

Taxing Sovereign Wealth Funds Mark II: Looking to Singapore for inspiration

Abstract

The taxation of sovereign wealth funds is an important issue for governments as they are both investors and need to attract investment. Operating in global markets, how these funds are taxed can affect investment location decisions.

The basis of how sovereign wealth funds are taxed in Australia is administrative. Each fund must apply for exemptions via private rulings which are then assessed on their facts and merits. It is an inefficient and costly process which lacks certainty. Over the period 2009 to 2011 the government of the day proposed legislating its practices dealing with sovereign wealth funds. In 2010 Singapore introduced a fund exemption scheme, markedly different from that proposed in Australia.

This paper considers the current Australian taxation practice and looks backwards at the method that had been proposed. It then considers Singapore's practice and looks forward at how that method could work in Australia.

1. Introduction

The taxation of sovereign wealth funds is an important issue for governments for two reasons. Firstly, as investors as the funds in sovereign wealth funds are government assets. Governments therefore have an interest in how they are taxed (or not taxed). Secondly, part of the economic function of governments is in attracting foreign investment. Sovereign wealth funds operate in global markets, and, as such, are an important source of investment in the domestic market. How they are taxed can affect investment location decisions. There are currently around 77 funds operating out of 49 countries with assets of around US\$7.2 trillion.¹

Many countries offer tax exemptions for the interest and dividend income of sovereign wealth funds. Australia is no exception. Yet the tax exemption is not currently grounded in the tax legislation. An attempt was made in around 2011 to enact effecting legislation but was scuttled by a change in government. That was Mark I. Around the same time Singapore legislated a tax exemption for sovereign wealth funds. Whether this could be applied to Australia is the focus of this paper. This is Mark II.

This paper considers the current Australian taxation practice and looks backwards at the codification method that had been proposed. It then considers Singapore's practice and looks forward at how that legislative provision could work in Australia. From this recommendations are made.

¹ Compiled from SWF Institute, 'Sovereign Wealth Fund Rankings' Available at www.swfinstitute.org/sovereign-wealth-fund-rankings/. Accessed 30 November 2015.

2. Australia's current system

Australia often provides income tax exemptions for investment income with respect to sovereign wealth funds by way of private tax rulings. As such, it is generally claimed that Australia's practice is administrative rather than legislative. And, in practical terms, it usually is. Theoretically, however, the granting of a private ruling is an option of last resort. According to the Australian Taxation Office (ATO), a private ruling is only an option, and the only option, if an income or withholding tax exemption is not available under income tax legislation or tax treaty.²

The ATO concedes that the taxation legislation does not provide any basis for exemption on the grounds of sovereign immunity.³ Consequently, with respect to applications for sovereign immunity, recourse must first be made to tax treaties,⁴ failing which 'the common law doctrine will be applied'.⁵ But there is also the view that, notwithstanding any exemption provided for in the tax legislation or treaty, a foreign government must nevertheless apply to the ATO for a private ruling in order to determine whether the exemption applies.⁶

2.1 Legislation

Notwithstanding that the principle of sovereign immunity is not incorporated into the Australian income tax legislation, it is nevertheless important to ascertain if any other exemption is available to sovereign wealth funds. If there is, this could be the source of any tax exemption claim without the need to resort to sovereign immunity.

Australia defines its tax base, relevant to foreign residents, by reference to the source of income.⁷ The source of interest income is the place of contracting (that is, where the credit is provided) or the place where the funds are advanced.⁸ The source of dividend income is governed by the source of the profits out of which the dividend is paid.⁹ As each country is a sovereign state there is no obligation or requirement for one country to collect the taxes of another country. Largely for that reason interest and dividend income is taxed by way of withholding

² Australian Taxation Office, 'Private rulings for sovereign immunity – supporting information' (2014) Available at <https://www.ato.gov.au/General/ATO-advice-and-guidance/In-detail/Private-rulings/Supporting-documents/Sovereign-Immunity/>. Accessed 19 November 2015.

³ Australian Taxation Office, 'Edited Version of Notice of Private Ruling: Authorisation Number 31076' available at <https://www.ato.gov.au/rba/content/?ffi=/misc/rba/content/31076.htm>. Accessed 19 November 2015 ("Private Ruling 31076").

⁴ Referred to in Private Ruling 31076 as 'to the provisions of the International Tax Agreements Act 1953'.

⁵ Private Ruling 31076.

⁶ Taxpayers Australia Inc, *The Taxpayers Guide 2014-2015* (26th ed) (Milton, Queensland: Wrightbooks, 2014) Paragraph 22.810; KPMG, *SWFs – Riders through the storm* (KPMG International, November 2014) 27.

⁷ *Income Tax Assessment Act* (ITAA) 1997 ss 6-5, 6-10.

⁸ *Commissioner of Inland Revenue v Philips Gloeilampenfabrieken* 10 ATD 453 per North and Hay JJ, and per Gresson P, respectively.

⁹ ITAA 1936 s 44(1).

taxes.¹⁰ This ensures the income is taxed prior to it leaving the jurisdiction therefore affording some protection to the tax base.

Foreign residents are not subject to income tax on receipts of interest and dividends that are subject to withholding tax.¹¹ There are no specific exemptions from withholding tax for foreign government agencies, defined as the government or an authority of the government of a foreign country or parts of that country.¹² The term 'foreign country' is itself defined in the *Acts Interpretation Act 1901* as 'any country (whether or not an independent sovereign state) outside Australia and the external Territories'.¹³

Under the withholding tax regime for non-treaty countries, interest is taxed at 10 per cent and the unfranked portion of dividends is taxed at 30 per cent.¹⁴ The rates applicable to treaty countries vary between zero and 15 per cent for interest and between zero and 30 per cent for the unfranked portion of dividends. No withholding is applied to the franked portion of dividends as this portion represents company tax already paid. A higher dividend withholding rate generally applies to portfolio dividends than to non-portfolio dividends.

Under the controlled foreign companies or CFC provisions a 'non-portfolio dividend' is one where the company receiving the dividend has a voting interest of 10 per cent or more of the voting power of the company paying the dividend.¹⁵ On the other hand the 'non-portfolio interest test' is passed if the entity holding the interest has 10 per cent or more of the 'direct participation interests'.¹⁶ 'Direct participation interests' is itself defined in terms of 'the direct control interest'¹⁷ which is, in turn, defined to cover a holding of share capital, the rights to distribution on winding up or the rights to vote or participate in any decision-making concerning distributions of capital or profits, variation of share capital and the constituent document of the company.¹⁸ Thus, while the non-portfolio interest test is wider in scope, it is also narrower when only considering voting rights.

Portfolio dividends are generally associated with passive investment and non-portfolio dividends with active investment. However, having a share holding of anywhere between 10 and 50 per cent does not necessarily mean that the company holding such shares has control or even the ability to influence decisions which is what being 'active' necessarily involves. The legislation could be clearer by defining what is considered to be a 'portfolio dividend' for passive investment purposes, allowing a 'non-portfolio dividend' to be defined by

¹⁰ The collection of withholding tax is contained in *Taxation Administration Act* Subdiv 12-F Sch 1 ss 12-210 to 12-300.

¹¹ ITAA 1936 s 128D.

¹² ITAA 1997 s 995-1.

¹³ *Acts Interpretation Act 1901* s 2B.

¹⁴ ITAA 1936 ss 128B(3)(ga).

¹⁵ ITAA 1936 s 317.

¹⁶ ITAA 1997 s 960-195.

¹⁷ ITAA 1997 s 960-190.

¹⁸ ITAA 1936 s 350.

implication. This would also prevent the ambiguity that arises between the CFC and 'non-CFC' provisions.

'Interest' is defined inclusively¹⁹ and therefore any amount that is 'interest' according to its ordinary meaning will be 'interest' for withholding tax purposes. The meaning of 'interest' is statutorily extended to include an amount that is 'in the nature of interest' and which is 'in substitution for interest'.²⁰

It is generally acknowledged that investment income is passive income.²¹ It is also generally acknowledged that passive income is interest income and portfolio dividends (that is, an equity holding of less than 10 per cent share capital).²² The CFC provisions do not define 'passive income' in this way. While dividends are included in the definition, interest must be 'tainted interest' in order to qualify.²³

From this discussion it can be concluded that, under Australian tax legislation, no exemption or other special treatment is afforded to foreign sovereign wealth funds. Withholding tax will therefore apply in the same manner as it applies to any foreign entity having due regard to whether the investment is considered 'portfolio' or not.

2.2 Tax treaties

2.2.1 Model treaty and treaties generally

Most bilaterally agreed tax treaties are based on the Organisation for Economic Cooperation and Development's (OECD) Model Tax Convention ("model treaty") which will be used here as a proxy tax treaty. Essentially a tax treaty will only apply, and therefore any tax exemption is only available, to an entity that meets the treaty's residency requirements.²⁴ There are two residency requirements relevant to sovereign wealth funds. The first is concerned with governance structure and the second with a liability to tax in the state that residency is being claimed.²⁵

The first major amendment to the definition of residency was made in 1995.²⁶ This inserted the specific inclusion of the contracting state (or country) themselves, their political subdivisions and their local authorities. This expansion of the definition was not so much a change as merely confirming the

¹⁹ ITAA 1936 s 128A (1AB).

²⁰ ITAA 1936 ss 128A(1AB)(a) and (b) respectively

²¹ See for example Private Rulings 69161 and 94751; The Service, *A Selection of Internal Revenue Service Tax Information Publications* Vol 3 (University of Michigan, 1989) 291.

²² ATO ID 2002/45 and Private Ruling 94751; Brian J Arnold, Jinyan Li and Daniel Sandler, 'Comparison and Assessment of the Tax Treatment of Foreign Source Income in Canada, Australia, France, Germany and the United States' (Working Paper 96-1, Technical Committee on Business Taxation, Department of Finance, Ottawa, December 1996) 4.

²³ ITAA 1936 s 446(1).

²⁴ OECD, *Model Tax Convention on Income and Capital*, Article 1.

²⁵ *Ibid*, Article 4 [1].

²⁶ OECD, 'Commentaries on the Articles of the Model Tax Convention' *Model Tax Convention* (Paris: OECD, 2010) Commentary on Article 4 [8.4].

prior general understanding of most states.²⁷ These government ‘parties’ which are ‘part of’ a state are generally exempt from tax in their home state. As such, by including these government ‘parties’ in the definition as residents ensured that they avoided having to deal with the ‘liable to tax’ requirement.

The question thus arose as to whether entities that are wholly owned by a state or a political subdivision or local authority thereof, meet the residency requirements.²⁸ In order to address this, amendments to the model treaty commentary were made in 2010. States may modifying the definition of ‘resident of a Contracting State’ to include the terms ‘statutory body’, ‘agency or instrumentality’ or ‘legal person of public law’.²⁹ Such terms would cover wholly-owned entities that are not considered to be part of the state or its political subdivisions or local authorities.³⁰ By including these entities in the definition of ‘residency’ for treaty purposes means that they can follow the same rules that apply to the state itself. As a result, the ‘subject to tax’ requirement is not applicable to these entities either.

Therefore these definitional amendments, if adopted and incorporated into tax treaties, may help to clarify the circumstances of when treaty benefits are available to sovereign wealth funds. Australian treaties have not extended the definition but this is most probably as a result of few treaties being negotiated since 2010.³¹ Singapore, on the other hand, has included the term ‘statutory body’ in its definition of resident³² while New Zealand has used the term ‘agency or instrumentality’.³³

The second requirement of residency is that there is a liability to tax in the state that residency is being claimed.³⁴ Where entities are exempt from tax in their state of residence, as many sovereign wealth funds are, this can be interpreted in one of two ways. Firstly, the entity is only exempt from tax because a specific provision in the tax law applies to make the entity exempt. That is, they meet the necessary legislative requirements to claim tax-exempt status. Such entities are still, nevertheless, subject to the tax law. This is the most common interpretation. However, the second interpretation is that, regardless of the reason why the entity is not ‘liable to tax’, this automatically prevents the tax treaty from applying to such entities. Here ‘liable to tax’ is interpreted as ‘subject to tax’.³⁵

²⁷ Ibid, Commentary on Article 1 [6.35]; Commentary on Article 4 [8.4].

²⁸ Ibid, Commentary on Article 4 [8.5].

²⁹ Ibid, Commentary on Article 1 [6.36].

³⁰ Ibid, Commentary on Article 1 [6.9].

³¹ Post-2009 treaties were signed with Chile (10 March 2010) and Turkey (28 April 2010); amending protocols were signed with India (16 December 2011) and Malaysia (24 February 2010). See The Treasury, ‘Income Tax Treaties’ at www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties accessed 2 November 2015.

³² See for example ‘Agreement between the Government of the Republic of Singapore and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income’, Article 4 [1].

³³ See for example ‘Convention Between Canada and New Zealand for the Avoidance of Double taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income’, Protocol Article II.

³⁴ OECD, above n 24, Article 4 [1].

³⁵ The Netherlands is one country that takes this approach.

That is, a liability to tax means that an actual tax payment must be effected. This may have implications for sovereign wealth funds that are exempt from taxation in their home state such as the Australian Future Fund. Indeed, some countries that have significant sovereign wealth funds are excluding the wording ‘persons who are liable to tax’ from their tax treaties. For example the India-United Arab Emirates tax treaty includes the wording in respect of a resident of India but omits it in the case of a resident of the United Arab Emirates.³⁶ The United Arab Emirates has close to US\$1215 billion in sovereign fund assets under management and India has none.³⁷

Other defining factors could be taken into account. These include the source of the income (governmental or commercial activities), the purpose of the assets and income (public purposes or for the benefit of non-governmental persons), type of income (certain classes of interest and/or dividends) and type of investment (portfolio or direct investment).³⁸

In addition, many states negotiate provisions that grant an exemption from tax on certain items of income such as dividends and interest to other states. Some are referred to merely as state-owned entities such as central banks while others refer to entities by name.

For example, the interest article between United Kingdom and Malaysia exempts tax on interest if:³⁹

[I]t is derived and beneficially owned by the government of the other contracting state, a statutory body thereof, or a political subdivision or a local authority thereof, or the central bank of that other state, or by any agency or instrumentality of, or any financial institution wholly owned by, that government;

The interest article between Singapore and Malaysia is more specific, exempting tax on interest derived by the ‘Government’ which is defined for treaty article purposes to include:⁴⁰

[I]n the case of Malaysia means the Government of Malaysia and shall include:

- i. the Government of the States;
- ii. the Bank Negara Malaysia [the central bank];

³⁶ ‘An Agreement Between the Government of the Republic of India and the Government of the United Arab Emirates for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital’, Article 4 [1].

³⁷ Comprising Abu Dhabi Investment Authority US\$773b, Investment Corporation of Dubai US\$183b, Abu Dhabi Investment Council US\$110b, International Petroleum Investment Company US\$66.3b, Mubadala Development Company US\$66.3b, Emirates Investment Authority US\$15b and RAK Investment Authority US\$1.2b. Sourced from SWF Institute, available at <http://www.swfinstitute.org/sovereign-wealth-fund-rankings/>. Accessed 3 December 2015.

³⁸ OECD, above n 26, Commentary on Article 1 [6.39].

³⁹ ‘Agreement between the government of the UK of Great Britain and Northern Ireland and the government of Malaysia for the avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income’, Article 11 paragraph 8(a).

⁴⁰ ‘Agreement Between the Government of the Republic of Singapore and The Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income’, Article 11 paragraph 5.

- iii. the local authorities;
 - iv. the statutory bodies; and
 - v. the Export-Import Bank of Malaysia Berhad;
- in the case of Singapore means the Government of the Republic of Singapore and shall include:
- i. the Monetary Authority of Singapore [the central bank];
 - ii. the Government of Singapore Investment Corporation Pte. Ltd [a sovereign wealth fund]; and
 - iii. the statutory bodies.

It is made specifically clear in the OECD commentary to the model treaty that the amendments should not be interpreted 'as affecting in any way the possible application by each State of the customary international law principle of sovereign immunity'.⁴¹ It further states that:⁴²

The [Model Tax] Convention does not prejudge the issues of whether and to what extent the principle of sovereign immunity applies with respect to the persons covered under Article 1 ... and each Contracting State is therefore free to apply its own interpretation of that principle as long as the resulting taxation, if any, is in conformity with the provisions of its bilateral tax conventions.

Thus, given the lack of international consensus on the scope of the sovereign immunity principle, each country is free to apply its interpretation of this principle within the bounds of the treaty provisions. There are considerable differences in how this principle is applied. Firstly not all countries recognise sovereign immunity in taxation matters. Secondly, the extent of its recognition can vary. For example, some countries that recognise the principle of sovereign immunity only recognise it to the extent that it has been incorporated into its domestic law. Other countries apply it as customary international law but subject to limitations. The most common exception is that of commercial transactions but even the application of the commercial exception differs between countries.

2.2.2 Australian tax treaties

Notwithstanding Australia has negotiated tax treaties with the majority of foreign governments based on the model treaty, individually negotiated treaties can vary significantly. As noted above, Australia has not as yet modified any definition of 'resident of a Contracting State'. As will be seen, Australia has also not followed the lead of other countries that define the term 'government' to specifically include their sovereign wealth funds.⁴³ This should be considered, as it would make the intention of the application of tax treaties to sovereign wealth funds more transparent.

⁴¹ OECD, above n 26,, Commentary on Article 1 [6.38].

⁴² Ibid.

⁴³ See for example the Singapore-Malaysia and Singapore-Laos tax treaties; Poland-Norway tax treaty.

Australia does recognise the doctrine of sovereign immunity and does apply it in tax matters. The Explanatory Memorandum accompanying the introduction of the 2006 Australia-Norway Tax Convention states⁴⁴

The exemption for interest paid to the Australian and Norwegian Governments reflects the principle of sovereign immunity and will apply to interest derived from the investment of the Government's official reserve assets. Similar exemptions apply in a number of Australia's tax treaties.

Yet what is actually intended (as evidenced in supporting documentation such as explanatory memoranda) is not always clear in the wording of the treaty. The Australia-Switzerland tax treaty provides an exemption for dividends where the beneficial owner is (a) a contracting state (or government) or political subdivision or local authority thereof which also includes a government investment fund; and (b) a central bank of a contracting state (subject to the equity holding being below a stipulated amount).⁴⁵ A similar exemption applies to interest income.⁴⁶ Yet it is only evident from the Explanatory Memorandum that the intent of the delegations was that the investment funds must be, and must remain, government funds.⁴⁷ Clarity, and therefore certainty, could be achieved by defining what is meant by a 'government investment fund' in the treaty itself.

In addition, during negotiations of the treaty it was agreed that the tax exemption would apply to 'the Future Fund, the Building Australia Fund, the Education Fund and the Health and Hospitals Fund, as well as any similar fund the purpose of which is to pre-fund future government liabilities'.⁴⁸ Including these or the term 'sovereign wealth funds' in the actual wording of the treaty would provide certainty. Alternatively, defining 'government investment fund' to include a sovereign wealth fund would have the same effect.

The Australia-New Zealand tax treaty also uses the terminology 'government investment fund' in both dividend and interest articles.⁴⁹ This is taken to apply (although not explicitly stated in the tax treaty) to the Future Fund and other nation building funds thus exempting them from New Zealand tax on interest and certain dividends⁵⁰. Furthermore, the Australia-New Zealand treaty, instead of referring to 'a central bank' refers to 'a bank performing central banking

⁴⁴ Explanatory Memorandum, International Tax Agreements Amendment Act (No 1) 2007, [2.131].

⁴⁵ 'Convention Between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income', Article 10 [4(a) and (b)].

⁴⁶ *Ibid*, Article 11 [3(a)].

⁴⁷ Explanatory Memorandum, International Tax Agreements Amendment Act 2014, [1.138].

⁴⁸ *Ibid*.

⁴⁹ 'Convention Between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion', Article 10 [4] and Article 11 [3(a)] respectively.

⁵⁰ Joint Standing Committee on Treaties, 'Chapter 2 Taxation Agreement with New Zealand' (Report 107: Review into treaties tabled on 20 August (2) and 15 September 2009, House of Representatives Committees, Parliament of Australia, 16 November 2009) [2.13].

functions'. This would appear to extend the exemption. But this is not necessarily the case.

In an interpretive decision the ATO determined that a German bank, undertaking central bank activities, was not entitled to an exemption from tax.⁵¹ Each case turns on its facts. The facts here concerned a German state owned bank (not the central bank of Germany) that, although providing commercial banking activities, nevertheless also performed some central banking functions. The German Protocol provides that interest is exempt from tax where it is derived by a body exercising government functions or by a bank performing central banking functions.⁵² The term 'government functions' is not defined but taken to mean that it excludes trading or commercial activities in line with the restrictive view of the principle of sovereign immunity.⁵³ The term 'central banking functions' is also not defined. In addition, while not defined in the Australia-Germany Protocol, the Explanatory Memorandum to this Protocol states that this provision 'requires each country to exempt interest received by the Government of the other country or by its central bank'.⁵⁴

This interpretive decision concludes that, because this state bank is not the central bank, the interest is not exempt. It is noted that the interpretive decision is an 'edited and summarised record of a Tax Office decision' and may therefore exclude pertinent facts. It is also acknowledged that it does not provide advice. Nevertheless on the facts and analysis presented, it is contended that interest derived by the state bank is not exempt from tax merely because it is not the central bank. Rather, it is denied exemption only if the interest was derived from commercial activities rather than government activities. And that is only if commercial activities taint income from governmental activities, rendering all income taxable, as is the practice in the United States. There is no evidence to infer that this is the practice in Australia. Thus, if the interest is derived from the investing of German state funds then this is arguably exempt from tax being a political subdivision of the Federal Republic of Germany.

In some cases specific references to sovereign wealth funds have been made in the treaty itself. In the Australia-Japan treaty, the Export Finance and Insurance Corporation and 'a public authority that manages the investments of the Future Fund' are specifically exempt from tax on interest income.⁵⁵ The exemption is extended to 'any similar institution that may be agreed upon from time to time'.⁵⁶ Yet there is no similar provision in the dividend article. It is not as if Japan does not tax dividend payments. This omission actually increases the uncertainty for sovereign wealth funds as it could be implied that no exemption is available for

⁵¹ ATO ID 2005/355.

⁵² 'Agreement between the Commonwealth of Australia and the Federal Republic of Germany for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital and to certain other taxes' Protocol paragraph 9.

⁵³ ATO ID 2005/355.

⁵⁴ Explanatory Memorandum, Income Tax (International Agreements) Act 1984

⁵⁵ 'Convention Between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income', Article 11 [3(c)(ii)].

⁵⁶ *Ibid*, Article 11 [3(c)(iii)].

dividend income paid to the entities specifically mentioned as in the interest article.

The regulation impact statement notes that there will be no withholding tax on interest derived by, inter alia, 'Australia's Future Fund'.⁵⁷ The Future Fund is a sovereign wealth fund. No mention is made here of the 'public authority that manages the investments of the Future Fund'. Yet it is with respect to this latter entity that the Explanatory Memorandum refers to as being the entity granted the interest exemption.⁵⁸

The public authority that manages the investments of the Future Fund is the Future Fund Board of Guardians with the support of the Future Fund Management Agency. The Board and the Agency also manage the investments of the Building Australia Fund, the Education Investment Fund, the Health and Hospitals Fund, the DisabilityCare Australia Fund and the Medical Research Fund. The investments are actually made in the name of the Future Fund Board⁵⁹ which probably accounts for why the manager, and not the sovereign wealth fund, is granted the tax exemption on interest income in the treaty. Whether any agreement has been made to extend the interest tax exemption to the other funds is not clear. This can be contrasted with the explanatory memorandum to the Australia-Switzerland tax treaty noted above which specifically refers to the other funds that were, at the time of drafting the treaty, operational.

Perhaps it is notable that the inclusion of this specifically naming provision, as a means of clarifying 'that interest payments to these bodies are free from interest withholding tax' was at the request of Japan.⁶⁰ Because of how Australia's funds are managed, this may be an occasion when a generic reference to 'government entities', 'government investment funds' or even 'sovereign wealth funds' may be more appropriate than naming names.

2.3 Private ruling

If a tax exemption is not available under Australian tax law or under a tax treaty, the remaining option is sovereign immunity. Requesting sovereign immunity requires a private ruling application by the foreign sovereign wealth fund. The restricted view of sovereign immunity⁶¹ is recognised by Australia with the ATO acknowledging that (interest) income derived from within Australia by a foreign government, or an instrumentality of a foreign government solely performing governmental functions, is exempt from Australian tax'.⁶² Guidance on applying for a private ruling is provided for in tax administration interpretive decision ID 2002/45.

⁵⁷ Explanatory Memorandum, *International Tax Agreements Amendment Bill (No 1) 2008*, 6.

⁵⁸ *Ibid*, [1.175].

⁵⁹ See for example *Future Fund Act 2006* s 16(2); *Nation-building Funds Act 2008* s 32(2); *Medical Research Future Fund Act 2015* s 37(2).

⁶⁰ *Ibid*, [1.176].

⁶¹ Sovereign immunity does not apply to commercial activities.

⁶² Private Ruling 63031, 94751

In order to gain an exemption, the sovereign wealth fund must meet three requirements.⁶³ First, the entity deriving the income is a foreign government or an agency of a foreign government. Second, the moneys being invested are, and will remain, monies of that foreign government. The third criterion is that the income is derived from non-commercial activity. Commercial activity is generally associated with the trading of goods and services, including the carrying on of a business. While outside the scope of this paper, it should be noted that non-commercial activities does not equate to governmental functions. ID 2002/45 clarifies that⁶⁴

Income derived by a foreign government or by any other body exercising governmental functions from interest bearing investments or investments in equities is generally not considered to be income derived from a commercial operation or activity.

Although each case is determined on its own set of facts, it is generally accepted that an equity holding of 10 per cent or less (also referred to as a portfolio holding) in a company will be considered non-commercial.⁶⁵ Other factors are the size, in dollar value and in percentage, of the direct and indirect investment, the extent of voting interests, and the degree of control or influence able to be exerted in respect of the financial and operating decisions of the entity. These factors may be very important in the case where the holding is 10 per cent. This is because the tax legislation, by reference to the non-portfolio interest test, in effect defines (by inverse application) a portfolio interest to be a holding of less than 10 per cent⁶⁶ rather than 'of 10 per cent or less'.

What constitutes a 'foreign government or agency of a foreign government' is not stated. The taxation legislation defines 'foreign government agency' as the government or an authority of the government of a foreign country including parts of that country.⁶⁷ The 'parts of that country' covers all levels of a government including regional (or state) and local governments. It is not clear what 'an authority of the government' is. Does it refer to 'power' or 'command' of individuals or does it refer to statutory authority entities such as the ATO and other public service bodies? Sovereign wealth funds can be constituted as separate legal entities, either governed by a specific constitutive law (such as Australia's Future Fund and New Zealand Superannuation Fund) or as a state-owned corporation (such as Singapore's GIC Private Ltd or China Investment Corporation). Sovereign wealth funds can also be pools of assets controlled by the central bank (as in Norway's Government Pension Fund Global) or controlled by a separate statutory agency (as in Canada's Alberta Heritage Fund). In addition, in some countries especially those of the Middle East, their rulers (as opposed to government) own the sovereign wealth funds. An example is Dubai Holding, privately owned by the Ruler of Dubai.

⁶³ These are set out in ATO ID 2002/45.

⁶⁴ ATO ID 2002/45.

⁶⁵ Australian Taxation Office Interpretive Decision ATO ID 2002/45.

⁶⁶ ITAA 1997 s 960-195 defines the 'non portfolio interest test' to be passed where the holding is '10% or more'.

⁶⁷ ITAA 1997 s 995-1.

The sovereign immunity legislation, the *Foreign States Immunities Act 1985*, defines a 'foreign state' and thereafter extends the definition. The definition section defines a foreign state to cover the head of the foreign state in their public capacity and the executive government or part of the executive government such as a department or organ. The definition applies equally to the equivalent positions in any political subdivisions of the foreign state.⁶⁸ It does not include a separate entity of a foreign state⁶⁹ which is itself defined as "an agency or instrumentality of the foreign State and is not a department or organ of the executive government of the foreign State".⁷⁰ The provisions of the *Foreign States Immunities Act* are then extended to 'separate entities' in the same way they apply to a foreign State, except for the special provisions for transactions between States.⁷¹ This reflects the broad application of the international doctrine of sovereign immunity.

As a consequence of the private nature of private rulings it is not clear how the ATO determines whether the entity seeking sovereign immunity is a 'foreign government or agency of a foreign government'. As evident above, the sovereign immunity definition is arguably broader and certainly more certain than the tax law definition.

The current practice of granting tax exemptions by way of tax rulings requires extensive administrative effort. This is costly not only to the sovereign wealth funds but also to the ATO. Differences in interpretation and in application can result in different funds being treated differently merely because of the way they have been constituted. Consistency is an issue and therefore certainty, impacting on efficiency and equity. The administrative practice also lacks transparency.

2.4 The case for legislation

The income tax legislation as currently drafted does not provide a tax exemption for the interest and dividend income of sovereign wealth funds. While this outcome could be achieved through tax treaties there are a number of matters to consider. Definitional issues regarding residency need to be addressed. Considerations are to incorporate terms as suggested in the 2010 model treaty commentary amendments, determine if any other defining factors should be taken into account or whether it is desirable to name entities specifically or generally. Where an exemption is expedient, this needs to be made very clear. Options are explicit wording or defining certain terms in the treaty itself rather than merely referring to intent in the extrinsic materials. Of course, being bilateral, the other country that is party to the treaty would need to agree to these requests. A further consequence of it being a bilateral agreement is that the

⁶⁸ FSIA subsection 3(1) definition of "foreign State"; subsection 3(3).

⁶⁹ FSIA subsection 3(3).

⁷⁰ FSIA subsection 3(1) definition of "separate entity".

⁷¹ FSIA section 22 except for the special provisions for transactions between states (at governmental level).

process would need to be undergone with every treaty partner, worldwide. Legislation may be a more preferable outcome.

Legislation would also negate many of the compliance and administrative costs associated with applying for a private ruling and determining the veracity of any claim for sovereign immunity. Instead of determining each case on its facts with possible arbitrary and/or conflicting results, the sovereign wealth fund could self-assess against the criteria stipulated in the legislative provision.

If the objective is to clarify and provide certainty concerning the tax consequences in Australia for investments made by foreign governments (as outlined in the next section), then legislation may be the only viable alternative. Such legislation would also need to factor in the issues identified here, namely the type of entity or foreign government agency it would apply to, and the type of income that would be exempt.

3. Looking backwards: 2011 proposed legislation

In 2009 the then Rudd Labor Government proposed the codification of the taxation exemption provided to sovereign wealth funds, releasing a consultation document *Greater Certainty for Sovereign Investments*.⁷² This was followed in 2011 with the *Options to Codify the Tax Treatment of Sovereign Investments* paper ("Options Paper").⁷³ The objective was to clarify and provide certainty concerning the tax consequences in Australia for investments made by foreign governments.⁷⁴ This was to be achieved by codifying the current administrative practice rather than changing the existing law and practice.

Two options were put forward,⁷⁵ both with the objective of rendering the income of sovereign wealth funds non-assessable non-exempt. The difference between the two options relates to the tests that apply to equity interests. The first option includes a 'safe harbour test' which applies to an equity interest of less than 10 per cent in the entity being invested in. This correlates with the current non-portfolio interest test. If the sovereign wealth fund fails to qualify under this safe harbour test, the second option contains a 'commercial activity test'. This is akin to the restrictive view of sovereign immunity. The existence of this second test has the consequence of implying that a holding of 10 per cent or more cannot be considered a commercial holding, something that the ATO has always relied on when considering private rulings.⁷⁶

⁷² Australian Federal Treasury, 'Greater certainty for Sovereign Investments' (Consultation Paper, November 2009).

⁷³ Australian Federal Treasury, 'Options to codify the tax treatment of sovereign investments' (Proposal Paper, April 2011) available at <archive.treasury.gov.au/documents/2017/PDF/Proposals_Paper.pdf>.

⁷⁴ Ibid.

⁷⁵ These are discussed in more detail in Sally-Ann Joseph, Michael Walpole and Robert Deutsch, 'Taxation of Sovereign Wealth Funds – A Suggested Approach' (2015) 20(1) *Journal of the Australasian Tax Teachers Association*.

⁷⁶ ATO ID 2002/45; Private Rulings 69161 and 94751.

Withholding of withholding tax is done at source. A company paying a dividend will know if the recipient entity falls within the safe harbour test. However, the dividend-paying company may not know if the recipient entity and its subsidiaries together fail the safe harbour test. There is no tolerance for companies that fail to withhold. Indeed, in Australia the withholding tax rules make the withholder liable for any withholding tax.⁷⁷ Meeting the 'commercial activity test' is even more problematic for dividend-paying companies to determine. Given that sovereign wealth funds are, by definition, sovereign, the applicable governments may be reluctant to divulge the information necessary for a dividend-paying company to make an assessment. This is notwithstanding the increase in compliance costs that would be imposed on such companies.

Determining which entities are to be covered is again a defining issue. The Options Paper extends the class of 'eligible entities' to include wholly owned entities of foreign government agencies such as wholly owned companies and investment vehicles. While it would cover entities such as Singapore's GIC Private Ltd and China Investment Corporation, it may not necessarily cover sovereign wealth funds owned by rulers rather than that country's government.

Apart from ownership, the other two qualifying criteria mirror those applicable to private ruling applications. The first is that the sovereign wealth fund must be funded solely with public money or property and that any asset, income or gain generated by the foreign government agency or sovereign fund must be for the benefit only of that foreign government agency or sovereign fund. This is an integrity measure designed to prevent any individual (including foreign sovereigns, officials or administrators acting in a private capacity) or ineligible entity receiving a tax benefit designed solely for a foreign government agency or sovereign wealth fund. The second is that only income derived from non-commercial activities will be exempt from tax.

Although the purpose underlying the Options Paper was not to change the law, it nevertheless suggested adopting the rules applicable in the United States.⁷⁸ It is therefore worth noting how the exemption operates in the United States.

The United States legislation is based on the principle of sovereign immunity, codified into the tax law in 1976 as section 892.⁷⁹ Termed the 'foreign government exemption' it applies only to 'integral parts' of foreign governments and their controlled entities.⁸⁰ A 'controlled entity' is defined as a separately formed entity created under the laws of the foreign country and that is wholly owned and controlled by a foreign government. In addition its net earnings must only be creditable to its own account and its assets must vest in the foreign government upon liquidation. It would therefore appear that sovereign wealth

⁷⁷ *Tax Administration Act* 1953 Schedule 1.

⁷⁸ Australian Federal Treasury, above n 66, [3.3]

⁷⁹ Janssen S, 'How to Treat(y) Sovereign Wealth Funds? The application of tax treaties to state-owned entities, including sovereign wealth funds' in D Weber and S van Weeghel (eds) *The 2010 OECD Updates: Model Tax Convention & Transfer Pricing Guidelines – A Critical Review* (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2011) pp 185-227.

⁸⁰ Defined in the Temporary Treasury Regulation paragraph 1.892-2T.

funds with company or statutory body governance structures would meet such a definition. However, specifically excluded would be an individual sovereign or official acting in its private capacity. In such a case how 'private capacity' is interpreted is important as some sovereign wealth funds are owned and controlled by rulers rather than by governments as noted above.

Section 892 provides a tax exemption for income received from investments in the United States in stock, bonds or other domestic securities and interest on deposits in the United States. This is termed 'portfolio income'. These investments must, however, be held solely in execution of governmental financial or monetary policy. As such, income derived from the conduct of a commercial activity, whether internal or external to the United States, will render all income received as taxable. That is, even US\$1 received from a commercial activity conducted anywhere in the world will negate the section 892 tax exemption. This is akin to the concept of 'tainted income' used in the Australian legislation.

The Options Paper is silent as to whether any commercial activity, however minimal, will negate any Australian exemption in total or if the governmental and commercial activities can be segregated and therefore the exemption could still apply to income received from governmental activities.

This proposal to codify the administrative practice of providing tax exemptions to sovereign wealth funds was abrogated by the Abbott Coalition Government in 2013.⁸¹

4. Looking forwards: Singapore's legislation

4.1 Operation of section 13Y

Singapore provides a tax exemption for prescribed income derived by sovereign wealth funds and their fund managers and investment advisers. The provision was introduced to 'encourage the building up of a cluster of sovereign funds as a niche class of financial institutions that promotes the development of [Singapore's] financial sector'.⁸²

Section 13Y of the *Income Tax Act* is reproduced in Annexure 1. Introduced effective from 1 April 2010, there is an in-built five-year sunset clause. The provision has subsequently been extended to 31 March 2019.⁸³ Allowing for a review every five years keeps it relevant. But, as will be seen, this does not mean that the tax exemption is only available for this period which would create uncertainty for the longer term.

⁸¹ Arthur Sinodinos, Assistant Treasurer, 'Integrity restored to Australia's taxation system' (Media Release, 14 December 2013).

⁸² Singapore, *Parliamentary Debates*, Parliament, 18 October 2010, 1354 (Minister of Finance, Mr Tharman Shanmugaratnam)

⁸³ *Income Tax Act* (ITA) s 13Y(2). Extended by Act 37 of 2014

The type of income that is exempt is termed 'specified income' and 'designated investments'. The specified income and designated investments of the managed funds of non-residents is also exempt and, as a result, section 13Y refers to and adopts the same definitions of these terms.⁸⁴ However, these are not so much definitions as listings, covering the type of investments sovereign wealth funds generally make. Two types of investments are specifically excluded. These are investments in companies in the business of trading or holding of Singapore immovable properties (other than the business of property development) and investments in unlisted stocks and shares.

The provision applies to two types of entities. The first is a 'prescribed sovereign fund entity' arising from its funds that are managed in Singapore by an 'approved foreign government-owned entity'.⁸⁵ It also applies to an 'approved foreign government-owned entity' from its own investments and also from managing the investments of the prescribed sovereign fund entity or providing an investment advisory service to the prescribed sovereign fund entity.⁸⁶

The legislation defines a 'prescribed sovereign fund entity' as a sovereign fund entity that satisfies prescribed conditions.⁸⁷ The term 'prescribed' is defined in the income tax legislation to mean prescribed by rules or regulations made under this Act. The first condition is that the funds of the sovereign fund entity are funds of the foreign government that wholly and beneficially owns the 'approved foreign government-owned entity' (itself a defined term) that manages the funds of the sovereign fund in Singapore. The second condition is that the sovereign fund entity does not engage in any commercial activity in Singapore.

A 'sovereign fund entity' is defined to mean either the government of a foreign country or an entity wholly and beneficially owned by the government of a foreign country whose funds are managed by an 'approved foreign government-owned entity'. These funds may include the reserves of that foreign government or any pension or provident fund of that foreign country.⁸⁸

A foreign government-owned entity is an entity that is wholly and beneficially owned, directly or indirectly by the government of a foreign country and whose principal activity is to manage its own funds or those of a prescribed sovereign fund entity.⁸⁹ The foreign government-owned entity is 'approved' through a formal process by the Minister for Finance or their delegate.⁹⁰

⁸⁴ Income Tax (Exemption of Income of Non-Residents arising from Funds Managed by Fund Manager in Singapore) Regulations 2010 (S 6/2010) s 2.

⁸⁵ ITA s 13Y(1)(a).

⁸⁶ ITA s 13Y(1)(b).

⁸⁷ Income Tax (Exemption of Certain Income of Prescribed Sovereign Fund Entities and Approved Government-Owned Entities) Regulations 2012 [3]. ("ITR")

⁸⁸ ITA s 13Y(4).

⁸⁹ ITA s 13Y(4).

⁹⁰ ITA s 13Y(2).

Terms such as ‘foreign government’ and ‘commercial activity’ are not defined in the tax legislation. The *State Immunity Act*, being the sovereign immunity legislation, defines a ‘commercial transaction’ as:⁹¹

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity (whether of a commercial, industrial, financial professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

4.2 Regulations supporting section 13Y

The applicable regulations are the Income Tax (Exemption of Certain Income of Prescribed Sovereign Fund Entities and Approved Foreign Government-Owned Entities) Regulations. In addition to defining the type of income that is exempt, it also determines the amount of income exempted from tax, the approval period and conditions, and reporting requirements.⁹²

The approval granted by the Minister for Finance (or delegate) to any foreign government-owned entity is for a maximum period of 10 years.⁹³ The approval is subject to the terms and conditions specified in the approval letter.⁹⁴ What these terms and conditions are, are not made publicly available. The approval may be renewed provided the renewal occurs while the provision is active.⁹⁵ That is, before the expiry of the sunset clause (if not extended as is currently the case). The reporting requirements do not appear to be onerous being merely an annual declaration that the conditions, the subject of the approval, have been met.⁹⁶

It is not only the type of income that is prescribed (in list form as discussed above) but also the amount. Any expenses allowable under the *Income Tax Act* and which are attributable to that income are deductible from that income.⁹⁷ Any other expenses are disregarded. Also to be deducted are any capital allowances attributable to that income even if no claim for these allowances have been made.⁹⁸

Further, no deduction is allowed for any loss arising from any transaction in respect of any designated investments if the gains or profits from such

⁹¹ SIA subsection 5(3).

⁹² ITA s 13Y(3).

⁹³ ITR [4(1)].

⁹⁴ ITR [4(2)].

⁹⁵ ITR [4(4)].

⁹⁶ ITR [8].

⁹⁷ ITR [6(a)].

⁹⁸ ITR [6(b)].

transaction would be exempt under this provision.⁹⁹ It needs to be remembered that Singapore does not have a capital gains tax regime.

4.3 Analysis of section 13Y

Applying the provision to two specific types of entities allows the tax exemption to be targeted to its policy objective. Rather than focusing on the governance structure, the Singapore legislature has looked to particular criteria. Definitional issues arise when the wording is made very broad in order to encompass the target entities. In other words, instead of attempting to define 'foreign government' Singapore has defined 'sovereign fund entity' and 'foreign government entity' in terms of other defining factors being ownership, purpose of the assets and income and source of income.¹⁰⁰ These three criteria match the criteria used by Australia: that the funds are owned by the foreign government, that the assets and income are for the sole benefit of the foreign government and that the source of the income is not from commercial activities.

The types of investments that give rise to exempt income are listed, not principles-based. Although detailed they will need to be periodically reviewed to take into account any new financial instruments. Being contained in regulations does make it easier to amend. While principles-based drafting is the preferred Australian option,¹⁰¹ the GST legislation with respect to financial supplies is in list form. The Options Paper was also rule-based.

While the legislation exemption is reviewed every five years, approval for a tax exemption can be made for up to 10 years. This provides certainty to the sovereign wealth fund in line with the long-term view of its investments while providing the Singapore Government flexibility in its policy.

It is contended that, by making the net amount deductible, unnecessary complexity has been introduced. Under the withholding regime it is the gross amount that is exempt, with no deduction allowed for expenses attributable to the gaining of that income. Both approaches give the same result.

5. Recommendations and concluding remarks

Sovereign wealth fund investments provide significant benefits for both home and host countries. For home countries they can aid in diversifying economies, spread income across generations and lower vulnerability to certain types of risks such as adverse macroeconomic developments and shifts in exchange rates

⁹⁹ ITR [7].

¹⁰⁰ Other defining factors that could be taken into account were discussed in section 2.2.1.

¹⁰¹ Duncan Bentley, 'Tax law drafting: the principled method' (2004) 14(1) *Revenue Law Journal* 1; Greg Pinder, 'The coherent principles approach to tax law design' *Economic Roundup Autumn 2005* Available at http://archive.treasury.gov.au/documents/987/HTML/docshell.asp?URL=07_coherent_principles.asp. Accessed 3 December 2015.

or commodity prices. For host countries the benefits arise from these funds having long investment horizons and unique risk bearing capacities. Both Australia and Singapore aspire to be financial capitals in the region and therefore seek to attract the investments sovereign wealth funds offer.

It is recommended that Singapore's section 13Y income tax exemption for certain income derived by sovereign wealth funds be considered for Australia subject to a few considerations. Discussion points centre around three areas: qualifying entities, qualifying investments and administrative matters. Of course, it need not be a full tax exemption but could be a reduced tax rate which is comparable with tax treaties.

As noted, Singapore's approach to defining the qualifying entities is not dissimilar to Australia's current approach. What Singapore does differently is to apply a more narrow definition so as to target the provision to (two) specific types of entities. Broad, all-encompassing definitions may ensure that all relevant entities are covered but also requires integrity and other, often complex, provisions to prevent unintended consequences. Consideration would need to be given to sovereign wealth funds that are owned by individuals rather than governments. The analysis in this paper has shown how difficult it is to incorporate sovereign wealth funds owned by individual rulers yet it is a lucrative investment market. This may best be achieved through negotiated tax treaties. It is noted, however, that Australia does not have a tax treaty with the United Arab Emirates.

There are essentially two methods to determine qualifying investments and/or specified income: rule-based or principle-based. If a principle-based approach were adopted, terms such as 'portfolio income' and 'passive income' would need to be defined. This could be an opportunity to take into account those assets that are inherently passive and involve mobile capital even if the bright line test of '10 per cent or more' is exceeded. Further, income should possibly not cease to be passive merely because of the volume of transactions. The long-term nature of the investment could be a consideration. Consideration would also need to be given to capital gains and losses.

A major disadvantage of rules-based drafting is that the list that inevitably results requires periodic review and updating to take account of new and changing financial instruments. The law (and regulations) tend to lag market practice. Notwithstanding sovereign wealth funds' investments tend to be long term, they are not necessarily always conservative. An alternative proposition is dual rates. These could be zero (or exempt) for 'traditional' investments and reduced rates (in line with tax treaties) for more volatile investments.

In Singapore the Minister for Finance is responsible for approval of the sovereign wealth funds and foreign government-owned entities. In Australia the Foreign Investment Review Board could fulfil that role. While this Review Board generally examines proposals by foreign interests wishing to undertake direct investment in Australia, being a government body may make it a more

acceptable option to foreign governments in considering the investments of these foreign governments.

Granting an exemption from tax means foregoing tax revenue. Yet this may be an acceptable price to pay for attracting investment by sovereign wealth funds. Further, Australia's Future Fund and other nation-building funds may benefit from reciprocity of tax-exempt treatment from other countries and the legislated exemption would certainly provide bargaining power when negotiating tax treaties.

A legislated provision better meets the design principles of simplicity and certainty. It is also more efficient, equitable and transparent as any possible subjectiveness associated with making a private ruling decision is eliminated.

Annexure 1

INCOME TAX ACT (CHAPTER 134)

(Original Enactment: Ordinance 39 of 1947)

REVISED EDITION 2014
(31st March 2014)

Part IV Exemption from Income Tax

Exemption of certain income of prescribed sovereign fund entity and approved foreign government-owned entity

13Y.

—(1) There shall be exempt from tax such income as the Minister may by regulations prescribe of —

(a) a prescribed sovereign fund entity arising from its funds that are managed in Singapore by an approved foreign government-owned entity; and

(b) an approved foreign government-owned entity arising from its funds that are managed in Singapore, and from managing in Singapore the funds of, or providing in Singapore any investment advisory service to, a prescribed sovereign fund entity.

(2) The Minister or such person as he may appoint may, at any time between 1st April 2010 and 31st March 2019 (both dates inclusive), approve a foreign government-owned entity for the purpose of subsection (1).

(3) Regulations made under subsection (1) may —

(a) provide for the period of each approval, and that the conditions to which any approval is subject may be stated in the letter of approval issued to the foreign government-owned entity;

(aa) provide for renewal of an approval;

(b) provide for the determination of the amount of income of a prescribed sovereign fund entity or an approved foreign government-owned entity that is exempt from tax;

(c) provide for the deduction of expenses, allowances and losses of a prescribed sovereign fund entity or an approved foreign government-owned entity otherwise than in accordance with this Act; and

(d) make provision generally for giving full effect to or for carrying out the purposes of this section.

(4) In this section —

“foreign government-owned entity” means an entity wholly and beneficially owned, whether directly or indirectly, by the government of a foreign country and whose

principal activity is to manage its own funds or the funds of a prescribed sovereign fund entity;

“prescribed sovereign fund entity” means a sovereign fund entity that satisfies such conditions as may be prescribed;

“sovereign fund entity” means the government of a foreign country or an entity wholly and beneficially owned by such government, whose funds (which may include the reserves of that government and any pension or provident fund of that country) are managed by an approved foreign government-owned entity.