the properties of the foreign states or foreign central banks.

2. The Government Pension Fund Global

a. Current Structure

Immunity from Suit. We understand that GPFG's assets, although managed by Norges Bank, are held in the name of the Norwegian government. In other words, Norway's central bank is currently the legal owner of the Fund, and the Norwegian government is the beneficial owner.

As a central bank is a part or branch of the government of Norway, it is very likely that PRC courts would respect Norway's assertion of state immunity from suit against the Norwegian government or Norges Bank.

Immunity from Attachment and Execution. Even if PRC courts were to accept a lawsuit against Norges Bank, Norges Bank may assert the immunity from both attachment and execution afforded to its properties (including GPFG's assets) by the *Immunity Law on Foreign Central Banks*. The *Immunity Law on Foreign Central Banks* does not differentiate between legal ownership and beneficial ownership, and it is very unlikely that PRC courts would deem GPFG's assets not to be owned by Norges Bank because of the beneficial ownership of the Norwegian government. PRC courts should not execute any order or judgment against GPFG's assets in accordance with the *Immunity Law on Foreign Central Banks* unless (i) the Norwegian government or Norges Bank expressly waives its immunity in writing; (ii) GPFG's assets are specifically designated by the Norwegian government or Norges Bank as assets for execution; or (iii) Norway does not grant the same degree of immunity treatment to properties of the Chinese government or the properties of China's central bank.

Absent a waiver the exceptions described in (i) and (ii) above and apart from the uncertainty on reciprocity, we understand that the risks in connection with Norges Bank being sued in, or GPFG's assets being executed by, PRC courts under the current structure are generally remote, because (i) Norges Bank is a governmental branch of the Norwegian state and enjoys absolute immunity, and (ii) even if a lawsuit against Norges Bank were accepted by a PRC court, GPFG's assets, whose legal owner is Norges Bank, should be immune from execution.

b. Proposed Structure

Immunity from Suit. We understand that, under the proposed structure, instead of being managed by Norges Bank, the GPFG would be managed by a statutory entity to be created and wholly-owned by the Norwegian government. Although GPFG's assets would be placed as a capital deposit on the new entity's balance sheet, we understand that the Norwegian government could demonstrate and prove its ownership of GPFG's assets because (i) GPFG's assets would stay on the balance sheet of the Norwegian government; (ii) all returns from the investments made through the GPFG would be directly obtained by the Norwegian government rather than by the new entity; (iii) the proposed restructure is a change to the Fund's manager and there is no

change to the beneficial ownership of GPFG's assets; and (iv) the name and any description of the GPFG would remain unchanged, and the GPFG would be consistently identified by the Norwegian government as a fund of the Norwegian government.

Assuming that the statutory entity that would manage the GPFG would be a part or a branch of the Norwegian government, it is very unlikely that PRC courts would deny the Norwegian government's assertion of the state immunity from suit.

Immunity from Attachment and Execution. Because PRC courts are unlikely to accept a law suit against the new management entity, any execution against Fund assets would be a remote risk, even though the *Immunity Law on Foreign Central Banks* would no longer be applicable.

However, it is worth noting that if the statutory entity that would manage the Fund were a "commercial organization," such as a company or a limited liability partner, while it is likely that PRC courts may still respect the Norwegian government's assertion of state immunity, it would likely be more cumbersome as the Norwegian government would need to prove that such an entity only acts as a fund manager for the Norwegian government and does not really own the relevant properties. Since China has not enacted any state immunity code and there is a lack of judicial precedents in China in this regard, there is uncertainty as to whether all PRC courts would respect the Norwegian government's assertion of state immunity, especially as an issue related to the doctrine of reciprocity, if there may be a higher chance that Norwegian courts may not grant the same immunity to such types of entities of the PRC government, including state-owned enterprises in China.

* * * *

We hope the foregoing is helpful to you. Please do not hesitate to contact us if you have any questions or comments.

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Addendum A

A-I. JAPANESE LAW

1. Basic Principles

The Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. Japan is a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "**UN Convention**"), a convention that addresses the issue of sovereign immunity. Although the UN Convention has not yet come into effect, Japan passed the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. (Law No. 24 of April 24, 2009) ("**ACJJ**"), a law that closely follows the provisions of the UN Convention. The ACJJ sets out the terms and the scope of Japan's immunity from suit, attachment, and execution. [45]

Under the ACJJ, a foreign state and the organs of its government are entitled, with certain exceptions, to sovereign immunity. In addition, entities that have been granted some sort of administrative, legislative, or judicial authority are also entitled to sovereign immunity to the extent they are performing acts in the exercise of their sovereign authority (Article 2(iii) of the ACJJ) ("foreign state" and the entities discussed above will collectively be referred to in this memorandum as a "Foreign State").

Immunity from Jurisdiction. Under the ACJJ, a Foreign State is in principle immune from the civil jurisdiction of Japan, meaning that a Foreign State is entitled to immunity from suit, attachment, and execution (Article 4 of the ACJJ). The exceptions to this principle are set out below.

Exceptions to Immunity from Suit. Exceptions to immunity from suit include the following:

(i) Explicit consent to jurisdiction (*e.g.*, by agreement or by written notification to the court or the other party) (Article 5 Paragraph 1 of the ACJJ);
(ii) Deemed consent to jurisdiction (*e.g.*, by bringing suit or by appearing in court without asserting a sovereign immunity defense) (Article 6 Paragraph 1 of the ACJJ); and
(iii) Certain types of transactions or claims, including commercial transactions, labor contracts, claims based on death or injury of persons or loss of tangible property, claims in relation to real property in Japan and claims in relation to intellectual property protected under Japanese law (Articles 8-15).

The commercial transactions mentioned in (iii) above are defined as contracts or transactions relating to the civil or commercial buying and selling of commodities, procurement

[45] To be consistent with the US law section of this memorandum, we refer to a prejudgment restraint on property as "attachment" and post-judgment enforcement remedies as "execution".

of services, lending of money, or other matters (excluding labor contracts) (Article 8 Paragraph 1 of the ACJJ).

Exceptions to Immunity from Attachment and Execution. Exceptions to immunity from attachment and execution include the following:

(i) Explicit consent to attachment or execution (*e.g.*, by agreement or by written notification to the court or the other party) (Article 17 Paragraph 1 of the ACJJ);
(ii) Assets that have been provided as collateral (Article 17 Paragraph 2 of the ACJJ); and
(iii) Property held by a Foreign State that is in use or intended for use by the Foreign State exclusively for other than government non-commercial purposes (Article 18 Paragraph 1 of the ACJJ)

Central Bank Immunity. The ACJJ has a special provision covering attachment and execution of the assets of a foreign central bank or a financial entity equivalent to a foreign central bank (collectively, a "Foreign Central Bank"). A Foreign Central Bank is deemed to be a Foreign State for purposes of attachment and execution of a Foreign Central Bank's assets regardless of whether it satisfies the requirement of a Foreign State. Moreover, a Foreign Central Bank is immune from attachment and execution of a Foreign Central Bank's assets regardless of whether those assets are used for commercial purposes (Article 19 Paragraph 2 of the ACJJ makes it clear that Article 18 Paragraph 1 exception does not apply to a Foreign Central Bank). This means that a foreign central bank enjoys broader protection than a foreign government in terms of attachment and execution.

2. The Government Pension Fund Global ("GPFG")

a. Current Structure

Immunity from Suit. Under the current structure, Norges Bank is the legal owner of the GPFG, and the Norwegian government is the beneficial owner. In Japan, the legal owner's name is used for transactions, not the beneficial owner's name. There is no requirement that a transaction account should bear the beneficial owner's name. Our analysis below is based on the assumption that Norges Bank will be sued as the owner of the GPFG if a dispute arises in connection with the GPFG's investment activities in Japan.

We understand that Norges Bank is neither a foreign state nor one of the branches of government. However, it could be considered an entity that is granted the authority to exercise sovereign power, *e.g.*, the authority to determine monetary policy (Article 2(iii) of the ACJJ). If Norges Bank performs acts in the exercise of sovereign authority, it will be eligible for claiming immunity from the civil jurisdiction of Japan in connection with those acts under Article 4 of the ACJJ. In this case, however, the investment activities in the course of managing the GPFG would be viewed as commercial in nature, not an exercise of sovereign power, because any private sector entity without sovereign power would be able to manage the Fund. As such, it is unlikely that Norges Bank will qualify as a Foreign State in terms of its management of the

GPFG. Furthermore, commercial transactions are exempted from the scope of sovereign immunity.

Accordingly, Norges Bank will not be immune from suit in connection with its management of the GPFG.

Immunity from Attachment and Execution. With regard to central bank immunity, Norges Bank is, as the central bank of Norway, entitled to this immunity. Norges Bank's assets (not limited to those related to the GPFG) will not be subject to attachment or execution regardless of whether those assets are used for commercial purposes.

b. Proposed Structure

Immunity from Suit. Under the proposed structure, the Norwegian government would remove the GPFG from the aegis of Norges Bank and place it under the management of a new statutory entity (the "**New Entity**"). The GPFG would appear on the New Entity's balance sheet as a capital deposit and as an asset on the government's.

We understand from the description of the proposed structure that the owner of the GPFG will be either the New Entity or the Norwegian government. For the reasons set out below, we are of the opinion that neither the New Entity nor the Norwegian government will be immune from jurisdiction (suit, attachment, or execution) in terms of its management of the GPFG.

As discussed above, management of the GPFG would unlikely be viewed as an act in the exercise of sovereign authority. Even if tasked with the management of the GPFG, the New Entity would not qualify as an entity that has been granted the authority to exercise sovereign power and would therefore not be entitled to sovereign immunity.

While the Norwegian government, unlike the New Entity, is entitled to sovereign immunity, the GPFG's investment activities will likely be treated as "commercial transactions" falling under the commercial transaction exception to immunity from suit. The Norwegian government will therefore not be immune from suit in connection with GPFG.

Immunity from Attachment and Execution. As to immunity from attachment and execution, the issue is whether or not the GPFG's assets will be considered "property held by a Foreign State that is in use or intended for use by the Foreign State exclusively for other than government non-commercial purposes," which is one of the exceptions to immunity from attachment and execution applicable to Foreign States other than a Foreign Central Bank (as stated above, this exception does not apply to Foreign Central Banks, which are immune from attachment and execution regardless of the purpose for which the relevant property is held).

There is no court case or authoritative scholarly opinion on this particular issue. While it is arguable that, being a public pension fund and accordingly being held by the government for the operation of public pension system, GPFG can be considered to be held for non-commercial purposes, we believe there is substantial risk that it is held exclusively for other than government non-commercial purposes, especially when the economic aspect of the Fund, *i.e.*, the GPFG's assets would be held to be invested in various financial instruments and other properties, is highlighted.

Therefore, there is substantial risk that, under the new structure, the Fund's assets will not be immune from attachment or execution. With regard to central bank immunity, *i.e.*, broader immunity from attachment and execution, neither the New Entity nor the Norwegian government will be afforded this protection.

c. Summary

Immunity from suit will not be available under either the current structure or the proposed structure. However, compared to the current structure, the proposed structure would be disadvantageous in terms of immunity from attachment and execution in that under the proposed structure the central bank immunity, *i.e.*, broader immunity from attachment and execution, available under the current structure would not be available. Accordingly, it is suggested that Norges Bank remain the owner of the GPFG while the New Entity is responsible for managing the GPFG under the proposed structure. That way, the central bank will continue to enjoy the benefits of broader immunity from attachment and execution, as it does under the current structure.

Kojima Law Offices

Naoki Idei, attorney-at-law
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A-II. Swiss Law

I. Facts and Issue

We were asked by Cleary Gottlieb Steen & Hamilton LLP to advise on the sovereign immunity protections available under Swiss law to Norway's sovereign wealth fund, the Government Pension Fund Global (**GPFG**), both in its current form as well as in the restructured form contemplated by the central bank of Norway, Norges Bank.

Our advice is subject to the assumptions made and the information received in the e-mail of Mr. Blakemore dated July 20, 2016 and covers Swiss law only.

II. Sovereign Immunity in Switzerland

A. Basic Principles

In Switzerland, there is hardly any domestic legislation with regard to sovereign immunity. The matter is mainly governed by case law, primarily by the practice developed by the Swiss Federal Supreme Court over the last decades.[46]

Since 1918,[47] the Federal Supreme Court has applied a restrictive approach with regard to state immunity, reserving immunity defenses to acts of sovereign nature (*de iure imperii* acts) as opposed to commercial activities[48] (*de iure gestionis* acts).[49] State immunity in Switzerland is therefore not absolute[50] and is granted to states not because of who they are (*ratione personae*), but because of what they do (*ratione materiae*).[51]

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[46] P. SIMONIUS, Privatrechtliche Forderung und Staatenimmunität, in: Juristische Fakultät der Universität Basel (ed.), Privatrecht, Öffentliches Recht, Strafrecht, Festgabe zum Schweizerischen Juristentag 1985, Basel 1985, 335-351, p. 351.

[47] AFT 44 I 49 (*Austrian Ministry of Finance v. Ludwig Dreyfuss*).

[48] Cf. Article 10 of the UN Immunity Convention.

[49] See, *e.g.*, DFT 104 Ia 367, c. 2.c; S. GIROUD, Enforcement against State Assets and Execution of ICSID Awards in Switzerland: How Swiss Courts Deal with Immunity Defences, ASA Bulletin 4/2012, 758-766, p. 759; A. PETERS, Die funktionale Immunität internationaler Organisationen und die Rechtsweggarantie, SZIER 3/2011, 397-428, p. 413.

[50] W. HABSCHEID, Die Staatenimmunität im Erkenntnis- und Vollstreckungsverfahren, in: Habscheid et al. (ed.), Festschrift Giger, Freiheit und Zwang, Bern 1989, 213-230, p. 216.

[51] Cf. A. HAHN, State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds, SZW 2/2012, 103-118, p. 111 et seq.; ATF 112 Ia 148, c. 3.b. (It is "*... the permanent jurisprudence in Switzerland, according to which the foreign state is granted immunity, both from jurisdiction as well as from execution, if it exercised a sovereign activity in the disputed matter, i.e. acted de iure imperii. If on the other hand it appeared as a bearer of private rights, i.e. acted de iure*

Immunity from jurisdiction: Pursuant to the Supreme Court's practice, Swiss courts have jurisdiction over a claim against a foreign state only (i) if the claim arises from a commercial activity, *i.e.*, from an act that was performed in the state's private capacity (*acta iure gestionis*); and (ii) if the claim has a sufficient connection to Switzerland.[52] Conversely, where a claim arises from an act performed in the exercise of sovereign authority (*acta iure imperii*), and provided that immunity has not been waived either expressly or by implication,[53] states are granted immunity from jurisdiction.[54]

Immunity from execution: Basically, the same principles apply in respect of immunity from execution.[55] Enforcement against state assets is therefore permissible only (i) if the claim for which enforcement is sought arises from the exercise of an act not covered by sovereign authority; and (ii) if the claim has a sufficient connection with Switzerland. As a third condition for enforcement to be permissible, the Federal Supreme Court requires that the state assets against which enforcement is sought are not assigned to serve sovereign purposes.[56] As a result of that third requirement, absent an express waiver, enforcement is not permissible, for example, against assets deposited on a diplomatic bank account used for sovereign purposes, even if the claim, firstly, arose from a commercial activity of the state and, secondly, were sufficiently connected with Switzerland.

The aforementioned principles have repeatedly been confirmed by the Federal Supreme Court over the last decades despite sporadic criticism in scholarly writing.[57] They are also partly reflected in Article 92(1)(11) of the Swiss Debt Enforcement and Bankruptcy Act (**DEBA**),[58]

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gestionis, the case law of the Federal Supreme Court permits a claim on the merits as well as enforcement measures against it, provided that the concerned legal relationship has a sufficient connection with Switzerland." [convenience translation by the authors]).

[52] ATF 134 II 122 c. 5.2.2. (= Pra 97 (2008) 105); ATF 106 Ia 142; ZR 99 (2000) no. 112, p. 302; KUKO SchKG-D. MEIER-DIETERLE, Art. 271 N 36; W. HABSCHEID, loc. cit. (Fn 50), p. 218; KUKO SchKG-J. KREN KOSTKIEWICZ, Art. 92 N 75.

[53] J. KREN KOSTKIEWICZ, Staatenimmunität im Erkenntnis- und Vollstreckungsverfahren nach schweizerischem Recht, Bern 1986, p. 502.

[54] Notification of the Federal Department of Justice and Police of July 8, 1986 regarding the Attachment of Foreign State Assets, BlSchKG 1986/5, 194-200, p. 197; ATF 134 III 570, 124 III 382.

[55] Cf. ATF 135 III 608, 134 III 122.

[56] ATF 111 Ia 62, 108 III 107; J. KREN KOSTKIEWICZ, loc. cit. (Fn 51), p. 92 et seq. and 360 et seq.; BSK SchKG I-G. VONDER MÜHLL, Art. 92 N 43 et seq.; P. Simonius, loc. cit. (Fn 46), p. 348 et seq.

[57] Cf. KUKO SchKG- J. KREN KOSTKIEWICZ, Art. 92 N 76.

[58] SR 281.1.

which provides that assets of a foreign state or a foreign state's central bank cannot be seized ("*unpfändbar*"), *i.e.*, are immune from enforcement, if they are assigned to tasks which are part of the state's duty as public authority. Such public assets include for instance buildings used by diplomatic missions or the rolling stock of state railway companies.[59]

The aforementioned principles apply not only to foreign states and certain international organizations. Article 92(1)(11) DEBA expressly states that central banks are immune from enforcement as well if they acted in the exercise of sovereign authority. Further, legal writing suggests that under certain restrictive conditions, these principles also apply to certain state agencies or other state-owned entities with legal personality, if and to the extent that these agencies, entities or enterprises are entitled to perform, and are in fact performing, sovereign functions on behalf of the state.[60] The Federal Supreme Court confirmed that view in a decision of March 21, 1984:

> Considering the views of the cited scholars as well as the European Convention [of State Immunity], [...] the legal opinion set forth in DFT 104 Ia 373 has to be clarified to the effect that, as a general rule, [state] entities with legal personality are not entitled to sovereign immunity and that exceptions are possible only if and to the extent they act with sovereign authority (*iure imperii*).[61]

If and to the extent that requirement is satisfied, immunity is granted (subject to the general principles described above) also to such entities or enterprises. However, the following has to be observed in that context:[62]

Bank accounts of state-controlled entities without legal personality are not immune from enforcement if they are used for commercial purposes. If assigned to public (sovereign) tasks, they are immune absent a waiver and subject to the aforementioned general principles.

Bank accounts of independent state entities with legal personality are normally *not* afforded immunity. However, they are exceptionally immune if and to the extent they are entitled to perform, and are in fact performing, sovereign functions on behalf of the state, and provided that the bank accounts are specially identified ("earmarked") for a clearly defined

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[59] S. GIROUD, loc. cit. (Fn 47), p. 760.

[60] A. HAHN, loc. cit. (Fn 49), p. 112; BSK SchKG I-G. VONDER MÜHLL, Art. 92 N 43; KUKO SchKG-J. KREN KOSTKIEWICZ, Art. 92 N 77; *see also* DFT 110 Ia 43 (*Banco de la Nación, Lima v. Banca Cattolica del Venetto, Vicenza*), c. 4; DFT 104 Ia 367, c. 3.

[61] DFT 110 Ia 43, c. 4.b; *see also* DFT 111 Ia 62 c. 7.b (*Lybische Arabische Volks-Jamahiriya v. Actimon SA*); DFT 134 III 122, c. 5.2 (*Moscow Center for Automated Air Control*); DFT 135 III 608, c. 4.4; DFT 104 Ia 367, c. 3 (leaving the question open).

[62] KUKO SchKG-J. KREN KOSTKIEWICZ, Art. 92 N 77.

sovereign purpose so that the assets destined for public (sovereign) purposes can be distinguished clearly from other assets used for commercial activities.[63]

Bank accounts of central banks enjoy full immunity from enforcement if they are recognizably reserved for a precisely defined sovereign purpose (*e.g.*, for a state's monetary policy). In order for them to be protected by immunity, however, such assets should be clearly separated from other, non-sovereign assets, and the relevant bank accounts should be distinctly earmarked for a specific sovereign purpose.[64]

With the exception of the requirement pursuant to which a claim against a foreign state must have a sufficient connection with Switzerland in order for a Swiss court to have jurisdiction, the (restrictive) concept of state immunity applied by the Federal Supreme Court is considered to form part of customary international law.[65] The United Nations Convention on Jurisdictional Immunities of States and Their Property of December 2, 2004 (the "**UN Immunity Convention**"),[66] which Switzerland has ratified,[67] is based on the same distinction between *acta iure gestionis* and *acta iure imperii*. The Swiss Federal Supreme Court repeatedly held that the UN Immunity Convention, albeit not in force,[68] constitutes a codification of internationally accepted principles in the area of immunity law.[69]

Conversely, the threshold requirement of a sufficient connection with Switzerland is not a requirement of customary international law, but is rather considered to be a requirement of Swiss national law which has been developed by the Swiss Federal Supreme Court.[70] The requirement

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[63] ATF 111 Ia 62 c. 7a (= Pra 1985 No. 190); Decision of January 24, 1994, in SZIER 1995, p. 593.

[64] ATF 111 Ia 62 c. 7b; KUKO SchKG-J. KREN KOSTKIEWICZ, Art. 92 N 77; S. GIROUD, loc. cit (Fn 47), p. 760.

[65] A. HAHN, loc. cit. (Fn 49), p. 111.

[66] SR 0.273.2.

[67] Amongst other international instruments relating to state immunity, Switzerland has also ratified the European Convention of State Immunity of May 16, 1972 (SR 0.273.1).

[68] Pursuant to Article 30(1) of the UN Immunity Convention, the UN Immunity Convention enters into force on the 30th day following the date of deposit of the 30th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. Switzerland was the ninth state ratifying the UN Immunity Convention. Cf. S. GIROUD, loc. cit (Fn 47), 758.

[69] ATF 136 III 575 c. 4.3.1; ATF 134 III 122 c. 5.1; Decision 4A_542/2011 of November 30, 2011 c. 2.1; cf. D. RÜETSCHI, Zustellung von Zahlungsbefehl und Arresturkunde an ausländische Staaten – Welche Frist ist anzusetzen?, BlSchKG 2012/1, 1-16, p. 9.

[70] ATF 106 Ia 142. The Court referred to that requirement for the first time in a decision of 1918 (ATF 44 I 49). *See also* P. Simonius, loc. cit. (Fn 44), p. 344; M. SCHNEIDER/J. KNOLL,

is applied in a strict, narrow manner,[71] and it must be met notwithstanding a waiver of immunity[72] and regardless of whether the claim for which enforcement is sought is based on an enforceable final judgment.[73] Pursuant to the Court's practice, a claim is deemed to be sufficiently connected with Switzerland only if the legal relationship from which the claim has arisen was established in, or has to be performed in, Switzerland, or if the state (as the debtor) performed certain acts in Switzerland that are sufficient to establish a place of performance in Switzerland.[74] However, neither the mere location of assets or the claimant's domicile in Switzerland, nor even the existence of an award rendered by an arbitral tribunal seated in Switzerland can create such a connection.[75]

Since the requirement of a sufficient connection with Switzerland is not based on domestic legislation but rather on case law, some legal scholars question whether that requirement is compliant with Article 29a of the Swiss Constitution, providing for a fundamental right of access to court pursuant to which in legal dispute, everyone has the right to have his or her case adjudicated by a judicial authority.[76] According to Article 36 of the Swiss Constitution, the fundamental right of access to a court may be restricted only if such restriction is based on a formal federal act or on the constitution. It is thus argued that the right of access to court may not be restricted on the basis of a rule developed by court practice, as opposed to a law passed by the parliament. The Federal Supreme Court has however constantly adhered to that practice in the past, despite the (sporadic) criticism in legal writing. Furthermore, in a remarkable decision of January 24, 2013, the Appellate Court of the Canton of Zurich expressly rejected the argument that the requirement of a sufficient connection with Switzerland is not compatible with the Swiss Constitution. It held that the requirement was established by the Supreme Court in 1918 in order to fill a loophole in the law, and has been constantly applied since; concluding that it therefore

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Enforcement of Foreign Awards against Sovereigns – Switzerland, in: Enforcement of Arbitral Awards against Sovereigns, R. Doak Bishop (ed.), Huntington 2009, 311-353, p. 344; W. HABSCHEID, loc. cit. (Fn 48), p. 218.

[71] ATF 135 II 608 c. 4.3 and 4.5; ZR 1999 (2000) No. 112, p. 303.

[72] ATF 106 Ia 142 c. 4; ATF 134 III 122 c. 5.3.3, Decision 5A_618/2007 of January 10, 2008, c. 3.2.

[73] ATF 135 III 608 c. 4.3.

[74] P. Simonius, loc. cit. (Fn 44), p. 344 et seq.

[75] Notification of the Federal Department of Justice and Police, loc. cit (Fn 52), p. 196; ATF 106 Ia 142; Decision 5A.261/2009 of September 1, 2009; S. GIROUD, loc. cit (Fn 47), p. 759.

[76] *See* E. HENRY, L'impact combine de la jurisprudence de la Haye et de Strasbourg: les juges de Lausanne devrait-ils revoir leur jurisprudence en matière d'immunités d'éxecution?, in: Jusletter January 21, 2013, *passim*.

constitutes (domestic) customary law which is a sufficient basis for restricting the fundamental right of access to a court pursuant to Article 29a of the Constitution.[77]

Unless the aforementioned conditions are satisfied, Swiss courts do not have judicial authority ("*Justizhoheit*," "*Gerichtsbarkeit*") in respect of claims against foreign states or foreign central banks.[78] Under Swiss law, judicial authority is considered to be a mandatory procedural requirement. According to Article 60 of the Swiss Civil Procedure Code (the "**CPC**"), a Swiss court has to examine *ex officio* whether or not the procedural requirements are satisfied in any given case. If a procedural requirement is not met, a Swiss court has to declare the lawsuit inadmissible without deciding on the merits (Article 59(1) CPC).

B. The Government Pension Fund Global

1. Current Form

We understand that under the current structure, Norges Bank is legal owner of GPFG, whereas the Norwegian government is its beneficial owner. GPFG is managed by a separate asset management unit within Norway's central bank (Norges Bank). We assume that GPFG has no legal personality, so that Norges Bank would be the party to any proceedings.

Immunity from Suit. Consequently, a Swiss court has jurisdiction over Norges Bank (as the legal owner of GPFG) with regard to claims arising from commercial activities, provided that such claims have a sufficient connection to Switzerland, in particular if the legal relationship from which the claim has arisen was established in, or has to be performed in, Switzerland, or if Norges Bank performed certain acts in Switzerland that are sufficient to establish a place of performance in Switzerland.

On the other hand, if Norges Bank were sued in Switzerland with regard to claims that arose from sovereign acts relating to GPFG, Norges Bank—absent a waiver—would be granted the immunity protections described above. It is however unlikely that normal investment activities of GPFG in Switzerland would be considered sovereign acts; we believe that more likely than not they would qualify as commercial activities, with the consequence that Norges Bank could not invoke an immunity defense with regard to claims arising from such GPFG related activities. However, it would have to be analyzed on a case-by-case basis and in consideration of all relevant circumstances whether a particular activity would constitute a sovereign or a commercial act.

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[77] Decision of the Appellate Court of the Canton of Zurich of January 24, 2013 (PS120238-O/U), c. 3.4.3 (p. 17 et seq.): "Das Bundesgericht hat das Erfordernis der Binnenbeziehung seit dem ersten Entscheid aus dem Jahre 1918 (BGE 44 I 49) in ständiger Rechtsprechung bestätigt und weiterentwickelt [...]. Es handelt sich somit um **Richterrecht**, welches sich inzwischen **zu Gewohnheitsrecht verdichtet** hat, und dem ebenso wie einem Gesetz im formellen Sinn **Rechtsquellencharakter** zukommt [...]." [emphasis added]. Cf. also the Decision of the Appellate Court of the Canton of Zurich of May 14, 2013 (PS130067), c. 3.5.1-3.5.4., fully confirming the aforementioned decision.

[78] BK ZPO I-S. ZINGG, Art. 59 N 157 et seq.

Immunity from Attachment and Execution. GPFG's assets are subject to enforcement in Switzerland (including attachment) only if the targeted assets are not recognizably assigned to tasks which are part of Norway's duties as public authority and provided that the claim for which enforcement is sought arises from commercial acts of Norges Bank relating to GPFG and has a sufficient connection with Switzerland.

2. Proposed Form

We understand that under the envisaged new structure, the Fund would be removed from Norges Bank and placed under the management of a new statutory entity which would be wholly directly owned by the Norwegian state.

We think that the contemplated new structure of the Fund would not materially affect the sovereign immunity protections available to GPFG's assets in Switzerland. As a special statutory entity fully owned by the Norwegian state, the new entity would in principle also be immune from suit and execution under Swiss law if and to the extent the underlying claim arose from sovereign acts (*de iure imperii* acts) which this entity was entitled to perform on behalf of the Norwegian state.

Immunity from Suit. As is the case under the current structure, the new entity would not be immune from suit in Switzerland with regard to claims arising out of commercial activities of the Fund. There might exist a factual difference between the old and new structures only insofar as a judge may be more cautious to accept jurisdiction in proceedings against the Norwegian national bank, than against another state-owned entity.

Immunity from Attachment and Execution. Immunity from execution would be granted only if and to the extent the targeted assets are assigned to tasks which are part of the state's duty as public authority and provided that these assets are clearly and recognizably separated from other (non-sovereign) assets.

Homburger AG

Balz Gross
Julian Schwaller