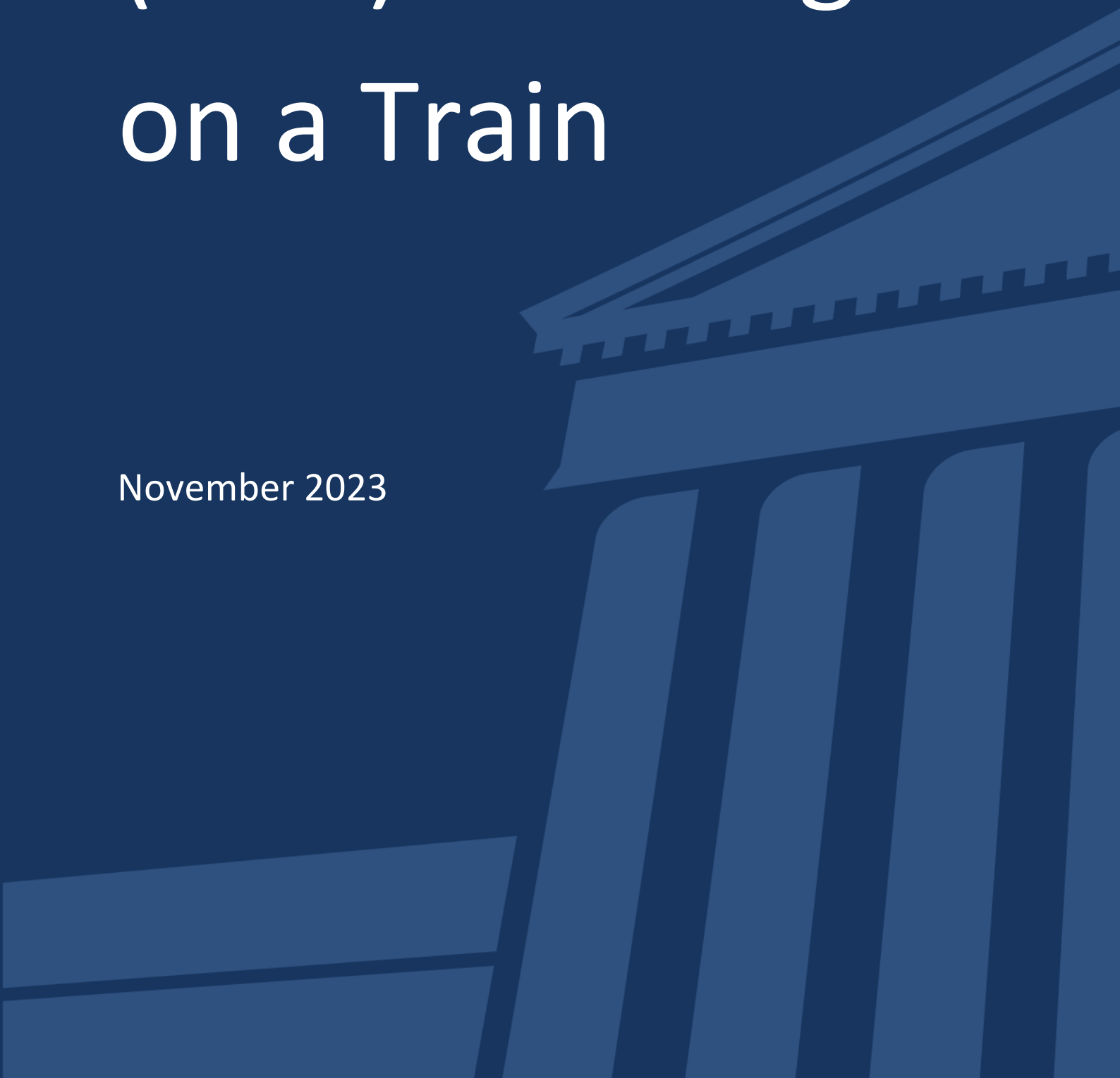


(Two) Sovereigns on a Train

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Policy Analysis 08/2023

(TWO) SOVEREIGNS ON A TRAIN

Author: Levik Rashiti*

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Group for Legal and Political Studies
“Rexhep Luci” str. 16/1
Prishtina 10 000, Kosovo
Website: www.legalpoliticalstudies.org
E-mail: office@legalpoliticalstudies.org
Tel/fax.: +381 38 234 456

*Research Fellow, Group for Legal and Political Studies



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(TWO) SOVEREIGNS ON A TRAIN¹

EXECUTIVE SUMMARY

What starts as a generic overview on Sovereign Wealth Funds, is only functional) to the linchpin of the paper - permeation into the terrain of Kosovo's Sovereign Fund initiative. Once there, the argument unfolds between the lines of Kosovo's proposal as manifested through its Concept Document and more importantly, the Draft Law seeking to regulate it.

At the center of the analysis lie legal arguments on why Kosovo's proposal is in tension with the bedrock principles on free-market economy and public finances. The tension and thus the investigation, centers on the extensive authorizations granted to the Sovereign Fund in domestic investments, with the inquiry naturally and briefly flowing through antitrust too. A segment of the preset paper is dedicated to a comparative rebuttal, comprising arguments that push back on the soundness of models used as reference by Kosovo in contouring its own Sovereign Fund.

Departing from the legal purview, the analysis then takes a policy bent, providing theoretical examinations of Kosovo's Sovereign Fund using the alter ego notion and the one-stop shop label to elucidate the initiative's underpinnings. Considering the state of play, this paper also -in passing- touches on a thorny issue, that of foreign direct investments – seizing the opportunity to offer a cautionary tale to policymakers.

On the whole, from a legal and policy vantage point, these contentious facets are not to be taken lightly. Hence, the ensuing critique.

ROADMAP

The present paper analyzes the Kosovo Sovereign Fund proposal in general and the corresponding Draft Law with its precursory Concept Document in specific. It starts by briefly providing a (I) general overview of Sovereign Wealth Funds and then narrows down to the mainstay of the paper: (II) Kosovo's Sovereign Fund initiative. The latter section is three-pronged: comprising legal arguments, policy perspectives, and theoretical examinations which push back on several grounds of the initiative. Afterward, the paper concludes with (III) final remarks and (IV) recommendations, excised from the substantive parts of the paper.

¹ An allegory to: Alfred Hitchcock (director) "Strangers on a Train," Warner Bros. 1951. *The purpose of using the allegory, is the idea behind the "alter ego" notion in this film: see Peter J. Dellolio, "Figures of Style in Strangers on a Train," Fall 2006 Issue of KINEMA, pg. 2, available at: <https://openjournals.uwaterloo.ca/index.php/kinema/article/view/1123/1335>, last accessed on: 09/11/2023. This alter ego notion is helpful in providing a theoretical examination of Kosovo's SWF proposal, and which also influences and inspires Section D of this paper & see *infra* note 83; see also Donald Spoto, "The Art of Alfred Hitchcock: Fifty Years of His Motion Pictures," First Anchor Books Edition, Second Edition: Completely Revised and Updated, New York, 1992, Chapter 23 ("Strangers on a Train").

I. A tour d’horizon of Sovereigns and their Funds

It has become a cliché to note that there is no consensus on framing a **definition** for a plethora of terms, but the same applies to what are known as Sovereign Wealth Funds (“SWF”),² a denomination by courtesy of Andrew Rozanov.³ In this context, different definitions stem from different bodies, such as the Organization for Economic Co-operation and Development (“OECD”), the Santiago Principles (“SP”)⁴, and the European Union (“EU”) among others.⁵ According to Haeri et al., an important aspect where the EU’s definition differs from those of OECD and SP is that it views SWFs as an entity rather than merely as a group(ing) of assets.⁶ However, although this may hold regarding the EU/OECD comparison,⁷ there does not seem to be an incongruity between the SP and EU formulations (owing to the former’s broad sweep)⁸ as the SP definition stipulates that:

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

While the foregoing definition traces back to 2008, the concept of an SWF on the other hand, first materialized 55 years earlier in Kuwait -although different authors would point to two different

² Hussein Haeri, Yarik Kryvoi, Camilla Gambarini & Robert Kovacs, "Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution," British Institute of International and Comparative Law and Withers, 2021, pg. 10 (quoting: IFSWF, ‘The origin of the Santiago Principles. Experiences from the past; guidance for the future’ https://www.ifswf.org/sites/default/files/IFSWF_Santiago_Principles_book.pdf).

³ Salman Bahoo, Ilan Alon & Andrea Paltrinieri, “Sovereign Wealth Funds: Past, Present and Future,” International Review of Financial Analysis, vol. 67, 2020, pg. 2 (citing: Rozanov, A. (2005). Who holds the wealth of nations? SSGA Working Paper. State Street Global Advisors; quoting: Mehrpouya, A. (2015). Instituting a transnational accountability regime: The case of sovereign wealth funds and “GAPP.” Accounting, Organizations and Society, 44, 15–36).

⁴ Udaibir S. Das, Adnan Mazarei & Alison Stuart, Sovereign Wealth Funds and the Santiago Principles, Chapter 5, pg. 59 *In*: Udaibir S. Das, Adnan Mazarei & Han van der Hoorn (Eds.) "Economics of Sovereign Wealth Funds - Issues for Policymakers," International Monetary Fund, 2010. (“An IMF-facilitated International Working Group of Sovereign Wealth Funds (IWG) was formed in May 2008 to develop a set of principles that properly reflect the investment objectives and practices of SWFs”); Santiago Principles are a “soft law” instrument: Victoria Barbary, Adam D. Dixon & Patrick J. Schena, "The Evolving Landscape of Sovereign Wealth Funds in a Changing World Economy: How Resilient Are the Santiago Principles?" *In*: Springer Studies in Law & Geoeconomics. Springer, Cham. 2023, pg. 9 (internal citations/quotations omitted). However, in the case of Kosovo, they would become “hard law” considering that the Draft Law (**infra* note 33) makes reference to them in its Article 6 para. 1.2.

⁵ Haeri et al., *supra* note 2, pg. 10-11 (internal quotations omitted).

⁶ *Id.* pg. 11.

⁷ *Id.* pg. 10-11 (providing OECD and EU definitions) (internal quotations omitted).

⁸ International Working Group of Sovereign Wealth Funds, "Sovereign Wealth Funds: Generally Accepted Principles and Practices "Santiago Principles," October 2008, pg. 27, fn. 47 (“... the use of the word arrangements as an alternative to funds allows for a flexible interpretation of the legal arrangement through which the assets can be invested. SWFs vary in their institutional arrangements, and the way they are recorded in the macroeconomic accounts may differ depending on their individual circumstances”); *see also* David Gaukrodger, “Foreign State Immunity and Foreign Government Controlled Investors,” OECD Working Papers on International Investment, 2010/2, OECD Publishing, 2010, pg. 14 (internal citations omitted).

⁹ International Working Group, *id.* pg. 27.

U.S. States for this¹⁰ before stretching out to a growing number of jurisdictions.¹¹ An expansion that now makes its arrival in Kosovo. Yet, they really started to attract attention with the advent of the '07 crisis in the U.S. where foreign SWFs intervened in the latter's domestic market to relieve the financial plight.¹² This **international feature** of SWFs is not coincidental, as quite to the contrary, SWFs were commonly oriented towards foreign and international markets¹³ and so is a voluminous corpus of scholarship on SWFs, ranging from international economic analyses to international relations, or from the standpoint of national security.¹⁴ But although SWFs have become a reality, abandoning theoretical postulations is unfavorable, as they give rise to engaging arguments on whether SWFs merit the label of "imperialist-capitalism," "market-based rational investors," or "new mercantilism."¹⁵ Moreover, its importance goes further, as a proper **theoretical evaluation** enhances the often-dry **legal** norms, and vice-versa.

However, despite the same umbrella term, SWFs are by no means the same as one another,¹⁶ hence the **classification of SWFs** into different groups.¹⁷ To this end, Bernstein et al. provide a taxonomy of SWFs based on their purpose, distinguishing between those concerned with

¹⁰ Zhao Feng, "How Should Sovereign Wealth Funds Be Regulated?" *Brook. J. Corp. Fin. & Com. L.*, vol. 3, 2009, pg. 485 (citing: Martin Weiss, *Sovereign Wealth Funds: Background and Policy Issues*, CRS REPORT FOR CONGRESS (RL34336; Jan. 28, 2008); Robert M. Kimmitt, "Public Footprints in Private Markets: Sovereign Wealth Funds and the World Economy," *Foreign Affairs*, vol. 87, no. 1, 2008, pg. 119; *This seems to be the prevalent point of view (Kuwait origins), however some other authors state otherwise: that the first SWF materializes many years earlier than that of Kuwait, namely in Texas, *see* Ermanno Affuso, Khandokar M. Istiak & Alex Sharland, "Sovereign Wealth Funds and Economic Growth," *Journal of Asset Management*, vol. 23, iss. 3, 2022, pg. 201 (citing: Dewenter, Kathryn L., Xi. Han, and Paul H. Malatesta. 2010. Firm values and sovereign wealth fund investments. *Journal of Financial Economics* 98 (2): 256–278); *see* Maria Kaurakova, "Sovereign Wealth Fund As A Subject Of The Private International Law," *Lex ET Scientia International Journal*, vol. 1, no. XX, 2013, pg. 51; *However we also have another author positing that the State of Ohio is where the first SWF materializes: Diego López, "SWF 3.0: How Sovereign Wealth Funds Navigated COVID-19 And Changed Forever," *Journal of International Business Policy*, Commentary, vol. 6, iss. 3, 2023, pg. 3.

¹¹ Feng, *id.* pg. 485-486 (internal citations omitted).

¹² *Id.* (Feng) pg. 483; *compare with* Hélène Raymond, "Sovereign Wealth Funds As Domestic Investors Of Last Resort During Crises," *International Economics*, no. 123, 2010, pg. 122 (scholar Raymond views '08 crisis as a turning point, but where SWFs shift their focus from the international realm to the domestic one).

¹³ Alan Gelb, Silvana Tordo, Håvard Halland with Noora Arfaa & Gregory Smith, "Sovereign Wealth Funds and Long-Term Development Finance Risks and Opportunities" Policy Research Working Paper 6776, pg. 2; *see also* International Working Group, *supra* note 8, pg. 27 ("The investment strategies include investments in foreign financial assets, so it excludes those funds that solely invest in domestic assets.") (This strengthens the argument that the international orientation is inherent to a SWF).

¹⁴ For instance, *see* Richard A. Epstein & Amanda M. Rose, "The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow," *University of Chicago Law Review*, vol. 76, no.1, 2009; *see* Benjamin J. Cohen, "Sovereign Wealth Funds and National Security: The Great Tradeoff," *International Affairs* (Royal Institute of International Affairs 1944-), vol. 85, no. 4, 2009; *see* Roland Beck & Michael Fidora, "The Impact Of Sovereign Wealth Funds On Global Financial Markets," ECB Occasional Paper Series, no. 91, Research Report, European Central Bank (ECB), July 2008.

¹⁵ Kyle Hatton & Katharina Pistor, "Maximizing Autonomy in the Shadow of Great Powers: The Political Economy of Sovereign Wealth Funds," *Columbia Journal of Transnational Law*, vol. 50, no. 1, Columbia Law and Economics Working Paper No. 395, 2012, pg. 4-5 (Hatton & Pistor argue instead in favor of an "autonomy-maximizing theory" *pg.5, the crux of which lies in ". . . the ruling elite[s] utiliz[ing] SWFs to secure their domestic political dominance against both internal and external threats," and which authors consider to be supported by a number of real-life cases scrutinized by the authors *pg. 3-4); On "new mercantilism," *see* Epstein & Rose, *id.* pg. 112-113. (quoting and citing: Ronald I Gilson and Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 *Stan L Rev* 1345, 1346 (2008)).

¹⁶ *See* Andrea M. Ryer, "Canadian Income Taxation of Sovereign Wealth Funds," (Master's thesis, University of Calgary, Calgary, Canada), retrieved from <https://prism.ucalgary.ca>. doi:10.11575/PRISM/13058 <http://hdl.handle.net/1880/106413>, 2018, pg. 16 (quoting: Andrew Rozanov, "Definitional Challenges of Dealing with Sovereign Wealth Funds" (2011) 1:2 *Asian Journal of International Law* 249 at 251).

¹⁷ William L. Megginson, Asif I. Malik & Xin Y. Zhou, "Sovereign Wealth Funds in the Post-pandemic Era," *Journal of International Business Policy*, vol. 6, iss. 3, 2023, pg. 255 (internal citation omitted).

safeguarding the economic well-being for the generations to come, then those aimed at keeping price fluctuations at check; and third, SWFs as "holding companies" allowing the state to invest strategically in national or foreign companies.¹⁸ This classification seems to be along similar lines with that of "Global SWF"¹⁹ to which Megginson et al. adhere²⁰ - and although other classifications exist,²¹ their importance goes beyond the scope of our work here.

In line with the foregoing, a class of SWFs are characterized as **development-based**, through the creation of which states seek to invest domestically in certain sectors.²² We note that Divakaran et al., consider development funds to form part of "public capital strategic investment funds," which in turn are a subtype of "*strategic investment funds*,"²³ but which does not give rise to any incongruity in terms of the substance of this paper (for reasons that we will discuss in the 'one-stop shop' section.)²⁴ In this context, "sovereign development funds" according to Sharma are described as "... hav[ing] a specific mandate to invest in sectors that support the social and economic development of local economies."²⁵

The geographic reach of these SWFs is diverse, traversing from the continent of Asia to that of Europe and Africa.²⁶ What is more, this class of SWFs is further divided into four types: namely, those focused on "... industrial development and economic diversification"; then those which have the role of "... holding companies ..."; SWFs engaged in privatization (to varying degrees) and lastly, those aimed at "... attracting foreign investors as co-investment partners."²⁷ Absent the third aspect, Kosovo's proposed SWF fits with all of the three other features (although that of a holding company weighs more) – justifying the "one-stop shop" label we ascribe.

¹⁸ Shai Bernstein, Josh Lerner & Antoinette Schoar, "The Investment Strategies of Sovereign Wealth Funds," *Journal of Economic Perspectives*, vol. 27, no. 2, 2013, pg. 222; A somewhat similar categorization is used when discussing SWFs that rely on natural resources: Alexander James, Timothy Retting, Jason F. Shogren, Brett Watson & Samuel Willis, "Sovereign Wealth Funds in Theory and Practice," *Annual Review of Resource Economics*, vol. 14, no. 1, 2022, pg. 622.

¹⁹ Global SWF, website is available at: <https://globalswf.com/>, last accessed on: 08/18/2023. (Global SWF is a group of "industry experts" focusing on "State-Owned Investors, including Central Banks (CBs), Sovereign Wealth Funds (SWFs), and Public Pension Funds (PPFs)"). It is interesting to note that the head of Global SWF, Diego Lopez (representing the latter) took part in the ceremony pertaining to Kosovo's SWF on May 7, 2023, see Global SWF, "Global SWF participates in the launch of Kosovo SWF" (May 8, 2023). Available at: <https://globalswf.com/news/global-swf-participates-in-the-launch-of-kosovo-swf>, last accessed on: 09/20/2023.

²⁰ Megginson et al., supra note 17, pg. 255 (internal citation omitted).

²¹ Id. pg. 255 (citing Carney, R. W. 2021. Sovereign wealth funds' investment purpose and the investment implications. Available at SSRN 3902962).

²² IMF, "Sovereign Wealth Funds: IMF Global Financial Stability Report (GFSR) Annex 1.2," October 2007, pg. 46. Available at: <https://www.imf.org/external/pubs/ft/gfsr/2007/02/pdf/annex12.pdf>, last accessed on: 08/09/2023.

²³ Shanthi Divakaran, Håvard Halland, Gianni Lorenzato, Paul Rose & Sebastian Sarmiento-Saher, "Strategic Investment Funds - Establishment and Operations," World Bank Group, World Bank Publications, 2022, pg. 7 (internal citation/reference omitted).

²⁴ Infra Section F of this paper.

²⁵ Rajiv Sharma, "Sovereign Wealth Funds Investment in Sustainable Development Sectors," pg. 2, available at: https://www.un.org/esa/ffd/high-level-conference-on-ffd-and-2030-agenda/wp-content/uploads/sites/4/2017/11/Background-Paper_Sovereign-Wealth-Funds.pdf, last accessed on: 08/18/2023.

²⁶ Barbary et al., supra note 4, pg. 11-12 (internal citations omitted); *Note that in this paper we confine the comparative analysis only to models that Kosovo has used as points of reference, in infra Section E of this paper.

²⁷ Id. (Barbary et al.) pg. 12 (citing: Gelb A, Tordo A, Halland H (2017) Domestic investment practices of sovereign wealth funds: empirical evidence to inform policy debates. In: Rietveld M, Toledano P (eds) *The new frontiers of sovereign investment*. Columbia University Press, New York, pp 124–149; Bruce-Clark P, Monk A (2017) *Sovereign development funds: the governance and management of strategic investment institutions*. In: Cumming DJ, Filatotchev I, Reinecke J, Wood G (eds) *The Oxford handbook of sovereign wealth funds*. Oxford University Press, Oxford; Schena PJ (2017b) *When states invest at home: the development role of sovereign wealth funds in public finance*. *Wake Forest Law Rev* 52:917).

At any rate, SWFs are historically reflective of an international feature,²⁸ and there is more room for assessing SWF types that invest in their domestic terrain.²⁹ Evidently, this has not been a matter of predilection or cherry-picking by scholars, but rather, akin to a form of supply and demand. In this context, there are varying thoughts regarding the soundness of SWFs investing internally, as for instance, one author views it as a promising avenue regarding the prospects of attaining the Sustainable Development Goals,³⁰ while another is wary of this course of action and pushes back on the idea,³¹ and others serve the middle ground by conditioning domestic investment with certain measures to be taken.³²

Now, all these standpoints carry valid points, but it is only right that we adapt to Kosovo's unique position. Hence the ensuing part of the analysis, which forms the mainstay of the paper.

II. THE CASE OF KOSOVO

This section forms the centerpiece of our inquiry, beginning with a (A) background on Kosovo's SWF Draft Law, after which (B) an overture is provided setting the stage for the (C) legal analysis scrutiny. Afterward, a theoretical explication of Kosovo's SWF as a (D) alter ego is provided, followed by (E) comparative assessments in the form of a rebuttal. At the end of this section, we argue that Kosovo's SWF is essentially (F) a one-stop shop mechanism, and the segment concludes with (G) a cautionary tale for policy-makers.

A. The (Technical) Structure of Kosovo's SWF Draft Law in 353 words

At the beginning of the second quarter of 2023, the Kosovo Government penned down the "Draft Law on the Sovereign Fund of Kosovo,"³³ having succeeded its Concept Document.³⁴

²⁸ Gelb et al., *supra* note 13, pg. 2.

²⁹ *Id.* pg. 24.

³⁰ Sharma, *supra* note 25, pg. 1-2.

³¹ Andrew Bauer, "Six Reasons Why Sovereign Wealth Funds Should Not Invest or Spend at Home," Natural Resource Governance Institute Blog, available at: <https://resourcegovernance.org/articles/six-reasons-why-sovereign-wealth-funds-should-not-invest-or-spend-home>, last accessed on: 08/25/2023.

³² Gelb et al., *supra* note 13, pg. 3.

³³ ***Important clarifications here:** The Draft Law version (approved in principle by the Assembly on July 13th of 2023 -see *infra* note 35-) is this: "Draft Law nr. 08/L-238 on the Sovereign Fund of the Republic of Kosovo," ("Draft Law"). Available at: https://www.kuvendikosoves.org/Uploads/Data/Documents/PLperFondinSovranteRepublikesseKosoves_wj3YCbEbm.pdf, last accessed on: 07/25/2023;

***However**, later on, the relevant Assembly's Committees approved the **amendments proposal** to the Draft Law (on 11/21/2023, respectively 11/23/2023), and as of 11/30/2023 it is expected to be voted together with the Draft Law, by Kosovo's Assembly (see Kosovo's Assembly Calendar for 11/30/2023 in *infra* note 36; see Kosovrapress news article, again, in *infra* note 36) *The document containing **only the proposed amendments** is available at: <https://pdf.ac/2i2lcc> (*given that the proposed amendment as of 11/29/2023 is not published to the public, I have created this URL for the readers), last accessed on: 11/22/2023; also: RTKLive, Arbresha Berisha "The Committee on Economy Approves the Draft Law on the Sovereign Fund," news article, published on: 11/21/2023, available at: <https://www.rtklive.com/sq/news-single.php?ID=652396>, last accessed on: 11/28/2023.

³⁴ "Concept Document for Establishing the Sovereign Fund of the Republic of Kosovo," pg. 16-21, pg. 17 fn. 15 ("Concept Document"). Available at: https://kryeministri.rks-gov.net/wp-content/uploads/2022/07/PDF-07.07.2022-ENG-KONCEPT-DOKUMENTI-Fondi-Sovran-FINAL_prill2022_PASTER.pdf, last accessed on: 11/22/2023.

Eventually, the Assembly of Kosovo approved the Draft Law (in principle) on July 13 of the same year,³⁵ and as it stands, an entry into force requires a second approval by the Assembly.³⁶

Now, regarding its structure, the Draft Law is grouped and structured into fifteen thematic chapters, starting off with basic norms and principles and continuing with the Sovereign Fund's organizational structure and operation.³⁷ Accordingly, Chapters I and II start off by defining several terms used throughout the Draft Law, and continues with the principles which ought to guide the SWF, respectively.³⁸ Afterward, Chapter III sets the organizational backbone of the SWF, where among other aspects it provides the basis for the SWF's statute.³⁹

But to understand the structural organization of the SWF, one has to leap to Chapter VIII, delineating the bodies and positions with their corresponding appointment/removal procedures, and then, Chapter XIII regulating SWF's position in terms of how it relates to Kosovo's institution.⁴⁰ Tracing back, Chapters IV to VII prescribe aspects of: SWFs assets (through a tripartite categorization); its foundational and operational authorization related to enterprises; its investment orientation (conceived to be both domestic and international) and its "strategy and planning."⁴¹

Further, Chapter IX addresses the issue of public procurement, before continuing with regulating issues of "dividends and reserves" in Chapter X.⁴² Next, Chapter XI regulates aspects pertaining to ownership of "publicly owned assets" and other closely related facets to "public finance," while Chapter XII addresses the financial accountability of the SWF.⁴³ Additionally, Chapter XIV foresees the establishment of a quasi-educational body within the SWF.⁴⁴

Lastly, Chapter XV concludes the Draft Law with the now-customary "transitional and final provisions," which -among other aspects- regulate the interplay of the Draft Law with other laws.⁴⁵ It also sets the Commercial Court of Kosovo as competent when disputes concerning SWF or its enterprises arise (with exceptions for when the competent court is instead a foreign one, or in certain instances when arbitration takes precedence).⁴⁶

³⁵ Decision Nr. 08-V-584, 13/07/2023, Assembly of the Republic of Kosovo, available at: https://www.kuvendikosoves.org/Uploads/Data/Documents/238Vendimpermiratimneparim_6U56Gtr8Kk.pdf, last accessed on: 10/18/2023; Telegrafi.com "The Draft Law on Sovereign Fund Goes Through in Principle," news article, published on 07/13/2023, available at: <https://telegrafi.com/kuvendi-kosoves-e-ka-kaluar-ne-parim-projektligjin-per-fondin-sovran/>, last accessed on: 07/24/2023;

³⁶ *As of 11/30/2023, the voting by Kosovo's Assembly is **expected** to be on **11/30/2023**: (Kosovo's Assembly Calendar, schedule for the date 11/30/2023, *point 8 of the Session that is scheduled for *16:00, available at: <https://www.kuvendikosoves.org/shq/kalendari/>, last accessed on: 11/30/2023); also Kosovapress, "The Draft Law on the Sovereign Fund, the Opposition Warns of Sending it to the Constitutional Court," news article, published on 11/27/2023, available at: <https://kosovapress.com/%E2%80%8Bprojektligji-per-fondin-sovran-opozita-paralajmeron-dergimin-ne-kushtetuese/>, last accessed on: 11/28/2023 (" . . . in a special session [of Kosovo's Assembly on 11/30/2023], several international agreements and the Draft Law on the sovereign fund will be voted on."); *Regarding the procedural aspects awaiting the Draft Law and the proposed amendments: see Rules of Procedure of the Assembly of the Republic of Kosovo, Article 78 & 79, available at: https://www.kuvendikosoves.org/Uploads/Data/Files/6/2022_08_09_RulesofProcedureoftheAssemblyoftheRepublicofKosovo_mGJNJJBv62.pdf, last accessed on: 11/23/2023; also see supra note 33.

³⁷ Draft Law, supra note 33.

³⁸ Id. Chapter I & II.

³⁹ Id. Chapter III.

⁴⁰ Id. Chapter XIII.

⁴¹ Id. Chapter IV, V, VI & VII.

⁴² Id. Chapter IX & X.

⁴³ Id. Chapter XI & XII.

⁴⁴ Id. Chapter XIV.

⁴⁵ Id. Chapter XV.

⁴⁶ Id.

B. Curtains Unfold

The use of *bold formatting* for several terms in the preceding parts of this paper has not been sporadic. On the contrary, it is reflective of a schematic pattern intended to distill the core aspects related to SWFs and set the stage for the central part of this work. In this sense, and recalling a dichotomy of *defining* SWFs (as presented at the beginning of this paper),⁴⁷ one can ascertain that Kosovo's proposed SWF is akin to the EU/SP definition.⁴⁸ This is due to the confluence of two factors: its fabric of a joint stock company,⁴⁹ compounded by the functional authorizations vested in it. Here, it is worth noting that the term "fund" is misleading in describing Kosovo's SWF (by the same token for countries with similar organizational forms of SWFs), as it connotes something that is mainly static and thus unsuitable to describe the dynamic nature of joint stock companies.

As per *classifying* Kosovo's model, the structure of the paper has been suggestive in this sense, by briefly angling the attention to development funds. Accordingly, as the Draft Law suggests (alongside the Concept Document provided prior to it), Kosovo has followed a dual model, combining the prongs of development and investment.⁵⁰ Admittedly, Kosovo's model is reflective of a catch-all approach,⁵¹ but we consider that its ethos is really confined to the nexus of investing domestically in private companies,⁵² which is also the most contentious in our view.

At any rate, a crucial consideration is that of theory – an elusive terrain. Fortunately, the ensuing legal analysis of Kosovo's SWF Draft Law also aids in laying the groundwork for the theoretical part. Thereafter, the latter complementing the former.

C. Legal Inquiry

Several provisions in the Draft Law give rise to vexed legal questions, but which we group into two domains. Drawing from this, the two main areas discussed in the following comprise **(1)** the concept of the free-market economy and **(2)** public finances.

1. Free-Market Economy

A free-market economy is what Kosovo's Constitution prescribes,⁵³ at the heart of which lies competition between market participants. Understandably, this state-economy detachment is not boundless as Kosovo's institutions carry duties in safeguarding this framework, an

⁴⁷ See *supra* note 6.

⁴⁸ See *supra* note 7 & 8.

⁴⁹ Draft Law, *supra* note 33, Article 14 para 1.

⁵⁰ *Id.* Article 1; see also Concept Document, *supra* note 34, pg. 16, available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41337&fbclid=IwAR3T8nLNN4QUvyVmtEiUtXirJPA0WM7aHtJW5UEDHIOJPApfoY0ob-eE-Vg>, last accessed on: 08/09/2023.

⁵¹ *Infra* Section F of this paper.

⁵² Draft Law, *supra* note 33 Article 31.

⁵³ Constitution of the Republic of Kosovo (hereinafter "K-Constitution"), Article 10.

authorization commonly referred to as intervention.⁵⁴ Surely one could debate the boundaries of interventionism, but parlance counsels us that what falls outside of it, is participation.⁵⁵

Yet, the Sovereign Fund's authorizations do not instantly trigger a constitutional violation. Considering that the Draft Law offers the possibility of transferring ownership of public assets to the SWF,⁵⁶ there is a valid argument that the SWF complies with constitutional parameters. That is, given that its aim is presumably the furtherance of the public's interest, a claim that can be supported if read *in analogy* with Article 119 para. 9 of Kosovo's Constitution, positing that "[t]he Republic of Kosovo shall exercise its ownership function over any enterprise it controls consistently with the public interest, with a view to maximizing the long-term value of the enterprise."⁵⁷ Moreover, from this Article one can ascertain this nexus of public interest,⁵⁸ where the constitutional check is centered around the notion of public interest, and on the fulfillment of which the public-enterprise validity impinges upon. Therefore, from this standpoint, the Draft Law is in line with the Constitution when it foresees the opportunity for the SWF to gain and maintain ownership of public assets.⁵⁹

However, concerns arise when facing the Draft Law's authorization of the SWF to invest in private-domestic companies.⁶⁰

In this sense and returning to the dimension of being a participant in the economy, the maximum where SWF's constitutionality can stretch is confined to the ownership of enterprises related to the public interest. However, the Draft Law supplies the SWF with -essentially- a *carte blanche* to invest in domestic companies.⁶¹ Surely, the cynic would posit that companies have the

⁵⁴ Enver Hasani *In: Enver Hasani & Ivan Čukalović, "Commentary - Constitution of the Republic of Kosovo,"* GIZ, 2015, pg. 612. ("Article 119.4 [of Kosovo's Constitution] defines the obligation of the state of Kosovo to promote welfare for all its citizens, encouraging sustainable economic development. Two are the basic principles deriving from the article in question: one, for the state to have the obligation to guarantee a basic social welfare environment for its citizens; which is a relatively important obligation but also *interventionist*; and two, for the state to encourage sustainable economic development through its public policies. In terms of the latter, Article 119.4 *does not make the state the bearer of development economic*, but imposes the obligation to build the basic conditions *so that the sector private could be able to carry such a development forward.*") (emphasis added); Evidently, interventionism traces back to Keynes, *see* Bruce Greenwald & Joseph E. Stiglitz, "Keynesian, New Keynesian and New Classical Economics," *Oxford Economic Papers* 39, no. 1, 1987, pg. 119; Also, on Keynes *see also* Stephen K. Aikins, "Political Economy of Government Intervention in the Free Market System," *Administrative Theory & Praxis*, Routledge, vol. 31, iss. 3, 2009, pg. 404-405 (internal citations omitted); Regarding state "intervention", there is a recent Kosovo's Constitutional Court pronouncement: Judgment in Case Nr. KO173/22, *infra* note 154, para. 179, para. 131, para. 132 and overall / *in Passim*.

⁵⁵ *Id.*, Hasani; *but see* Andrew Rozanov, "Long-Term Implications of the Global Financial Crisis for Sovereign Wealth Funds," Chapter 18 *In: Das et al., supra* note 4, (On State's involvement in economy in times of crisis as a "principal player in the domestic financial market." pg. 253) (Also, Rozanov gives support the argument for ". . . a new version of the Washington Consensus . . ." **id.*, Rozanov, pg. 254, pg. 255 fn. 20 (internal citation omitted)); As per an interesting vantage point which also touches on the issue of interventionism *see* Agnès Festré, "Michael Polanyi's vision of economics: Spanning Hayek and Keynes," *Journal of Government and Economics*, vol. 4, 2021, pg. 2 & overall / *in Passim* (focusing on Michael Polanyi's thought and thus touching on Keynes and Hayek thoughts too).

⁵⁶ Draft Law, *supra* note 33, Article 52 para. 1.

⁵⁷ K-Constitution, Article 119 para. 9.

⁵⁸ Besides Article 119 para. 9, this "public interest" check is present in para. 5 of the same Article of K-Constitution.

⁵⁹ Draft Law, *supra* note 33, article 52; *We return to this point in Section F of this paper.

⁶⁰ *Id.* Article 31, para 1, 2 & 3.

⁶¹ *Id.* Article 31; *One could argue that the requirements for domestic companies to be producers of goods, or exporters (*Draft Law, supra* note 33, Article 31 para 3.3) present(s) a sufficient check on this power. However,

right to refuse this owing to the free market, but this very argument retaliates, because “when the Leviathan comes to market,”⁶² resistance becomes illusory. Furthermore, these concerns are amplified by the Draft Law’s provisions on “champion enterprises,” which through its licensing scheme⁶³ would create a *de jure* hierarchy of private companies.⁶⁴ In this context, some may hurry to point out that the Constitution foresees the restriction of competition if done by a law,⁶⁵ and thus -the argument would follow- the SWF’s domestic investment in private companies is justifiable. However, it is unlikely that the drafters of the Constitution had in mind a restriction that is alienated from the notion of public interest. Instead, the more cogent rationale counsels us that the drafters were likely envisaging acts akin to “price regulation” or measures in areas -again- related to the public interest.⁶⁶

Additionally, we must bear in mind that although formally a single entity, the SWF transcends these lines in practice, given its status of a joint stock company,⁶⁷ which enhances its reach and therefore, the concerns for a free and competitive market economy.

Thereby, the Draft Law’s almost *unbridled*⁶⁸ authorization for the SWF to invest in private-domestic companies raises constitutional concerns related to the notions of free-market and

the broad reach of these parameters would enable a large number of private companies to qualify for absorbing SWF investments and thus effectively dissolve competition.

⁶² *A fitting idiom provided by author Simon Lacey in his paper: Simon Lacey, "When Leviathan Comes to Market: Emerging Multilateral Disciples on State Owned Enterprises and What Existing Rules on State Trading Enterprises and Sovereign Wealth Funds Can and Cannot Teach Us," November 2011, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984074, last accessed on: 11/21/2023.

⁶³ Draft Law, *supra* note 33, Article 32; ; On issues and aspects pertaining to national champions in general see Remarks of Deborah Platt Majoras U.S. Federal Trade Commission Chairman, "National Champions: I Don't Even Think it Sounds Good," International Competition Conference/EU Competition Day, Munich, Germany, 26 March 2007, pg 3 (internal citations omitted), available at: https://www.ftc.gov/sites/default/files/documents/public_statements/national-champions-i-dont-even-think-it-sounds-good/070326munich.pdf, last accessed on 10/24/2023; Also for an interesting examination regarding national champions: Jonathan Galloway, "The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy," *European Competition Law Review*, 2007.

⁶⁴ From -evidently- another angle, see the following cases: The Constitutional Court of the Republic of Kosovo, Judgment in Case Nr. KO157/18, Nr. ref.: AGJ 1341/19, 28 March 2019, paras. 108, 113, 114, 115, 116, 134, 135 & *in Passim* (“... the obligation of only insurance companies to pay the determined amount from the income collected from the motor liability insurance as a contribution to the Red Cross budget is not justified, namely it is not based on objective reasons. Consequently, there is no legitimate aim that would justify the *unequal treatment* of vehicle insurance companies.” (emphasis added) para. 113 of the foregoing Judgment, eventually finding (among other violations) violation of Article 119.2 and 26 of Kosovo’s Constitution (point II of the foregoing Judgment’s dispositive));

The Constitutional Court of the Republic of Kosovo, Judgment in Case Nr. KO97/12, Nr. ref.: AGJ403/13, 12 April 2013 (the applicant in this case claimed (among others) a violation of Article 10 of Kosovo’s Constitution due to “commercial disadvantage,” and the Court found (again among other violations) that specific provisions of the given law did indeed contravene Article 10 (para. 134, 135 & point II of the dispositive in this Judgment));

Judgment in Case Nr. KO173/22, *infra* note 154 (“... economic operators enjoy all fundamental rights and freedoms guaranteed by Chapter II of the Constitution, for as applicable. The same can only be limited to criteria and conditions defined in Article 55 of the Constitution and consequently, any interference in these rights, must (i) be "defined by law"; (ii) to "pursue a legitimate purpose"; AND (iii) be "proportional to the purpose pursued," (*para. 135), and pg. 19 of the same Judgment (quoting Article 21.4 of the Constitution)).

⁶⁵ K-Constitution, Article 119 para. 3; compare/contrast this with the recent Kosovo’s Constitutional Court Judgment KO173/22 in *infra* note 154, overall / *in Passim*.

⁶⁶ Here, a representative example would be “the Draft Law on Price Regulation of Medicinal Products,” available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41737>, last accessed on: 07/25/2023; compare/contrast this with the recent Judgment KO173/22 in *infra* note 154, overall / *in Passim*.

⁶⁷ Draft Law, *supra* note 33, Article 14 para. 1.

⁶⁸ See *supra* note 61.

competition,⁶⁹ urging immediate reconsideration.

2. Public Finances

From another vantage point, the Draft Law explicitly derogates the “Law on Public Procurement”⁷⁰ which although not a constitutional category, has traditionally reflected one of the pillars of the constitutional requirement of accountability for public finances. To be clear, derogation of the Law on Public Procurement is not a *per se* constitutional violation, as with the exception of “vital legislation”⁷¹ (which the Law on Public Procurement is not), there is no hierarchy between laws in our legal system. Nevertheless, the constitutional conundrum here is that there is no substitution provided for the Law on Public Procurement in relation to the SWF, and as the Constitutional Court of Kosovo asserted:

“... the authorities have a constitutional obligation to ensure the uniform application of laws; therefore this constitutional obligation may be impeded by introducing provisions which completely contradict other existing relevant provisions of the law [...] *without changing those provisions at the same time.*”⁷² (emphasis added).

Accordingly, by derogating its application to the SWF, the Draft Law not only sets the foundations of an additional/concurrent system procurement but sets the ground for a system adopted in the form of a *policy* rather than in the form of a *law*. A caveat here is that it will be the statute adopted by the Assembly of Kosovo⁷³ (also operating under the capacity of the Shareholder’s Assembly)⁷⁴ that will furnish the groundwork for the SWF’s procurement domain,⁷⁵ but the exact procedures and rules are to be set out by the SWF.⁷⁶ Yet, this goes further, as the ‘privilege’ of alternative strains of procurement rules, extends to the enterprises falling within the umbrella of the SWF,⁷⁷ thus paving the way to a multitude of procurement norms.

⁶⁹ See K-Constitution, Article 7, 10, 119 para. 1 & para. 2.

⁷⁰ Draft Law, *supra* note 33, Article 48 para. 1; *Also an MP, Ms. Hykmete Bajrami from the opposition, criticized (among other aspects, such as calling the initiative “Attempt to capture everything...” *a pronouncement which another media used in the title in their news article: *Nacionale.com*, *in *infra* note 157*) the Draft Law’s derogation of the Law on Public Procurement: Kallxo.com, “Bajrami Considers the Draft Law on the Sovereign Fund Unconstitutional,” news article, published on 05/08/2023, available at: <https://kallxo.com/lajm/bajrami-e-konsideron-antikushtetues-projektligjin-per-fondin-sovran/>, last accessed on: 11/28/2023; see comparatively: the Slovenian Sovereign Holding does not derogate the applicable Slovenian law on procurement: Slovenian Sovereign Holding Act (ZSDH-1), Article 72 and also Article 31 para. 2. Available at: <https://www.gov.si/assets/ministrstva/MF/Glavno-urednistvo/Novice/DOKUMENTI/SDH-javni-poziv-za-NS-april-2020/SLOVENIAN-SOVEREIGN-HOLDING-ACT-Unofficial-translation.pdf>, last accessed on: 07/25/2023.

⁷¹ K-Constitution, Article 81.

⁷² The Constitutional Court of the Republic of Kosovo, Judgment in Case Nr. KO 97/12, Nr. ref.: AGJ403/13, 12 April 2013, pg. 31 para. 130 (internal references omitted).

⁷³ Draft Law, *supra* note 33, Article 17 para. 3.

⁷⁴ *Id.* Article 39 para. 3.

⁷⁵ *Id.* Article 17 para. 2.6 (“The Statute shall define: the principles and procedure for approving the procurement policy”).

⁷⁶ *Id.* Article 48 para. 2 (“The Supervisory Board shall adopt procurement policy of the Fund in accordance with this Law and the Statute of the Fund. The procurement policy of the Fund shall define the procedure for purchasing goods and services for the Fund and the mandatory rules for the enterprises of the Fund”).

⁷⁷ *Id.* Article 48 para. 3.

In doing so, the Draft Law affords an inflated level of deference to the SWF, diluting the power of the Assembly to lay down the procurement rules as law, and enhancing those of the SWF to do so under policy-basis. This consignment of procurement rules from the domain of law to that of policy raises two issues: accountability regarding the use of public finances (as discussed above), but we also face the conundrum of the Assembly's constitutionally vested competencies.⁷⁸

That is, according to the current Draft Law, the Assembly would indirectly relinquish its law-making authority with regards to lawmaking of the procurement procedure and rules, a role that is constitutionally vested and that it has also customarily exercised in the past, as evidenced by its adoption of the Law on Public Procurement.

To this end, even though these two issues go hand in hand, they give rise to two separate constitutional issues. First, we have the accountability requirements regarding public expenditure and management, enshrined in Article 120, para. 1 of the Constitution⁷⁹, whereas the second constitutional issue consists of the Assembly withdrawing from its vested powers of lawmaking (embedded in Article 65 para. 1 of the Constitution),⁸⁰ by delegating the entitlement to prescribe procurement rules and procedures to another body (which, what's more, forms part of no branch of government).

D. Alter Ego

For one, the principle of SWF's independence⁸¹ is paradoxical given that it is (at least partly) financed by taxpayers, established by the will of the people (through the Assembly) to which it is accountable, and its operation intersects with the work of other institutions (Executive and Assembly) in ways that a private entity does not. For another (and to pre-empt the counterargument), neither the delegation of SWF's control to persons not vested with institutional power nor the status of a joint stock company (or reference to the Law on Business Organizations) are sufficient to nullify the paradox, because we fear that the question "[c]an an SWF indeed serve as an island of good governance in a domestic political environment otherwise characterized by poor institutional quality?"⁸² does not have an affirmative answer.

Therefore, taking into consideration these two central considerations, it wouldn't be an overkill to characterize it as an alter ego of the State.⁸³

⁷⁸ See K-Constitution, Article 65.

⁷⁹ K-Constitution, Article 120 para. 1.

⁸⁰ K-Constitution, Article 65 para. 1.

⁸¹ Draft Law, *supra* note 33, Article 11.

⁸² Adam D. Dixon, Patrick J. Schena & Javier Capapé, "Sovereign Wealth Funds - Between the State and Markets" Finance Matters, Agenda Publishing, 2022, pg. 83 (citing Sala-i-Martin, X. & A. Subramanian 2013. "Addressing the natural resource curse: an illustration from Nigeria". *Journal of African Economies* 22 (4): 570–615)).

⁸³ Although in a different context, *see* Kaurakova, *supra* note 10, pg. 52-53 ("Sovereign wealth funds may be considered by the law as alter-ego of the government that is characterized by the absolute immunity or persons which *jure imperii* are protected."); *see* Muhammad Bello & Elizabeth Snyman-Van Deventer, "Reconceptualising Sovereign Debt In International Law," *Law, Democracy & Development*, vol. 26, no. 1, 2022, pg. 260. ("The case of *Law Debenture Trust Corp v Ukraine* indicates that, at least for the purpose of sovereign debt, SWFs can be called official creditors as they function as alter egos of their governments.") (citing: *Ukraine v Law Debenture Trust Corp Plc* (2018) at para 200); the reader might find helpful the following: Weidemaier, *infra* note 88, (overall the paper); the same applies to the following article: Omair Jafrani & Sandra Aigbinode Lange, "Seizing from an Alter Ego: Quebec Court determines whether the assets of state-owned companies can be validly seized to pay the debt of the Republic of India," McCarthy Tétrault, *International Arbitration Blog* 03/01/2022, available at: <https://www.mccarthy.ca/en/insights/blogs/international-arbitration-blog/seizing-alter>

Now, construing the problematic aspect of this alter ego dimension is not an arduous task to accomplish. Because the SWF enables the state to enter the economy “through the backdoor of capital markets,”⁸⁴ -and Kosovo’s Draft Law heralds the latter and the SWF’s authorizations to invest there⁸⁵- the same safeguards do not apply and the pursuit of economic interest could act as a shield in pursuit of illicit aims. Accordingly, one way to look at it (and perhaps the most sensible) is the use of the SWF to entrench political power on market participants where on one hand the State remains intact, whereas the SWF acts as the facilitator. Hence, the backdoor that we referenced earlier is instead a Dutch door⁸⁶ but not for purposes of the Dutch disease,⁸⁷ but rather to facilitate the symbiosis. Hence, if the State uses the “backdoor” to enter the economy, the market participants could use the same to ‘enter’ the State - a ubiquity of the SWF’s competencies that collides with the already-corroded field of antitrust in Kosovo.

Thus, we emphasize again that the lynchpin of characterizing Kosovo’s SWF as an alter ego lies in its potential to serve as an avenue for pursuing illegitimate aims veiled under the veneer of SWF’s investment choices.⁸⁸ But one would err in assessing this as a matter of probability for things to go south. Rather, the mere existence of justifications is sufficient to raise the alarm, and albeit this holds in general, the liable democracy that Kosovo is exacerbates these concerns, and as the ensuing section illustrates, Kosovo’s reliance on a select number of comparative models⁸⁹ does not rise to the occasion either.

Hence, the following rebuttal.

[ego-quebec-court-determines-whether-assets-state-owned-companies-can-be-validly-seized-pay-debt-republic-india](#) , last accessed on: 11/29/2023 (internal citation/s omitted); see also *supra* note 1.

⁸⁴ Massimiliano Castelli & Fabio Scacciavillani, "SWFs and State investments: A preliminary general overview," *In: Research Handbook on Sovereign Wealth Funds and International Investment Law*, Chapter 1, Edward Elgar Publishing, pg. 30 ("Over the last decade [...] there has been an evolution in how sovereign wealth is managed and invested in global markets ... This evolution has raised the profile of sovereign institutions, which have moved from their traditional position of being custodians of a reserve of liquidity to being active players in the private economy. This has raised some eyebrows among those who see this evolution as the return of state capitalism through the back door of capital markets."); Kosovo’s SWF Draft Law announces the aspiration to create capital markets through prospective lawmaking (Draft Law, *supra* note 33, Article 33 para. 2) and that it will invest in the latter (**id.* Draft Law, Article 33, para. 1 & Article 116 para 2.6); on state capitalism: Ian Bremmer, "The Return of State Capitalism," Routledge, vol. 50, iss. 3, 2008, pg. 56; also Wu, *infra* note 136, pg. 3-4.

⁸⁵ Draft Law, *supra* note 33, Article 33 para 1 & 2, Article 16 para 2.6.

⁸⁶ Merriam-Webster dictionary, available at: <https://www.merriam-webster.com/dictionary/Dutch%20door>, last accessed on: 08/31/2023, (defining the term “Dutch door” as "a door divided horizontally so that the lower or upper part can be shut *separately*") (emphasis added).

⁸⁷ On “the Dutch Disease,” see Dixon et al., *supra* note 82, pg. 95 note 4, 2022. (“The term “Dutch disease” was coined by The Economist (1977) to describe the injurious effects of windfall gas revenues on the growth of other sectors of the Dutch economy.”); This notion is prevalent in SWF-centered scholarship, e.g., see Jeanne Amar, Christelle Lecourt & Valerie Kinon "Is the emergence of new sovereign wealth funds a fashion phenomenon?" *Review of World Economics*, vol. 154, no. 4, 2018, pg. 8 (internal citations/quotations omitted).

⁸⁸ Not stemming from the following, but the reader might find it curious: W. Mark C. Weidemaier, "Piercing the (Sovereign) Veil," *Brigham Young University Law Review*, vol. 46, iss. 3, 2021, pg. 801 (“A state may extensively wield power *as an owner* without implicating any policy relevant to organizational law. By contrast, it may extensively wield power *as a sovereign* to accomplish goals that would be forbidden to any other owner.”)

⁸⁹ We use the comparative models (*in the same chronological order) that the Concept Document, (*supra* note 34, pg. 16-21, pg. 17 fn. 15) referenced as models in contouring Kosovo’s own Sovereign Fund.

E. Comparatively – A 552 words Rebuttal

We begin with Temasek,⁹⁰ seemingly an object of admiration for SWFs⁹¹ which will soon (in 2024) mark the fifth decade since its creation as a private company (albeit solely owned by the state).⁹² Initially, Temasek had a focus on domestic companies until the early 2000s, when it started to widen its horizon internationally.⁹³ However, one ought to be attentive to what one author posits, namely that ". . . that the Singaporean bureaucracy has little independence from the People's Action Party (PAP)-business nexus of power."⁹⁴ Moreover, and as Kosovo's Concept Document rightfully notes, Temasek is a constitutional category within the fabric of the Singaporean legal system,⁹⁵ making any comparison (of a legal nature) to Kosovo's proposal be nugatory. Because, *volens nolens*, what acts as a roadblock to Kosovo's SWF is not the vitality of the policy, but the vital Chapter IX of the latter's Constitution.⁹⁶

Shifting the focus to the Balkans, the establishment of the Slovenian Sovereign Holding ("SSH") as Slovenia's SWF by a special law⁹⁷ constituted another effort at pooling the state's owned assets under one body⁹⁸ - in a bid to abide by OECD's prescriptions.⁹⁹ Although at first garnering acclaim for this policymaking,¹⁰⁰ the SSH's reputation has seemingly taken hits, as evidenced by a Freedom House report in 2017.¹⁰¹ But more importantly to us, the differences between the SSH and Kosovo's SWF are poles apart in terms of their objectives. Because, where the SWF is Slovenia's tool to exit the economy,¹⁰² on the other hand, Kosovo's SWF exhibits a

⁹⁰ *Singapore has opted for two SWFs, namely Temasek and GIC, but for our purposes here we focus solely on the former: Christopher C. H. Chen, "Solving the Puzzle of Corporate Governance of State-Owned Enterprises: The Path of the Temasek Model in Singapore and Lessons for China," *Northwestern Journal of International Law & Business*, vol. 36, no. 2., 2016, pg. 312.

⁹¹ Victor Shih, "Tools of Survival: Sovereign Wealth Funds in Singapore and China," *Geopolitics*, Routledge Taylor & Francis Group, LLC, vol. 14, 2009, pg. 331.

⁹² See Wilson Ng, "The Evolution of Sovereign Wealth Funds: Singapore's Temasek Holdings," *Journal of Financial Regulation and Compliance*, vol. 18, no. 1, 2009, pg. 2, 3.

⁹³ *Id.* pg. 2, 7.

⁹⁴ Shih, *supra* note 91, pg. 331; *but see* OECD, "State-owned holding companies: Background Note for the Asia-Pacific Network Meeting on Corporate Governance of State-Owned Enterprises," December 2022, pg. 38, available at: <https://www.oecd.org/corporate/ca/state-owned-holding-companies-background-note.pdf>, last accessed on: 09/17/2023 ("Over the years, successive Finance Ministers, have publicly reaffirmed that Temasek has been run with commercial discipline in order to maximise long-term risk-adjusted returns, with its investment decisions being independent of any government interference or influence"). *The present paper defers to Victor Shih's arguments due to its granular assessment of the context under which Temasek exists and operates.

⁹⁵ Chen, *supra* note 90, pg. 312 (citing/quoting: Constitution of the Republic of Singapore (Aug. 9, 1965) s 1/63, Fifth Schedule, Part II); Concept Document, *supra* note 34, pg. 17.

⁹⁶ K-Constitution, Chapter IX "Economic Relations."

⁹⁷ Janez Prasnikar, Polona Domadenik & Matjaz Koman, "The Puzzle of State Ownership in Slovenia," *Montenegrin Journal of Economics*, vol. 11, no. 2, 2016, pg. 55.

⁹⁸ Nicholas Ivers, "State Ownership in the Slovenian Economy: Progress from Catastrophe?" *Slovenia: Challenges and Opportunities, Perspectives on Business and Economics*, Paper 4, 2014, pg. 33.

⁹⁹ Sandra Damijan & Jože P. Damijan, "Corporate Governance in Slovenia: Working at Last?" *Corporate Governance and Organizational Behavior Review*, vol. 3, iss. 2, 2019, pg. 50.

¹⁰⁰ Dóra Piroška & Ana Podvršič, "New European Banking Governance and Crisis of Democracy: Bank Restructuring and Privatization in Slovenia," *New Political Economy*, vol. 25, iss. 6, 2020, pg. 1002.

¹⁰¹ Marko Lovec, "Slovenia: Nations in Transit 2017 Country Report," *Freedom House*, 2017, pg. 4, 11, (internal citation omitted). Available at: https://freedomhouse.org/sites/default/files/NiT2017_Slovenia.pdf, last accessed on: 08/09/2023.

¹⁰² Miklós Somai, Chapter 7: "The Changing Role of the State in Slovenia: Privatizations and Banks' Consolidations" *In: Miklós Szanyi (Ed.), "Seeking the Best Master: State Ownership in the Varieties of Capitalism," Central European University Press, Budapest - New York, 2019, pg. 208* ("During 2014–15, new laws and ordinances regarding the status and operations of the Slovenian Sovereign Holding company and the adoption of the State Assets Management Strategy were implemented. They can be considered fundamental to

tendency for re-entry, given that it is in contrast¹⁰³ with a prong of Slovenia's model which lies in privatization.¹⁰⁴ Thus, neither geographical nor other extra-legal proximities will be able to overturn the incongruity between the two.

Likewise, to no avail either is a model south-east from Kosovo, where Turkey entered the world of SWFs in 2016 by passing a law and subsequently issuing a decree for the establishment of the Turkish Wealth Fund ("TWF") as a joint stock company.¹⁰⁵ The TWF's law is minimalistic, with only a handful of Articles,¹⁰⁶ in contrast to the Slovenian one or Kosovo's Draft Law.¹⁰⁷ However and crucially, the incongruity in relation to Kosovo's model, comes from the first and last terms of Article 166 of Turkey's Constitution, which in regulating the economic domain, starts with the word "planning" and -after a number of words- ends with the terms "by the State."¹⁰⁸ Adding up to this disparity, and again as rightfully noted by the Concept Document, is the fact that the Turkish SWF is headed by Turkey's President¹⁰⁹ rather than an extra-institutional body. A disparity, that is also present further away geographically from Kosovo, where the Ireland Strategic Investment Fund ("ISIFI"), regulated by its founding law in 2014,¹¹⁰ will be "controlled and managed" by the National Treasury Management Agency of Ireland,¹¹¹ but owned by Ireland's Minister of Finance.¹¹²

Nevertheless, the nail in the coffin (in terms of comparative-incompatibility) is likewise to be found on Ireland's Constitution, which -in its relevant part- states that "[t]he State shall favour and, where necessary, supplement private initiative in industry and commerce"¹¹³ implying that

a clear and consistent ownership policy that ensures the governance of SOEs in a transparent and accountable manner (i.e., upgraded to OECD standards). They also serve as a legal and institutional framework for the withdrawal of the state from the economy").

¹⁰³ See Concept Document, *supra* note 34, pg. 44 (foreseeing SWF absorption of all "commercial" SOEs in the long run – and not delineating any plan to privatize them); see Draft Law, *supra* note 33, Article 67 para. 11.

¹⁰⁴ Igor Guardiancich, "Slovenia: The End of a Success Story? When a Partial Reform Equilibrium Turns Bad," *Europe-Asia Studies*, (*Not updated version*), vol. 68, no. 2, 2016, pg. 28 ("... the Slovenian Sovereign Holding (SSH) was approved in March 2014, in order to consolidate the indirect ownership stakes of the state and facilitate the privatisation of non-core assets"), available at: https://www.mwpweb.eu/1/144/resources/publication_2047_1.pdf, last accessed on: 10/02/2023; see Svetoslava Georgieva & David M. Riquelme, "Slovenia: State-Owned and State-Controlled Enterprises," *ECFIN Country Focus*, vol. 10, iss. 3, 2013, pg. 2; see Concept Document, *supra* note 34, pg. 19 (citing Slovenian Sovereign Holding Website: <https://www.sdh.si/en-gb/>).

¹⁰⁵ Samet Tatar, "Time to Reconsider the Regulatory Structure of the Turkish Wealth Fund: A Short Review," *Ticaret ve Fikri Mülkiyet Hukuku Dergisi*, vol. 8, no. 1, 2022, pg. 170-171 (internal citations/quotations omitted).

¹⁰⁶ See "The Law No. 6741 on Establishment of Turkey Wealth Fund Management Company and Amendments in Certain Laws." Available at: <https://www.tvf.com.tr/uploads/file/law-no-6741.pdf>, last accessed on: 08/10/2023.

¹⁰⁷ See Slovenian Sovereign Holding Act, (ZSDH-1), available at: <https://www.gov.si/assets/ministrstva/MF/Glavno-urednistvo/Novice/DOKUMENTI/SDH-javni-poziv-za-NS-april-2020/SLOVENIAN-SOVEREIGN-HOLDING-ACT-Unofficial-translation.pdf>, last accessed on: 09/28/2023; see Kosovo's Draft Law, *supra* note 33.

¹⁰⁸ Constitution of the Republic of Turkey (as amended on July 23, 1995; Act No. 4121), Article 166.

¹⁰⁹ Tatar, *supra* note 105, pg. 171 (internal citation omitted); The Law No. 6741 on Establishment of Turkey Wealth Fund Management Company and Amendments in Certain Laws, Article 2 para. 1, Article 3 para. 1; Concept Document, *supra* note 34, pg. 19.

¹¹⁰ National Treasury Management Agency (Amendment) Act 2014, Number 23 of 2014, Article 38. Available at: <https://www.irishstatutebook.ie/eli/2014/act/23/enacted/en/pdf>, last accessed on: 08/10/2023.

¹¹¹ *Id.* Article 41 para. 1.

¹¹² *Id.* Article 38 para. 3.

¹¹³ Constitution of Ireland of 1937 (as amended in 2019), Article 45 para. 3.1.

the State's position is subsidiary to private participants in the markets¹¹⁴ - which is at odds with Kosovo's constitutional fabric.¹¹⁵

In line with the foregoing, reliance on these comparative models is therefore, not to be considered compelling.

F. The One-stop Shop – A Question of Policy Soundness

Descending from constitutional heights and comparative aspects, the ambit of analysis becomes more flexible. To begin with, Kosovo's SWF Draft Law foresees a multitude of funding sources, from an initial 20 million infusion by the State to loans, donations, assets, ROI, and other sources stemming from the Draft Law's non-exhaustive clause.¹¹⁶ The initial observation here is that if the majority of SWFs are used to "channel" commodity profits and/or abundance of reserves,¹¹⁷ with Kosovo on the other hand, it seems more as if financial resources are channeled for the SWF, a polarity exemplifying Schena's et al. characterization of these two different situations as "supply-driven" and "demand-driven."¹¹⁸ On another note, its structure of a joint stock company (serving the role of a holding company¹¹⁹) is vested with broadly-sweeping appendixes of authorizations granted to the SWF, making it akin to a **one-stop shop**.

Among these extensive traits, a puzzling issue remains that of State-Owned Enterprises ("SOEs"). It is puzzling because this subject matter (markedly less contentious) formed the centerpiece of Kosovo's SWF Concept Document,¹²⁰ whereas, in the Draft Law it is somewhat counterweighed by other SWF's authorizations. Now, focusing on this juncture, the OECD and scholarship¹²¹ promote(s) centrality when it comes to SOEs,¹²² and the SWF Draft Law generally follows this model¹²³ which at least in theory creates a greater distance between SOEs and political interferences.¹²⁴ However, one cannot fail to notice that according to the Concept Document, the Government's authority is considered to be somehow estranged from the functioning of SOEs, and -their argument continues- SWF will amend this aspect of the problem issue (among other aspects) through a nexus between the latter on one side, and the Governmental long-term strategy on the

¹¹⁴ *As per Ireland's economy (*although from a rather unsophisticated -but informative- source*) see Britannica, "Economy of Ireland," available at: <https://www.britannica.com/place/Ireland/Economy> last accessed on: 10/19/2023.

¹¹⁵ See Hasani, *supra* note 54, and see overall discussion in Section C.1 of this paper.

¹¹⁶ Draft Law, *supra* note 33, Article 18 para. 2 points 1-9.

¹¹⁷ Eric Helleiner & Troy Lundblad, "States, Markets, and Sovereign Wealth Funds," *German Policy Studies*, vol. 4, no. 3, 2008, 63-65 (internal citation omitted); Amar et al., *supra* note 87, pg. 6 ("The motivation for launching a SWF is therefore to allow "excess" foreign exchange reserves to be channeled away from low-yielding sovereign bonds to higher-return equity and corporate debts investments").

¹¹⁸ Patrick J. Schena, Juergen Braunstein & Asim Ali, "Capitalizing Economic Development Through Sovereign Investment: A 'Paradox of Scarcity'?" *Global Policy*, vol. 9, iss. 3, 2018, pg. 1 (internal citation omitted).

¹¹⁹ On "state-owned holding companies": OECD, *supra* note 94, (the paper overall / *in Passim*).

¹²⁰ Concept Document, *supra* note 34, pg. 8 and overall / *in Passim*.

¹²¹ OECD, *supra* note 94, pg. 22.

¹²² Uwe Böwer, "State-Owned Enterprises in Emerging Europe: The Good, the Bad, and the Ugly," *International Monetary Fund, IMF Working Paper, WP/17/221*, 2017, pg. 19.

¹²³ Not every SOE will form part of the SWF as they will be able to pick and choose; Concept Document, *supra* note 34, pg. 37; see also Draft Law, *supra* note 33, Article 52 para. 2, Article 3.

¹²⁴ OECD, *supra* note 94, pg. 8, 9, 13.

other.¹²⁵ If to some the foregoing sounds familiar, the reason lies in Article 6 para. 1 of “the Law on Publicly Owned Enterprises,” which has already foreseen such a nexus.¹²⁶

Thus, it is difficult to understand why or how a model that tends to separate the Government with the SOEs¹²⁷ would aid in facilitating a harmonious strategy coordination between the two.

Shifting the focus to granular aspects, the Draft Law authorizes the Executive to appoint temporary Supervisory Board members for a maximum of 1 year.¹²⁸ This choice could fill in the lacuna¹²⁹ when a simple majority cannot come to a result, but it is also a “wild card” that could exploit this very lacuna but for less benevolent purposes. Especially so, considering that the Draft Law only foresees a 1-year limit but is silent on whether multiple 1-year temporary appointments can be made (always under the assumption that the regular voting cannot amount to a simple majority vote).

However, while the foregoing applies only to exceptional situations, another problematic facet is the entitlement of the Executive to make the initial appointments, mandates which could be valid for up to two years, unless regular appointments by the Assembly are made.¹³⁰ The rationale of this choice is evident. Its perils too, given that two years is not an insubstantial amount of time to entrench power internally *within* the SWF and/or externally *through* the SWF.

But if the Kosovo SWF’s mandate regarding SOEs is *at least conceptually* sound,¹³¹ that of domestic investment on the other hand, fails in terms of policy soundness too (besides its legal shortcomings addressed earlier). Accordingly, we can use two aspects to evaluate the prospects of setting up a SIF:¹³² “additionality” and “crowding in commercial capital.”¹³³ As per the first, SIFs have the potential to offer benefits¹³⁴ that could propel the prospects of this prong. However, it is the second aspect which acts as an impediment. In this regard, central to domestic investment in the Draft Law and the Concept Document is the framework of champion enterprises.¹³⁵ The problem here is that it would accrue capital to already well-established firms (perhaps akin to a “curse of bigness”?!¹³⁶) and the Draft Law (or Concept Document) do/es not provide us with the “capital gap” that ought to be intervened in.¹³⁷ Here, it is interesting to note that the element of

¹²⁵ Concept Document, *supra* note 34, pg. 9, 10-11.

¹²⁶ Law No. 03/L-087 on Publicly Owned Enterprises, Article 6 para. 1 (in its relevant part stating that: “The Government shall develop and issue, within ninety (90) days after the effective date of the present law, an ownership policy that defines the overall objectives of the Republic of Kosovo with respect to its ownership of Central POEs, *including - if the Government desires – its strategic guidelines on the development of the business activities of such POEs, and its role in the corporate governance of Central POEs*”) (emphasis added).

¹²⁷ *Supra* note 124.

¹²⁸ Draft Law, *supra* note 33, Article 42 para. 10.

¹²⁹ See Divakaran et al., *supra* note 23, pg. 68.

¹³⁰ Draft Law, *supra* note 33, Article 67 para. 3 & 4.

¹³¹ See *supra* notes 121, 122, 123 & 124.

¹³² Recall that one prong of Kosovo’s SWF is that of an SIF; Divakaran et al., *supra* note 23, pg. 31 (compare Kosovo’s case to the Nigerian example, where the latter’s SIF is a “subfund” of its SWF) (internal citation omitted).

¹³³ *Id.* (Divakaran et al.) pg. 22, 27.

¹³⁴ *Id.* pg. 23, 25 (outlining a number of “additional” benefits such as those related to the ability to take risks, familiarity with the domestic context and the ability for lengthy support in terms of finances among other aspects) (internal citations omitted).

¹³⁵ See Draft Law, *supra* note 33, Article 32.

¹³⁶ *Difficult not to think of Tim Wu, “The Curse of Bigness: Antitrust in the New Gilded Age,” *Curse of Bigness: New Deal Supplement*, Columbia Law School, pg. 6, available at: <https://scholarship.law.columbia.edu/books/63/>, last accessed on: 10/03/2023.

¹³⁷ See Divakaran et al., *supra* note 23, pg. 88, 126.

“additionality” is one of ISIFI’s tenets,¹³⁸ but Divakaran et al., also use it as a litmus test on whether establishing sovereign investment funds (SIF) is warranted.¹³⁹

Another important aspect is “the double bottom line,” namely the pursuit of financial and economic profits, where the former refers to ROI, whereas the latter relates to the pursuit of social goals¹⁴⁰ (ISIFI uses the three prongs to ensure compatibility of their investments with this double bottom line¹⁴¹). However, in Kosovo’s case the aims are contradictory because although terms signifying economic and policy goals are thrown into the mix, my contention is that key Articles of the Draft Law show that it is ROI that dictates investment,¹⁴² and judging from this, economic/social goals¹⁴³ are (if at all) simply collateral considerations. Closely related, the possibilities of “political interference” in terms of internal investment¹⁴⁴ add up to the complexity especially when taking into account a-yet-to-become-solid rule of law in Kosovo.¹⁴⁵ In fact, one would err in setting the bounds of Kosovo’s proposal as either “wise management or pipe dream,”¹⁴⁶ since a nightmare scenario is not to be excluded, as exemplified by the Malaysian 1MBD infamy.¹⁴⁷

G. Addendum - A Cautionary Tale

Employing SWFs to absorb FDIs in the form of foreign SWFs in domestic economies could be yet another feature of their arsenal - and one which Kosovo seeks to exploit.¹⁴⁸ Alongside their potential benefits however, they raise pressing dilemmas given the possibility that states could deploy their SWFs externally to other jurisdictions, but instead of pursuing economic value *stricto sensu*, their aim may be political.¹⁴⁹

¹³⁸ *Id.* pg. 31.

¹³⁹ *Id.* pg. 22.

¹⁴⁰ *Id.* pg. 19.

¹⁴¹ *Id.* pg. 22, 210-211 (Broadly speaking, if the investment brings “economic benefits to gross value added (GVA) and gross domestic product (GDP)” (“additionality”), which is not negated in other areas of economy in general (“displacement”) and for which there are no alternative ways through which the Government can achieve this (“deadweight”).

¹⁴² Draft Law, *supra* note 33, Article 31 para. 1, 2 & 4.1, Article 30 para. 2.

¹⁴³ See *supra* note 140.

¹⁴⁴ Bernardo Bortolotti, Veljko Fotak & Giacomo Loss, “Taming Leviathan: Mitigating Political Interference in Sovereign Wealth Funds’ Public Equity Investments” *Journal of Accounting and Finance*, vol. 19, no. 4, 2019, pg. 13, 16.

¹⁴⁵ In this sense, recall the quote referenced in *supra* note 82.

¹⁴⁶ Rudina Nallbani Hoxha, “Kosovo’s Sovereign Fund: Wise Investment Management or Pipe Dream,” Friedrich Ebert Stiftung, Policy Brief, July 2022. Available at: <https://library.fes.de/pdf-files/bueros/kosovo/19478.pdf>, last accessed on: 09/20/2023.

¹⁴⁷ Dixon et al., *supra* note 82, pg. 69 (internal citations omitted); see *id.* (Dixon et al.), pg. 70 (internal citations omitted) (*The opposite in terms of success when comparing it to the other Malaysian SWF, Khazanah).

¹⁴⁸ Global SWF “Global SWF participates in the launch of Kosovo SWF” May 8, 2023. Available at: <https://globalswf.com/news/global-swf-participates-in-the-launch-of-kosovo-swf>, last accessed on: 09/20/2023 (“In addition to managing those and other companies, the fund will have the target of facilitating FDI from other SWFs into the country – a hybrid model we are increasingly seeing in the industry”); see also Concept Document, *supra* note 34, pg. 5 (under the framework of Kosovo’s SWF, expressing the interest to attract FDIs in general).

¹⁴⁹ Ronald J. Gilson & Curtis J. Milhaupt, “Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism,” *Stan. L. Rev.* 1345, vol. 60, iss. 5, 2008, pg. 2 (citing in text, and quoting in footnote: James Politi, Sovereign Funds Face US Threat, *FIN. TIMES*, Feb. 14, 2008, at 8); see also Feng, *supra* note 10, pg. 483 (citing: Edwin Truman, Sovereign Wealth Funds: The Need for Greater Transparency and Accountability 4–6 (Peterson Inst. for Int’l Econ. 2007)).

These prospects reverberate the domain of national security for those states hosting foreign SWFs¹⁵⁰ and for Kosovo the state of play comprises heightened complexity due to its hunger for capital, situating it in a vulnerable position given the challenges to maneuver between national security interests and economic necessity. Striking a balance is further complicated considering that any solution ought to comply with Kosovo's constitutional parameters in this area¹⁵¹ - a delicate balance to attain.

Due to its complexity and context, this aspect calls for further research that is not strictly confined to the SWFs, however, for the purposes of this paper we consider it sensible to conclude the material part of the paper with this addendum of a cautionary tale for policy-makers and alike.

III. CONCLUDING REMARKS

To date, Kosovo's Constitutional Court repertoire lacks a landmark in the province of state-economy relations.¹⁵² As per the case on the "Draft Law no. 08/L-179 on Temporary Measures of Basic Products in Special Cases of Market Destabilization" to the Constitutional Court,¹⁵³ the author's view (before the decision) was that, the specific context (as the term "in special cases" suggests) was likely to narrow the scope of analysis, casting doubts as to whether a blueprint could arrive. Subsequently, the Constitutional Court struck down the latter as unconstitutional.¹⁵⁴ Now, the Court *did* articulate and expand on the state-economy nexus in a number of passages,¹⁵⁵ however I am unconvinced on its *fitness* for reverence.¹⁵⁶ However, should the Constitutional Court be seized with the matter of the current SWF Draft Law,¹⁵⁷ a landmark pronouncement on Article 10 and Chapter IX of the Constitution¹⁵⁸ becomes almost inevitable, as the SWF inquiry ought to operate under a suitable *climate* and *altitude* of the legal craft.

¹⁵⁰ Feng, supra note 10, pg. 483-484 (citing: Edwin Truman, Sovereign Wealth Funds: The Need for Greater Transparency and Accountability 4-6 (Peterson Inst. for Int'l Econ. 2007)).

¹⁵¹ K-Constitution, Article 119 para. 2.

¹⁵² But consider the recent case: Judgment in Case Nr. KO173/22, infra note 154; On the other hand, two Constitutional Court's cases (besides the latest case in infra note 154) that could stand out in the domain of Kosovo's free-market economy, but which do not sweep beyond the context of the respective case: Judgment in Case Nr. KO97/12, supra note 64 & Judgment in Case Nr. KO157/18, supra note 64.

¹⁵³ See Koha.net, "LDK submits to the Constitutional Court the Law on setting ceiling prices," news article, published on 11/16/2022, available at: <https://www.koha.net/arberi/352831/ldk-ja-dorezon-ne-kushtetuese-ligjin-per-çaktimin-e-cmimeve-tavan/>, last accessed on: 08/24/2023.

¹⁵⁴ The Constitutional Court of the Republic of Kosovo, Judgment in Case Nr. KO173/22, Nr. ref.: AGJ 2297/23, Judgment of 8 November 2023, published on 24 November 2023.

¹⁵⁵ Id. KO173/22, specifically para. 179, paras. 128 to 162, paras. 140 to 150; but also see paras. 177, 181 & overall / in Passim.

¹⁵⁶ An analysis of (Id.) Judgment in Case Nr. KO173/22, requires a separate study from the present one.

¹⁵⁷ There are signs that the -then to be the Sovereign Fund Law- could be referred to the Constitutional Court by the opposition: Nacionale.com ""Attempt to capture everything", LDK warns of sending the Draft Law on the Sovereign Fund to the Constitutional Court," news article, available at: <https://nacionale.com/politike/tentativa-me-kape-cdo-gje-ldk-paralajmeron-dergimin-e-projektligjit-per-fondin-sovran-ne-kushtetuese>, last accessed on: 10/19/2023; see also Koha.net, Marigona Brahim "The Committee on Economy approves the Draft Law, whose constitutionality is contested by the opposition," news article, published on 07/04/2023, available at: <https://www.koha.net/lajmet-e-mbremjes-ktv/384032/komisioni-per-ekonomi-miratton-projektligjin-qe-opozita-ja-konteston-kushtetutshmerine/>, last accessed on: 10/19/2023.

¹⁵⁸ Again, consider/contrast with Judgment in case Nr. KO173/22, supra note 154, specifically para. 132. ("As far as it is relevant in the circumstances of the concrete case, Article 119 [...] which should be read and interpreted in connection with Articles 7 and 10 of the Constitution, respectively...").

At any rate, the importance of the SWF proposal's scrutiny is an acute one, as in line with the arguments presented throughout this paper, several of the Draft Law's Articles do not pass constitutional muster. Several others quake policy grounds too.

Thereby, drawing from the above, we find it prudent to excise the already-provided recommendations throughout this paper.

IV. RECOMMENDATIONS

- In terms of purely domestic involvement, restrict the SWF's reach only to SOEs - circumvented by the notion of public interest as a safeguard¹⁵⁹
 - (i) Revision of Articles related to temporary appointments (both: in exceptional circumstances and at the initial phase of establishing the SWF)¹⁶⁰
- Abolish draft Articles on domestic investment aimed at private companies, the extensive authorizations of which are at odds with the constitutional category of a free-market economy¹⁶¹
- Abolish draft Articles on champion enterprises, as this too implicates constitutional protection of a free-market economy and competition¹⁶²
- Abolish draft Articles derogating the Law on Public Procurement, as this leads to an unconstitutional shift of legal prescription from the domain of law to that of policy¹⁶³
- To some extent the following transcends the Draft Law, but the Government and Assembly ought to address the risks from foreign SWFs (balancing the need for FDIs with national security interests and constitutional requirements)¹⁶⁴

¹⁵⁹ See discussion *supra* Section C.1.

¹⁶⁰ See discussion *supra* Section F.

¹⁶¹ See discussion *supra* Section C.1.

¹⁶² *Id.*

¹⁶³ See discussion *supra* Section C.2.

¹⁶⁴ See discussion *supra* Section G.

Policy Analysis

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