

THE “SANTIAGO PRINCIPLES” AND THE INTERNATIONAL  
FORUM OF SOVEREIGN WEALTH FUNDS: EVOLVING COMPONENTS  
OF THE NEW BRETTON WOODS II POST-GLOBAL FINANCIAL CRISIS  
ARCHITECTURE AND ANOTHER EXAMPLE OF AD HOC GLOBAL  
ADMINISTRATIVE NETWORKING AND RELATED “SOFT”  
RULEMAKING?

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**I. Introduction**

Beginning in the latter part of 2007, the proposed establishment of Chinese<sup>1</sup> and Russian<sup>2</sup> Sovereign Wealth Funds (“SWFs”)<sup>3</sup>

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<sup>1</sup> On September 29, 2007, the People’s Republic of China (“PRC”) Ministry of Finance established the China Investment Corporation (“CIC”) as a wholly-owned state corporation under the PRC Company Law by issuing RMB 1.55 trillion of special bonds that in turn were used to acquire \$200 billion of PRC Central Bank foreign exchange reserves. *See* China Investment Corporation, Overview, [http://www.china-inv.cn/cicen/about\\_cic/aboutcic\\_overview.html](http://www.china-inv.cn/cicen/about_cic/aboutcic_overview.html) (last visited Dec. 1, 2009). The CIC states that it maintains a “strict commercial orientation.” *Id.* For further discussion of the CIC see generally Hong Li, *China Investment Corporation: A Perspective on Accountability*, 43 INT’L LAW. 1495 (2009). In December 2009, it appeared that the CIC would be funded with an additional \$200 billion capital injection. Karen Yip & Mao Lijun, *Sovereign Wealth Fund May Get \$200b Cash Injection*, CHINADAILY.COM.CN, Dec. 22, 2009, [http://www.chinadaily.com.cn/bizchina/2009-12/22/content\\_9211206.htm](http://www.chinadaily.com.cn/bizchina/2009-12/22/content_9211206.htm).

It should be noted that when considering China’s sovereign investments there are a range of entities in China (at the national, provincial and local levels, including Chinese military-controlled entities) that could be considered as investing “sovereign funds,” and, at times, as competing against one another. For purposes of the timeframe for this article, it should also be noted that China’s plans for a formal SWF go back to at least March 2007, when a Chinese investment corporation announced its acquisition of a non-voting equity interest in the Blackstone group with a view to transfer

sparked considerable governmental, intergovernmental and private financial and business sector interest in, and countervailing concerns as to, SWFs. This concern evolved into a growing realization that the cumulative asset size of SWFs was beginning to represent an increasingly significant (though not yet systemically significant) component of the international capital markets.<sup>4</sup> This significance became further magnified when one considered the separate but related proliferation of other state-owned entities operating and

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this interest to its SWF, which was in the process of being formed. See MICHAEL F. MARTIN, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: CHINA'S SOVEREIGN WEALTH FUND 1 (2008).

<sup>2</sup> The Russian Federation established a "Stabilization Fund" in 2004. Ministry of Finance of the Russian Federation, About the Fund, <http://www.minfin.ru/en/stabfund/about/> (last visited Mar. 10, 2010). In 2008, the Russian Ministry of Finance split this Fund into two separate funds: the Reserve Fund and the National Well-Being Fund. Andrew E. Kramer, *Russia Creates \$32 Billion Fund for Foreign Investment*, N.Y. TIMES, Feb. 1, 2008, at C2. The Reserve Fund accumulates federal budget revenues from the production and export of oil, natural gas, and oil products. Ministry of Finance of the Russian Federation, Mission of Reserve Fund, <http://www1.minfin.ru/en/reservefund/mission/> (last visited Mar. 10, 2010). The National Well-Being Fund (which many consider a SWF) was originally capitalized with \$32 billion, is intended to provide long-term support for the Federation's pension system, and is authorized to invest in foreign stocks and bonds. Kramer, *supra*.

<sup>3</sup> For extensive background material on SWFs, see generally International Working Group of Sovereign Wealth Funds (IWG), <http://www.iwg-swf.org/> (last visited Dec. 1, 2009); Peterson Institute for International Economics, Hot Topics for SWFs, <http://www.iie.com/research/topics/hottopic.cfm?HotTopicID=11> (last visited Dec. 1, 2009); Sovereign Wealth Fund Institute, <http://swfinstitute.org/> (last visited Dec. 1, 2009); Sovereign Wealth Fund News, <http://www.sovereignwealthfundsnews.com/> (last visited Dec. 1, 2009).

<sup>4</sup> By the end of 2009, the SWF Institute estimated that there were in excess of fifty SWFs owned by over thirty countries/jurisdictions with total assets aggregating to around \$3.8 trillion. See SWF Institute, Fund Rankings, <http://www.swfinstitute.org/funds.php> (last visited Dec. 1, 2009). The IMF estimates these SWF assets could grow to between \$6-10 trillion by 2013. INT'L MONETARY FUND, MONETARY & CAPITAL MKTS. & POLICY DEP'T & REVIEW DEP'TS, SOVEREIGN WEALTH FUNDS-A WORK AGENDA 6 (2008), available at <http://imf.org/external/np/pp/eng/2008/022908.pdf> [hereinafter WORK AGENDA].

investing globally.<sup>5</sup> In addition, in the latter part of 2007, the U.S. and global financial sectors began to generate heightened investment interest in these SWFs because they helped to shore-up fragile global financial institutions<sup>6</sup> when the current Global Financial Crisis (“GFC”) began to rear its head.<sup>7</sup> Even intergovernmental development institutions came to see SWFs as possible engines for selective economic development financings.<sup>8</sup> Yet, this positive interest in SWFs also precipitated corresponding political ambivalence and outright concerns in various countries over possible untoward geopolitical, national foreign investment and national security implications to which a fundamental shift in global financial and economic markets (i.e., a perceived rise in “Global State Capitalism”) might give rise.<sup>9</sup>

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<sup>5</sup> See, e.g., Joshua Kurlantzick, *State Inc.*, BOSTON GLOBE, Mar. 16, 2008, at 1E.

<sup>6</sup> See, e.g., Bernardo Bortolotti et al., Sovereign Wealth Fund Investment Patterns and Performance 1(Working Paper, Apr. 6, 2009), available at <http://web.econ.unito.it/bortolotti/articles/SWF-Investment-patterns-perform-FIN-apr069.pdf>. As the GFC intensified in the second half of 2008, most of the SWFs backed off from investing in troubled Western financial institutions. See *id.* at 6 n.6.

<sup>7</sup> See, e.g., ALEX PATELIS, MERRILL LYNCH, GLOBAL ECONOMICS: MORE ON SWFS 1-2 (2007) (showcasing the high level of investor interest in SWFs during late 2007). For purposes of this article, it is important to note, in terms of timeline, that in 2007 and the first part of 2008, the U.S. Treasury and the G7 Finance Ministers did not fully appreciate the impending scope and depth of the current GFC, which really accelerated with the failure of Lehman Brothers in September 2008. See, e.g., Mark Lieberman, *Paulson’s Track Record Not So Strong on Facts*, FOX BUS., Sept. 24, 2008, <http://www.foxbusiness.com/story/markets/economy/paulsons-track-record-strong-facts/>. For background information on the GFC see generally Douglas W. Arner, *The Global Credit Crisis of 2008: Causes and Consequences*, 43 INT’L LAW. 91 (2009).

<sup>8</sup> See, e.g., Press Release, The World Bank, Sovereign Wealth Funds Should Invest in Africa, Zoellick Says (Apr. 2, 2008) available at <http://go.worldbank.org/50LXBPOUM0>.

<sup>9</sup> See GERALD LYONS, STANDARD CHARTERED BANK, STATE CAPITALISM: THE RISE OF SOVEREIGN WEALTH FUNDS 1 (2007), available at <https://research.standardchartered.com/researchdocuments/Pages/ResearchArticle.aspx?&R=50729>; BRAD W. SETSER, COUNCIL ON FOREIGN RELATIONS, SOVEREIGN WEALTH AND SOVEREIGN POWER 39-40 (2008), available at [http://www.cfr.org/publication/17074/sovereign\\_wealth\\_and\\_](http://www.cfr.org/publication/17074/sovereign_wealth_and_)

This emergence of the current “SWF phenomena” has generated a virtual “cottage industry” for legal and finance scholars, business, finance and political commentators and policy think tanks, spawning a plethora of reports, scholarly articles and news stories.<sup>10</sup> Topical SWF areas of specific legal interest have included a range of diverse matters such as national security regulation,<sup>11</sup> foreign direct investment (“FDI”) approaches,<sup>12</sup> international taxation,<sup>13</sup> corporate governance,<sup>14</sup> sovereign immunity<sup>15</sup> and possible World Trade Organization/General Agreement on Trade and Services (“WTO/GATS”) implications.<sup>16</sup> This article, however, does not intend to retrace either

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sovereign\_power.html; *The Invasion of the Sovereign-Wealth Funds*, ECONOMIST, Jan. 19, 2008, at 11.

<sup>10</sup> See, e.g., Edwin M. Truman, Remarks at the American Enterprise Institute: Do Sovereign Wealth Funds Pose a Risk to the United States?, Feb. 28, 2008, available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=892>.

<sup>11</sup> See *Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the United States: Assessing the Economic and National Security Implications Before S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (2007) (statement of Edwin M. Truman, Senior Fellow, Peterson Inst. for Int’l Econ.), available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=842>; Daniella Markheim, Heritage Lectures: Sovereign Wealth Funds and U.S. National Security (Feb. 7, 2008), in Heritage Foundation Lectures No. 1063, Mar. 6, 2008, at 4-5, available at <http://www.heritage.org/Research/tradeandeconomicfreedom/hl1063.cfm>.

<sup>12</sup> See, e.g., Justin O’Brien, *Barriers to Entry: Foreign Direct Investment and the Regulation of Sovereign Wealth Funds*, 42 INT’L LAW. 1231 (2008).

<sup>13</sup> See, e.g., Michael S. Knoll, Taxation and the Competitiveness of Sovereign Wealth Funds: Do Taxes Encourage Sovereign Wealth Funds to Invest in the United States? (Univ. of Pa., Working Paper, Feb. 10, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1342510](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342510).

<sup>14</sup> See, e.g., Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345 (2008).

<sup>15</sup> See, e.g., Bart De Meester, International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State (Institute for International Law, University of Leuven, Working Paper No. 18, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1308542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1308542).

<sup>16</sup> See Aaditya Mattoo & Arvind Subramanian, *Currency Undervaluation and Sovereign Wealth Funds: A New Role for the World Trade Organization* (Peterson Inst. for Int’l Econ., Working Paper Series, Paper No. 08-2, 2008), available at <http://www.petersoninstitute.org/publications/wp/wp08-2.pdf>.

a general policy analysis or any specific legal analyses of SWFs. Instead, it critiques the ad hoc processes (international, domestic and industry-based) surrounding the establishment of the International Working Group of Sovereign Wealth Funds (“IWG”)<sup>17</sup> of twenty-six IMF member countries having SWFs for the purpose of formulating the SWF-related “Generally Accepted Principles and Practices” (*Santiago Principles* or “GAPP”).<sup>18</sup> The article likewise critiques the subsequent creation in April 2009 of a permanent standing group under the so-called *Kuwait Declaration*, the International Forum of Sovereign Wealth Funds (“ISWF Forum”) for continuing and expanding upon the IWG-ISWF Forum process.<sup>19</sup> The primary

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<sup>17</sup> See International Working Group of Sovereign Wealth Funds, <http://www.iwg-swf.org/> (last visited Sept. 13, 2009). The first meeting of the IWG, which occurred on May 1, 2008, included twenty five member countries with SWFs:

Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Iran, Ireland, South Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, the United Arab Emirates, the United States, and Vietnam.

U.S. DEP’T OF THE TREASURY, REPORT TO CONGRESS ON INT’L ECON. & EXCH. RATE POLICIES; Sovereign Wealth Funds, at 2, 2. n.3 (May 2008), available at <http://www.ustreas.gov/offices/international-affairs/economic-exchange-rates/>. Additionally, Saudi Arabia, the OECD and the World Bank “participate[d] as permanent observers.” *Id.* at 2 n.3.

<sup>18</sup> See INT’L WORKING GROUP OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES “SANTIAGO PRINCIPLES” 4 (2008), available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> [hereinafter SANTIAGO PRINCIPLES] (“The purpose of the GAPP is to identify a framework of generally accepted principles and practices that properly reflect appropriate governance and accountability arrangements as well as the conduct of investment practices by SWFs on a prudent and sound basis.”).

<sup>19</sup> See International Forum of Sovereign Wealth Funds, <http://www.ifswf.org/> (last visited Sept. 13, 2009) (“IFSWF is a voluntary group of Sovereign Wealth Funds (SWFs), which will meet, exchange views on issues of common interest, and facilitate an understanding of the Santiago Principles and SWF activities.”). Specifically on the *Kuwait Declaration*, see International Working Group of Sovereign Wealth Funds, “Kuwait Declaration”: Establishment of the International Forum of Sovereign Wealth Funds, <http://www.iwg-swf.org/mis/kuwaitdec.htm> (last visited Sept. 13, 2009). The Forum is currently comprised of the IWG members referred to above in note 17.

objective of this critique is to explore how this IWG-ISWF Forum process (1) can be made more “administratively sound” in terms of legitimacy, transparency and accountability, and (2) can be made more relevant to the current reconfiguration of the global financial system that is underway under the guidance of the Group of 7 (“G7”) Finance Ministers, the Group of 20 (“G20”) Finance Ministers and the Heads of State (“Leaders”).<sup>20</sup> In effect, this article addresses the subject matter of SWFs from the vantage point of the proliferation of “global administrative networks” in the international economic and financial law area.<sup>21</sup>

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<sup>20</sup> For present purposes it should be understood that until recently the primary global policy determiners were the Heads of State of the G7 leading industrialized countries (in the mid 1990s, the G7 was expanded at the Leaders level to include Russia). However, the G7 Finance Ministers continued to meet as the G7 and not with Russia. In 1999, a G20 group of Finance Ministers (including the G7 countries and additional leading developed and emerging/developing economies) was formed to provide assistance, when requested, by the G7 Finance Ministers and/or G7/8 Leaders. It was not until November 2009 that the first G20 Leaders meeting was held to consider the GFC. At the September 2009 G20 Leaders meeting in Pittsburgh, it was announced that, after the combined G7/8-G20 meeting in Canada in 2010, the G20 framework (at both the Leaders and Finance Ministers levels) would replace the former G7/8 framework. For detailed records on the G7, G8 and G20, see the unofficial website maintained by the University of Toronto, Munk Centre for International Studies at Trinity College, G8 Information Centre, <http://www.g8.utoronto.ca/> (last visited Dec. 1, 2009).

<sup>21</sup> In 1995, I wrote a treatise on the informal “soft law” development of international financial rules and standards. JOSEPH JUDE NORTON, *DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS* (1995); *see also*, Joseph J. Norton, *Comment on the Developing Transnational Network(s) in the Area of International Financial Regulation*, 43 *INT’L LAW.* 175 (2009). Others began to expand this soft law concept into an “international network concept.” *See, e.g.*, ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). More generally, in 2005, an ongoing research project was commenced at the Institute for International Law and Justice at the NYU School of Law respecting “Global Administrative Law.” *See* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (2005); Institute for International Law and Justice, Website of the Global Administrative Law Project, [www.iilj.org/GAL](http://www.iilj.org/GAL) (last visited Dec. 1, 2009). This article does not argue that the *Santiago Principles* (GAPP) and the related IWG-ISWF Forum process comprise a form of “soft law”; discussions of “soft law” tend to end up at worst in a conceptual quagmire and at best in inconclusiveness.

This article’s initial point is that the grouping of various SWFs and regulators under the IWG-ISWF Forum process is not a true voluntary association, but rather one that was constructively “pressured” into existence. The formation of the grouping was constructively pressured initially by the then U.S. Secretary of the Treasury, Henry J. Paulson, operating reactively and directly. It was then pressured domestically through the Treasury, and then globally through the G7 Finance Ministers, the International Monetary and Finance Committee (“IMFC”) of the IMF and the Organization of Economic Cooperation and Development (“OECD”). Finally, the grouping was pressured on a bilateral basis by selective countries having SWFs (e.g., Abu Dhabi and Singapore) in an attempt to “prime” and to shape a broader global IWG approach. Yet, notwithstanding this rather strained, ad hoc and haphazard genealogy of the IWG process, this article proposes that there is a broader and more meaningful long-term role for the IWG and the *Santiago Principles*. This role can be best fulfilled if the IWG and the *Santiago Principles* can be “administratively” enhanced and effectively linked into the new “Bretton Woods II” framework for the global financial system, as is being called for by the G7 and G20.<sup>22</sup>

First, in Part II, this article considers generally the subject of the SWF and shows that SWFs are not by nature or conduct a homogenous or cohesive group. Next, in Part III, the article addresses the domestic processes that led up to the formulation of the *Santiago Principles*. In this context, Part III considers how various United States governmental bodies—the U.S. Treasury, Congress, the U.S. bank and investment securities regulators, the relevant U.S. national security bodies and the American polity—dealt with the SWF phenomenon during 2007-2008. Part III likewise addresses how the international events surrounding the IWG and the *Santiago Principles* unfolded. In Part IV, this article analyzes the nature and import of the IWG and the *Santiago Principles*. Finally, in Part V, this article presents brief concluding observations, including the recommendation that the IWG-ISWF Forum process needs to become integrated into the G20 “Bretton Woods II” reconfiguration of the global financial and economic systems, particularly bringing

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Rather, this article observes that the GAPP has developed into a type of “rule-making” process that is designed to impact the operation and decision making of SWFs on an ongoing basis. For further discussion, see *infra* Part IV.B.3.

<sup>22</sup> See *infra* Part V.

the ISWF Forum under the umbrella of the most recently restructured Financial Stability Board (“FSB”).<sup>23</sup> Part V also suggests that the FSB and ISWF Forum linkage needs also to be better coordinated with the developmental (World Bank) and trade (World Trade Organization (“WTO”)) pillars of the impending Bretton Woods II framework.

## **II. Background**

This section provides basic context for the subsequent analysis of the IWG-ISWF Forum process and the formulation of the *Santiago Principles* and the *Kuwait Declaration*.

### **A. Sovereign Wealth Funds: What are we really talking about?**

While not of recent vintage (the first SWFs go back to the 1950s)<sup>24</sup> and while retrospectively it has been estimated that by 2000 there were twenty SWFs managing approximately \$500 billion in assets on a global basis,<sup>25</sup> the term “Sovereign Wealth Fund” itself

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<sup>23</sup> For background information on the FSB, see Financial Stability Board, [www.financialstabilityboard.org](http://www.financialstabilityboard.org) (last visited Mar. 11, 2010) and discussion in *infra* Part V.

<sup>24</sup> The first SWFs go back to the 1950s (e.g., Kuwait and the Micronesia atolls of Kirabati, the former Gilbert Islands). See Simon Johnson, *The Rise of Sovereign Wealth Funds*, FIN. & DEV., Sept. 2007, at 56, 56, available at <http://www.imf.org/external/pubs/ft/fandd/2007/09/straight.htm>. The SWF of Abu Dhabi and Singapore go back to the 1970s and the Western “gold standard” SWF of Norway goes back to the early 1990s. The State of Alaska and certain Canadian Provinces also had SWFs dating back to the 1970s. Might I suggest anecdotally that my State of Texas established in its Constitution in 1876 the first prototype SWF, a commodity (oil reserve) based Fund, now with \$15 billion in assets, to support its state universities. Also, one commentator conjures that the French established the first SWF in 1816. Philipp Hildebrand, Vice-Chairman, Governing Bd. of the Swiss Nat’l Bank, *The Challenge of Sovereign Wealth Funds 2* (Dec. 18, 2007), available at [www.bis.org/review/r071219d.pdf](http://www.bis.org/review/r071219d.pdf) (citing Benoit Coeuré in note 4).

<sup>25</sup> See *Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the U.S. Before the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (2007) [hereinafter McCormick (2007)] (David H. McCormick, Under Secretary for International Affairs, U.S. Department of the Treasury), available at <http://banking.senate.gov/public/index.cfm?>

does not appear to have been coined until the 2005-2006 period<sup>26</sup> and did not enter the common public vocabulary until the first half of 2007.<sup>27</sup> The absence of public attention directed toward SWFs until most recently is the result, in part, of the fact that these funds were not considered individually or collectively to be of major significance to world financial markets. But, particularly over the past decade, fundamental global economic and trade imbalances—in foreign exchange reserves, oil and other commodity prices—have resulted in countries (particularly emerging market countries) running large and increasing current account surpluses.<sup>28</sup> The attendant shift in net capital outflows generated investment income and more significantly created a new global paradigm, which reflects significant shifts of wealth from the developed countries to the emerging market countries.<sup>29</sup>

In the 2005-2006 period, it seems that a number of domestic regulators worldwide—both domestic Central Banks and national Finance Ministries—began to ponder the best use of what was becoming “excessive” reserve holdings to protect their country’s exchange rate regimes. It is within these discrete aspects of Central Bank functions that the International Monetary Fund (“IMF”) first considered the subject matter of SWFs in a 2005 report.<sup>30</sup> In addition, around this time, global private financial institutions began to

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<sup>26</sup> Andrew Rozanov, then a senior manager at State Street Global Advisors, is credited with first coining the term “Sovereign Wealth Funds” in a short article he wrote in 2005. *See* Andrew Rozanov, *Who Holds the Wealth of Nations?*, 15 CENT. BANKING J., May 2005, at 52, 52-53.

<sup>27</sup> It’s fair to say that if one were to do a timeline Google search on “Sovereign Wealth Fund,” “Sovereign Investment Fund,” “Sovereign Fund” and “SWF” pre-2007, one would come up with barely a “hit.” Post 2006, however, one now would find thousands of entries.

<sup>28</sup> *See, e.g.*, Sir John Gieve, Deputy Governor, Bank of Eng., Speech to the Sovereign Wealth Management Conference: Sovereign Wealth Funds and Global Imbalances 2 (Mar. 14, 2008), *available at* <http://www.bis.org/review/r080319d.pdf>. It is worth noting that our UK counterparts at the Bank of England appear to be quite positive about SWFs. *See id.* at 6 (listing the positive effects of SWFs).

<sup>29</sup> *See id.* at 2-3.

<sup>30</sup> *See* ANTONIO GALICIA-ESCOTTO, IMF COMMITTEE ON BALANCE OF PAYMENT STATISTICS, ISSUES PAPER (RESTEG) #5: INVESTMENT FUNDS I (2005), *available at* <http://www.imf.org/external/np/sta/bop/pdf/resteg5.pdf>.

develop significant databases and business strategies that deal with methods of advising governments and others about alternative usages of these excess reserves.<sup>31</sup> Certainly in 2007—when the Russian Government began to seriously consider capping and restructuring its existing Oil Stabilization Fund and creating a new National Well-Being Fund with the increasing excess reserves, and, when China signed asset management contracts with twenty external investment managers regarding the contemplated creation of the China Investment Corporation (“CIC”), the global public radar screen was activated, and the public and private financial sectors began to realize the structural significance of what was occurring in the global financial system.<sup>32</sup>

Historically, SWFs have operated on a discrete, long-term perspective and on a non- or low-leveraged, commercial investment basis; though, there appears to be no common investment strategy among the SWFs and, in light of the current GFC, certain SWFs may well be changing their strategies and objectives.<sup>33</sup> But, for the most part and until very recently, SWFs have operated individually and largely below the public radar: they were not viewed yet as significant players in terms of the overall world financial markets.<sup>34</sup>

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<sup>31</sup> See Rozanov, *supra* note 26, at 55-56.

<sup>32</sup> See China Investment Corporation, *supra* note 1; Kramer, *supra* note 2.

<sup>33</sup> That being said, when the Kuwaiti Fund acquired over a twenty percent equity stake in British Petroleum in the late 1980s, Mrs. Thatcher and her conservative government pushed this investment into the public arena and backed the Fund down to a 9.9 percent interest based upon UK governmental concern that an oil producing state could unduly influence one of the world’s largest oil companies. *We Really Must Insist*, TIME, Oct. 17, 1988, <http://www.time.com/time/magazine/printout/0,8816,968689,00.html>. This author was at the University of London in 1988 and it is his anecdotal recollection that there was considerable “chatter” that Mrs. Thatcher intuitively bristled at having just privatized BP only to have a state-controlled entity try to acquire such a large equity position. The rumor that Kuwait was going to try to acquire up to a thirty percent interest in part to force BP divestiture from apartheid South Africa did not sit well with Mrs. Thatcher either.

<sup>34</sup> See WORK AGENDA, *supra* note 4, at 8. The author estimates, based on various reports over the past two years of the McKinsey Global Institute (<http://www.mckinsey.com/mgi/publications/>), the IMF, the World Bank, the OECD and the BIS, that the significance of SWFs in the global financial market is as follows: For comparative purposes, World GDP in 2009 is estimated at approximately \$60 trillion (with US GDP around \$14 trillion), and at 2008 world financial assets were estimated at approximately \$178

Further, there has been no substantiated evidence that SWFs have ever brought mischief to the international financial system.<sup>35</sup> Nor has there been any firm evidence that there is any necessary connection between an SWF's establishment and the nature of a country's political system;<sup>36</sup> that there is any one-size-fits-all structure for SWFs;<sup>37</sup> or that SWFs have operated in a non-commercial, political manner or have any current plans to do so.<sup>38</sup> Moreover, although current public interest in SWFs arose with the unfolding of the GFC and the increasing number and size of SWFs, SWFs have not been considered, to date, as operating as a financial industry group or in any way contributing to the causes of the GFC. To the contrary, various SWFs came to be looked upon as potential sources of needed

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trillion. In 2008, approximately \$1.4 trillion of assets were under hedge fund management; private equity funds were at \$.9 trillion; global pensions fund assets were at \$17.9 trillion; global mutual funds were at \$19 trillion; global stock market capitalization was at \$45 trillion; global bank deposits were at approximately \$61 trillion; government debt securities were at \$32 trillion; global private debt securities were at \$51 trillion; and global insurance assets were at \$16 trillion. Some financial analysts estimate that by 2012, fifteen SWFs could have assets close to approximately \$13-16 trillion (10-12% of current total global financial assets).

<sup>35</sup> See, e.g., Paul D. Marquardt, *Sovereign Wealth Funds*, <http://search.abanet.org/> (search "Sovereign Wealth Funds"; then click on the hyperlink entitled "Sovereign Wealth Funds") ("Although SWFs have lately attracted a great deal of attention, criticism, and concern, much of these exaggerate the scale and influence of SWFs and posit threats that are largely speculative.").

<sup>36</sup> See, e.g., Brad Setser, Council on Foreign Relations, *Regulating Sovereign Wealth Funds: Does the US Have Any Leverage* (Feb. 26, 2008), <http://www.cfr.org/> (follow "Think Tank Home" hyperlink; then follow "Muarice R. Greenberg Center for Geoeconomic Studies" hyperlink; then follow "Brad Setser: Follow the Money" hyperlink; then follow "February 2008" hyperlink; then follow "Regulating sovereign wealth funds: does the US have any leverage?" hyperlink).

<sup>37</sup> See Vidhi Chhaochharia & Luc Laeven, *The Investment Allocation of Sovereign Wealth Funds 9* (Int'l Monetary Fund Working Paper, July 8, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1262383](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262383); Bortolotti et al., *supra* note 6, at 5.

<sup>38</sup> See Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 87 (2008).

global capital for fragile global financial institutions and as a positive force in the search for global financial stability.<sup>39</sup>

In looking at the sources of the foreign exchange assets held, SWF assets can include balance of payment surpluses, surpluses from official foreign currency operations, proceeds of privatizations, fiscal surpluses and/or receipts from commodity exports.<sup>40</sup> Generically, SWFs have come to be categorized as either “commodity funds” (i.e., from oil and gas reserves, copper, silver or phosphates) or “non-commodity funds” (i.e., from transfers of assets from “excess” official exchange reserves).<sup>41</sup> Further, the IMF has identified five types of SWFs according to their primary investment objective: stabilization funds, savings funds for future generations, reserve investment corporations, development funds and contingent pension reserve funds.<sup>42</sup> The actual structure of an SWF can vary considerably: from being part of the Central Bank (e.g., the Norwegian Fund) or the Ministry of Finance (e.g., Kuwaiti Fund) to a separate stand-alone corporate entity (e.g., China’s CIC and Singapore’s two funds). The asset managers of SWFs are free to seek a higher rate of return than the managers of official reserves whose emphasis is on liquidity and safety.<sup>43</sup> As such, the SWF asset managers will tend to be more aggressive, risk tolerant and focus on the long-term in their investment strategies.<sup>44</sup> However, in many cases, these managers will be given a governmental benchmark for expected investment return. The managers may be drawn from government bureaucrats and/or private sector fund managers. The ownership, structure and management of SWFs, with a few exceptions (e.g., the Norwegian

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<sup>39</sup> See Tao Sun & Heiko Hesse, *Sovereign Wealth Funds and Financial Stability—An Event Study Analysis* 3 (Int’l Monetary Fund, Working Paper No. 09/239, 2009), available at <http://www.imf.org/external/pubs/ft/wp/2009/wp09239.pdf>.

<sup>40</sup> Udaibir S. Das et al., *Setting up a Sovereign Wealth Fund: Some Policy and Operational Considerations* 5 (Int’l Monetary Fund, Working Paper No. 09/179, 2009), available at <http://www.imf.org/external/pubs/ft/wp/2009/wp09179.pdf>.

<sup>41</sup> See, e.g., SWF Institute, About Sovereign Wealth Funds, <http://www.swfinstitute.org/swf.php> (last visited Dec. 1, 2009).

<sup>42</sup> Das et al., *supra* note 40, at 9-10.

<sup>43</sup> See Gordon L. Clark & Ashby H.B. Monk, The Oxford Survey of Sovereign Wealth Funds’ Asset Managers 13 (Oxford Univ. Ctr. for the Env’t, Working Paper, July 1, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1432078](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432078).

<sup>44</sup> See *id.* at 18.

Fund), give rise to concerns in many public and private corners about fundamental issues such as transparency, accountability, sound governance and sound risk management.<sup>45</sup> Satisfactorily addressing these issues seems to be of mutual concern and benefit to both the SWFs and the global financial system.<sup>46</sup>

In sum, the geographic embrace of the SWF is now truly global, covering countries (large and small) in Western Europe, Eastern Europe, North America, South America, Central Asia, Southern Asia, Eastern Asia, Australasia, Africa and the Middle East.<sup>47</sup> Of recent note, Saudi Arabia, which has traditionally invested country reserves through its Central Banking Authority and Royal Family accounts, in 2008, established what could become a megafund to rival or exceed Abu Dhabi's.<sup>48</sup> However, with all the current controversy over SWFs, Saudi Arabia appears to be opting initially for a mini \$5-6 billion SWF, even though its central bank holds very substantial international assets outside its normal foreign exchange reserves.<sup>49</sup> Even recently, a high-level French government official, notwithstanding France's concerns over the rise of the non-European

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<sup>45</sup> See WORK AGENDA, *supra* note 4, at 4, 8, 11, 14.

<sup>46</sup> See *id.* at 4.

<sup>47</sup> See SWF Institute, SWF Size & Concentration by Country, <http://www.swfinstitute.org/research/worldmapswf.php> (last visited Mar. 11, 2010). That being said, it appears the bulk of SWF assets (1) are held by seven jurisdictions, some having more than one fund (UAE, Norway, Russia, China, Kuwait, Singapore and Hong Kong); (2) are held by Middle Eastern and Asian entities; and (3) are commodity-based funds. See SWF Institute, *supra* note 4 (showing a table of the largest SWFs indicating, inter alia, each fund's country of origin and the size and nature of assets under management).

<sup>48</sup> *Infra* note 49.

<sup>49</sup> The Saudi Arabian Monetary Agency (“SAMA”), the Saudi central banking authority, distinguishes on its own books its foreign exchange reserve assets and its international asset holdings. See Saudi Arabian Monetary Agency, SAMA Functions, <http://www.sama.gov.sa/sites/SAMAEN/AboutSAMA/Pages/SAMAFunction.aspx> (last visited Mar. 12, 2010). Thus, though the SAMA has about \$400 billion in international assets, it is not formally considered a SWF. See SWF Institute, SAMA Foreign Holdings, <http://www.swfinstitute.org/fund/saudi.php> (last visited Mar. 12, 2010). In 2008, the Saudi Government authorized its domestic Public Investment Fund to establish a SWF in the form of a wholly-owned investment company (Sanabil). See *Gov't-Owned Sanabil al-Saudia to Start Ops Next Week*, MENAFN.COM, Apr. 29, 2009, [http://www.menafn.com/qn\\_news\\_story\\_s.asp?StoryId=1093246314](http://www.menafn.com/qn_news_story_s.asp?StoryId=1093246314).

SWFs, said she was “seduced” by the idea of France establishing an SWF, with France subsequently establishing a small Fund.<sup>50</sup> From 2008-2009, Brazil and Malaysia also established modest-sized SWFs.<sup>51</sup> Countries as diverse as India and Japan have preliminarily explored establishing an SWF, but have backed away, at least for the moment.<sup>52</sup>

## B. The Definitional Quandary

What’s in a name? Superficially, the term “Sovereign Wealth Fund” seems rather straightforward and self-descriptive. But in reality, arriving at a definitive and generally agreed upon definition for an SWF has proven elusive, largely because of the lack of homogeneity among individual SWFs and the current absence of a recognized cohesive SWF sector in the global financial system. As

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<sup>50</sup> See Danny Fortson, *Economy Minister Admits She Is ‘Seduced’ by Idea of French SWF*, THE INDEPENDENT, Feb. 19, 2008, <http://www.independent.co.uk/news/business/news/economy-minister-admits-she-is-seduced-by-idea-of-french-swf-784110.html>. In 2008, the French established the FSI (Fonds Stratégique D’Investissement) with about \$28 billion equivalent. See SWF Institute, *Strategic Investment Fund*, <http://www.swfinstitute.org/fund/france.php> (last visited Mar. 12, 2010).

<sup>51</sup> In 2009, Brazil established a small SWF (\$8.6 billion equivalent), the Fundo Soberano do Brasil. See SWF Institute, *Sovereign Fund of Brazil*, <http://www.swfinstitute.org/fund/brazil.php> (last visited Mar. 12, 2010). In 2008, Malaysia established a small (\$3.1 billion) SWF, 1 Malaysia Development Berhad, a sovereign fund similar to Temesak that apparently Malaysia does not consider a SWF and is not part of the IWG process. See SWF Institute, *1 Malaysia Development Berhad*, <http://www.swfinstitute.org/fund/terengganu.php> (last visited Mar. 12, 2010).

<sup>52</sup> On Japan, see *Japan Mulling Sovereign Wealth Fund -The Times*, REUTERS, Jan. 26, 2008, <http://www.reuters.com/article/idUST7419620080126>. However, with strong opposition within Japan’s Ministry of Finance and with a recent change in national government, it does not appear a final decision has been made. On India, see Gaurav Choudhury, *RBI Not Keen on Managing Sovereign Wealth Fund*, HINDUSTAN TIMES, Aug. 18, 2008, <http://www.hindustantimes.com/News-Feed/businessbankinginsurance/RBI-not-keen-on-managing-sovereign-wealth-fund/Article1-332137.aspx>. India’s dilemma is that its reserve assets are not commodity based and the country is still running a current account deficit.

Andrew Rozanov of the State Street Global Advisors pointed out: “There is no such thing as a ‘typical’ sovereign wealth fund . . . .”<sup>53</sup>

Furthermore, the early attempts at an SWF definition have been at the hands of private investment bankers who were more concerned with identifying key common functional characteristics—with the view of creating a broad grouping of funds for potential client and/or future financial collaborative purposes—even though SWFs did not have as much in common as the functional grouping might suggest, since there was very little institutional linkage and interaction among the “members” of this grouping.<sup>54</sup> Even when the policymakers became involved (e.g., the “think tanks,” the U.S. Treasury or the IMF), their attempts at a definition were also incomplete: rather than being informative from a policy perspective, they tended to focus on who might supervise and not necessarily on how to supervise in any substantive manner.<sup>55</sup> Moreover, even given a range of available definitions, there have occurred a number of embarrassing circumstances where various funds supposedly included in a definitional group denied being an SWF under the given definition,<sup>56</sup> or where a major jurisdiction has remained aloof from

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<sup>53</sup> Andrew Rozanov, What is “Sovereign Wealth” Anyway? 3 (Sept. 10, 2009) (unpublished article on file with author).

<sup>54</sup> See, e.g., Stephen Jen, Morgan Stanley, Global Economic Forum: The Definition of Sovereign Wealth Fund (Oct. 26, 2007), <http://www.morganstanley.com/views/gef/archive/2007/20071026-Fri.html>; cf. INT’L MONETARY FUND, *supra* note 4, at 37-38.

<sup>55</sup> See, e.g., Press Release, U.S. Dep’t of the Treasury, Remarks by Acting Under Secretary for International Affairs Clay Lowery on Sovereign Wealth Funds and the International Financial System (June 21, 2007) *available at* <http://www.ustreas.gov/press/releases/hp471.htm> [hereinafter Lowery Speech].

<sup>56</sup> For example, in March 2008, Temasek (perceived generally as a SWF) did not sign on to the Singapore Policy Principles agreement because it did not consider itself to be a SWF as it has to sell assets to raise funds for new investments and it does not require government approval. Press Release, Ministry of Foreign Affairs Sing., Guidelines to Avoid Investment Friction Reached (Mar. 22, 2008) *available at* [http://app.mfa.gov.sg/pr/read\\_content.asp?View,9632](http://app.mfa.gov.sg/pr/read_content.asp?View,9632). Also, in June 2008, Russian prime Minister retorted to a comment by U.S. Treasury Secretary Paulson about Russia’s SWF that Russia did not yet have a SWF and Russia’s investments in the U.S. were of a private nature through Russian SOEs/MNEs. See *Putin-No Sovereign Wealth Fund in Russia Yet*, REUTERS.COM, June 30, 2008, <http://www.reuters.com/article/idUSL3028241920080630>.

the IWG process.<sup>57</sup> Further, as Part III of this article considers, the early (and even current) discussions of SWFs get entangled with broader political and security concerns over foreign state-owned enterprise (“SOE”) investments by certain countries like China, Russia and a few Middle Eastern nations.<sup>58</sup>

Getting back to the matter of an appropriate SWF definition, Andrew Rozanov, in his 2005 seminal piece, does not attempt any formal definition.<sup>59</sup> Instead, he provides a quasi-definition by exclusion, which is in actuality an inclusive definition. He refers to SWFs as “a different type of public-sector player” that are “neither traditional public-pension funds nor reserve assets supporting national currencies, but a different type of entity altogether.”<sup>60</sup> His definition is concerned with the sovereign ownership and management dimension, and that the assets were not prudential monetary reserves of traditional pension funds. Rozanov was not concerned about the legal structure of these funds: he recognized that a central bank might have legitimate reasons to keep such excess reserves “in-house” in segregated accounts.<sup>61</sup> He was more concerned about “excessive reserves” and about exploring the sundry dimensions of what sovereign wealth management vis-à-vis traditional central bank functions should be about.<sup>62</sup> Though he observed that these funds often shared one or more common general objectives, he recognized that countries might have very particularized long-term concerns and needs that can be impacted by geopolitical and natural disaster variants.<sup>63</sup> He acutely states that had Kuwait not accumulated substantial excess reserves over the decades, it would never have been able to rebuild its country as it did after the 1991 Gulf War-Iraqi invasion.<sup>64</sup>

While acknowledging the great differences among the then-existing SWFs, Rozanov, recognizing the increasing importance of

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<sup>57</sup> *E.g.*, Saudi Arabia has chosen not to be a direct member of the IWG process, but to be a “permanent observer.” See INT’L WORKING GROUP OF SOVEREIGN WEALTH FUNDS, *supra* note 18, at 1.

<sup>58</sup> See *infra* Part III.

<sup>59</sup> See Rozanov, *supra* note 26, at 52.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 56-57.

<sup>62</sup> See *id.* at 55-57 (discussing the huge foreign reserves being accumulated in certain Asian countries and how those governments should use these reserves).

<sup>63</sup> See *id.* at 57.

<sup>64</sup> *Id.*

SWFs in terms of size and wealth, felt there was sufficient commonality within SWFs to merit carving them out as a separate subject matter for study, particularly as these funds are ultimately rooted in the core function of central bank reserve management.<sup>65</sup> Also, he thought SWFs should be considered as a group in order “to answer the following question: Are central bank reserve managers—at least those among them who have accumulated massive foreign exchange reserves in recent years—starting to act more like sovereign wealth managers?”<sup>66</sup> Interestingly, Rozanov apparently did not view engaging in only international investments as a characteristic of an SWF, a feature that subsequent commentators felt was important as a distinguishing factor. Now with the GFC and also in light of the political controversy some recent SWF forays have generated, a number of SWFs are diverting some of their investment strategy more inward.<sup>67</sup>

In a recent 2009 article, Rozanov provides both a three-year retrospective and a forward-looking examination.<sup>68</sup> In considering his original definition, he still likes its broad embrace, while conceding it does lack precision because the new emphasis is more “rule-based” to address evolving policy concerns and greater emphasis on regulation/self-regulation.<sup>69</sup> Rozanov has developed a multiple liability-based analysis,<sup>70</sup> but still feels the SWF construct remains not yet fully evolved.<sup>71</sup> Further, he sees that, in refining the main definition, a series of sub-definitional challenges arise regarding the connected issues of transparency, non-commercial motivation and reciprocity.<sup>72</sup>

Stephen Jen of Morgan Stanley, another early student of SWFs, felt there was sufficient overlap between various types of sovereign funds such that trying to come up with a set general definition would not be very useful.<sup>73</sup> He preferred to use definitions

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<sup>65</sup> *Id.* at 53.

<sup>66</sup> *Id.* at 53-54.

<sup>67</sup> See e.g., Zhou Xin & Jacqueline Wong, *China Wealth Fund Says Investing in Domestic Banks*, REUTERS, Jan. 16, 2009, <http://www.reuters.com/article/idUSPEK28548920090116>.

<sup>68</sup> Rozanov, *supra* note 53.

<sup>69</sup> See *id.* at 5.

<sup>70</sup> See Andrew Rozanov, *A Liability-Based Approach to Sovereign Wealth*, 18 CENT. BANKING 37, 37 (2008).

<sup>71</sup> Rozanov, *supra* note 53, at 7.

<sup>72</sup> See *id.* at 1, 12-18.

<sup>73</sup> Jen, *supra* note 54.

to suit the specific purpose being sought.<sup>74</sup> This being said, he felt an SWF “needs to have five characteristics: (1) sovereign; (2) high foreign currency exposure; (3) no explicit liabilities; (4) high risk tolerance; and (5) long investment horizon.”<sup>75</sup> This definitional approach would exclude most national stabilization funds and all national pension reserve funds.<sup>76</sup>

The earliest U.S. Treasury official to enter the SWF definitional fray was Clay Lowery, then Acting Under Secretary of the Treasury for International Affairs, who delivered a policy speech at the Federal Reserve Bank of San Francisco on June 21, 2007.<sup>77</sup> While acknowledging that there was no universal definition for an SWF, he proposed that the term denotes “a government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from official reserves.”<sup>78</sup> This proposed definition is indeed compact and straightforward, but, again, it lends itself to numerous interpretative issues, such as whether Temasek would come within this definition, given the way it

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<sup>74</sup> *See id.*

<sup>75</sup> *Id.*

<sup>76</sup> Rozanov, *supra* note 53, at 9.

<sup>77</sup> Lowery Speech, *supra* note 55. As will be picked up upon in Part III of this article, this speech came on the heels of China’s low-key and indirect announcement in March 2007 to set up an SWF, *see supra* note 1; though the speech curiously did not explicitly mention China’s CIC, except for a very brief passing reference to China’s and Russia’s soon-to-be-established SWFs. Lowery speech, *supra* note 55.

<sup>78</sup> Lowery speech, *supra* note 55. Interestingly, in the Treasury’s June 13, 2007 Semiannual Report on International Economic and Exchange Rate Policies, the end of Lowery’s definition was extended to include the words: “of the monetary authorities (the Central Bank and reserve-related functions of the Finance Ministry).” U.S. TREASURY, SEMIANNUAL REPORT ON INTERNATIONAL ECONOMIC AND EXCHANGE RATE POLICIES app. 3, at 1 (2007), available at [http://www.treas.gov/offices/international-affairs/economic-exchange-rates/pdf/2007\\_Appendix-3.pdf](http://www.treas.gov/offices/international-affairs/economic-exchange-rates/pdf/2007_Appendix-3.pdf). Lowery’s earlier definition would have excluded Central bank segregated and specially managed accounts and specially managed MOF accounts. *See id.* Thus, it seems that the Treasury refined Lowery’s definition to broaden the scope of SWFs. In Winter and Spring 2008, the Treasury is still using Lowery’s definition. *See, e.g.,* Robert M. Kimmitt, *Public Footprints in Private Markets: Sovereign Wealth Funds and the World Economy*, FOREIGN AFF., Jan./Feb. 2008, at 119, 120 [hereinafter Kimmitt, *Public Footprints*]; Robert M. Kimmitt, *In Praise of Foreign Investment*, INT’L ECON., Spring 2008, at 62, 62 [hereinafter Kimmitt, *In Praise of Foreign Investment*].

is structured and funded.<sup>79</sup> What is most significant about Lowery’s speech, as will be discussed further in the next Part of this article, is that the Treasury is raising, for public notice and discussion, the overriding policy challenge of how “to work to integrate these funds as smoothly as possible into the international financial system.”<sup>80</sup>

Picking up quickly on the Treasury’s policy signals, Mr. Edwin M. Truman published a series of policy papers and speeches and gave Congressional testimony that have been particularly influential in advancing an informed and evolving policy approach to the subject matter of SWFs.<sup>81</sup> Interestingly, Truman is not bogged down in the definitional quandary. He views SWFs as part of a “continuum” in the way governments manage their international assets—from traditional reserves, to stabilization funds, to SWFs, to support of SOEs and state-owned financial institutions.<sup>82</sup> While focusing on international assets, Truman nevertheless recognizes that some SWFs have domestic investments.<sup>83</sup> He also makes the argument, which has not achieved mainstream acceptance, that certain government-funded pension funds should be considered SWFs; although he does make a distinction between non-pension fund and pension fund SWFs.<sup>84</sup> Further, Truman is cognizant that

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<sup>79</sup> See *supra* note 56 and accompanying text.

<sup>80</sup> Lowery Speech, *supra* note 55.

<sup>81</sup> Mr. Edwin M. Truman is a senior economist with the Peterson Institute for International Economics, former senior economist with the Federal Reserve System, a former Assistant Secretary of the U.S. Treasury for International Affairs and a person with very good working connections within the Financial Stability Board “network.” For further biographical information on Mr. Truman and weblinks to his various policy briefs, working papers, speeches and Congressional testimony, see Peterson Institute for International Economics, Senior Research Staff: Edwin M. Truman, [http://www.iie.com/staff/author\\_bio.cfm?author\\_id=122](http://www.iie.com/staff/author_bio.cfm?author_id=122) (last visited Dec. 29, 2009).

<sup>82</sup> EDWIN M. TRUMAN, PETERSON INST. FOR INT’L ECON., SOVEREIGN WEALTH FUNDS: THE NEED FOR GREATER TRANSPARENCY AND ACCOUNTABILITY (POLICY BRIEF NO. PB07-6) 4 (2007), available at <http://www.iie.com/publications/pb/pb07-6.pdf>.

<sup>83</sup> See EDWIN M. TRUMAN, PETERSON INST. FOR INT’L ECON., A BLUEPRINT FOR SOVEREIGN WEALTH FUND BEST PRACTICES (POLICY BRIEF NO. PB08-3) 1 (2008), available at <http://www.iie.com/publications/pb/pb08-3.pdf>.

<sup>84</sup> See *id.* at 1, 1 n.3. On treatment of pension funds, see the *Santiago Principles*’ definition, which only excludes government-employee pension funds from the definition of an SWF. INT’L WORKING GROUP OF SOVEREIGN WEALTH FUNDS, *supra* note 18, at 3, 3 n.6.

central banks (e.g., the Saudi Arabian SAMA) may keep segregated internal accounts for “excessive reserves.”<sup>85</sup> Being well aware that “SWFs take many forms and are designed to achieve a variety of economic and financial objectives,” Truman views SWF as “a descriptive term for a separate pool of government-owned or government-controlled financial assets that include some international assets.”<sup>86</sup>

For Truman, trying to arrive at a narrow, precise definition of SWF diverts attention from the real issue: devising suitable governmental policies for the increasing range of government-controlled international assets.<sup>87</sup> Truman’s bottom line on SWFs is three-legged: (1) SWFs “do not pose a significant new threat to US security or economic interests”; (2) SWFs “are one of the many challenges of global economic and financial change in the 21st century” that the U.S. needs to appropriately address from a policy perspective; and (3) the U.S. should continue its efforts to have SWFs adopt “best practices” while itself not taking a protectionist approach to SWF regulation.<sup>88</sup> Truman’s primary concerns center around the following policy bases: transparency, accountability and good governance.<sup>89</sup> As an added contribution to the SWF debate in the 2007-2008 period, Truman (along with his assistant, Doug Dawson) presents not only a policy “blueprint” for addressing SWF “best practices,” but also proposes a relatively developed “scorecard” for testing (rating) specific SWFs as to structure, governance, accountability, transparency and behavior.<sup>90</sup>

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<sup>85</sup> See TRUMAN, *supra* note 82, at 2.

<sup>86</sup> TRUMAN, *supra* note 83, at 1.

<sup>87</sup> See *Sovereign Wealth Funds: New Challenges from a Changing Landscape Before H. Subcomm. On Domestic and International Monetary Policy, Trade and Technology*, 110th Cong. 1 (2008) (statement of Edwin M. Truman, Senior Fellow, Peterson Institute for International Economics), available at <http://www.iie.com/publications/papers/truman0908.pdf>.

<sup>88</sup> *The Rise of Sovereign Wealth Funds: Impacts on US Foreign Policy and Economic Interests Before H. Comm. on Foreign Affairs*, 110th Cong. 1-2 (2008) (statement of Edwin M. Truman, Senior Fellow, Peterson Institute for International Economics), available at <http://www.piie.com/publications/papers/truman0508.pdf>.

<sup>89</sup> See, e.g., *id.* at 3.

<sup>90</sup> TRUMAN, *supra* note 83, at 6-13, 17-21.

In October 2008, the IWG presented the *Santiago Principles*.<sup>91</sup> After much analysis, debate and honing in on the key elements of ownership, investments, purposes and objectives,<sup>92</sup> the IWG settled upon the following common definition of SWFs:

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.<sup>93</sup>

By footnote, the IWG points out that “the intention is not to exclude all assets on the books of central banks: SWFs can be on the books of central banks if they also are held for purposes other than balance of payments purposes (e.g., as intergenerational wealth transfer).”<sup>94</sup> This definition, however, does exclude “*inter alia*, foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, operations of state-owned enterprises in the traditional sense, government-employee pension funds, or assets managed for the benefit of individuals.”<sup>95</sup> For the moment, the Santiago definition can be considered the definitive one but perhaps not the last word.

### **III. *The Multi-track Road to Santiago and Kuwait City: The U.S. Domestic Network Track***

By the Spring of 2007, the increasing number and projected increasing size of SWFs have begun to push SWFs to the forefront of

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<sup>91</sup> See INT’L WORKING GROUP OF SOVEREIGN WEALTH FUNDS, *supra* note 18.

<sup>92</sup> *Id.* at 27.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 27 n.42.

<sup>95</sup> *Id.* at 27. The reference to “benefit of individuals” would refer to accounts held for the rulers of various Kingdoms in Middle East or elsewhere.

the international financial scene, to the research attention of academia and the investment banking world, and to the policy attention of the U.S. Treasury.<sup>96</sup> In part, as alluded to above, this heightened level of governmental and intergovernmental concern and interest is also attributable to China's and Russia's plans to establish SWFs.<sup>97</sup> This Part III of the article addresses and analyzes, from a domestic U.S. context, the events from Spring of 2007 and beyond that led to the promulgation of the *Santiago Principles* in October 2008 and the subsequent *Kuwait Declaration* in April 2009, which established the ISWF Forum. Part IV of this article will consider the related and interconnected "international track." The story that unfolds is one of an informal process that is largely driven by the U.S. Treasury (in particular by then Secretary Paulson) along a series of interconnected tracks and involving an ad hoc administrative network—domestically, bilaterally and multilaterally.

#### A. In General

From a U.S. perspective, SWF concerns get translated into "post-9/11" security issues and trade/investment protectionism issues due to the fact that certain countries (e.g., Middle Eastern countries and China), through SWFs, SOEs or otherwise, are investing (directly or indirectly) in what some Americans might consider "sensitive" areas—such as port authorities (e.g., Dubai Ports World's failed attempt to take over P&O's port business in the U.S. even though preliminarily cleared in advance by the Committee on Foreign Investment in the United States ("CFIUS"))<sup>98</sup> and energy industries (e.g., CNOOC's, a Chinese SOE, failed attempts to acquire Unocal). These two examples, which involved SOEs and not SWFs, provide evidence for the "politicization of the CFIUS process," albeit through different contexts: the Dubai Ports World because its Middle East base in the United Arab Emirates ("UAE") (ironically a staunch ally of the U.S.) is caught up in post-"9/11" security concerns (even though President Bush supported the acquisition), and CNOOC because of a hard-core anti-China lobby in

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<sup>96</sup> See *supra* notes 1-16 and accompanying text.

<sup>97</sup> See *supra* notes 1-4 and accompanying text.

<sup>98</sup> See *infra* note 154 (discussing The Committee on Foreign Investment in the United States ("CFIUS")).

the U.S. and supporters in the U.S. Congress.<sup>99</sup> Thus, the underlying currents of protectionism and Sinophobia evidenced by the uproar over these proposed SOE investments have direct implications for possible SWF investments—as such investments could likely become entangled in the same currents.

Equally so, the concerns expressed by Western Europe about the Russian Fund seem to get largely mixed up with the geo-political tension between Western Europe and Russia, as well as with specific concerns over the expansion of Gazprom, a Russian energy conglomerate, into Western Europe.<sup>100</sup> One high-level European Union (“EU”) official characterized the EU ambivalence toward SWFs in 2007, stating: “I believe there are issues relating to transparency and governance that we need to engage with certain Sovereign Wealth Funds on.”<sup>101</sup> Also, two other Western European commentators observed:

The reason for European (and American) unease is concern about the underlying motivation of some of these new investors. Few SWFs publish their management structures or investment objectives. Nor do Russia, Saudi Arabia or China share western conceptions of capitalism and pluralist democracy. So these countries might be tempted to buy firms in certain sectors for reasons other than boosting investment returns. Russia’s use of Gazprom as a

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<sup>99</sup> See EDWARD M. GRAHAM & DAVID M. MARCHICK, INST. FOR INT’L ECON., U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 128-41 (2006).

<sup>100</sup> See, e.g., Sylvia Pfeifer, *Gazprom Flexes Its Muscles in Europe*, TELEGRAPH, Apr. 15, 2007, <http://www.telegraph.co.uk/finance/migration/temp/2807346/Gazprom-flexes-its-muscles-in-Europe.html>.

<sup>101</sup> Charlie McCreevy, Eur. Union, Comm’r for Internal Mkts. & Servs., Financial Market Controversies of 2007 and Outlook for 2008, Address Before the 2007 Institute for Chartered Accountants in England and Wales (ICAEW) Corporate Finance Faculty December Debate (Dec. 5, 2007), <http://europa.eu/rapid/searchAction.do> (under “Date Range” click on the radio button adjacent to “Search complete database (no date specified)”; then, under “Option Search Criteria,” type “SPEECH/07/794” into the text box adjacent to “Reference”; then click the “Search” button at the bottom of the page; from the resulting page, one can access the html, pdf, or doc transcriptions of the speech), at 5.

foreign policy tool has done nothing to assuage these concerns.<sup>102</sup>

In effect, this is the contentious environment that SWFs and then Secretary of the Treasury Paulson found themselves in during 2007-2008 when the GFC was unfolding. Even during this period, Lawrence Summers, a former Secretary of the Treasury and current Obama senior economic advisor, was speaking out about major, ominous concerns regarding the role of SWFs within the global financial system,<sup>103</sup> and the French President Sarkozy was referring to non-European SWFs as “predators.”<sup>104</sup> All this was bubbling to the surface at a time when it was becoming apparent that the global financial system would soon need significant capital injections. In fact, the irony of the matter is that a variety of Western financial institutions (e.g., private equity funds such as Blackstone Group, Carlyle Group, JC Flowers and Apollo Management); investment banking firms such as Merrill Lynch, Bear Stearns and Morgan Stanley; and global banks such as Barclays, CitiGroup and UBS were actively courting investments from a variety of Middle East and Asian SWFs.<sup>105</sup> As part of these interconnections among differing financial institutions, both private and public, a new pattern of “global network finance” was emerging.<sup>106</sup>

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<sup>102</sup> Philip Whyte & Katinka Barysch, *What Should Europe Do About Sovereign Wealth Funds?*, CER BULL. (Centre For Eur. Reform, London, Eng.), Oct./Nov. 2007, at 1, 2.

<sup>103</sup> See Posting of Lawrence Summers to the Financial Times Economists' Forum, *Sovereign Funds Shake the Logic of Capitalism*, <http://blogs.ft.com/economistsforum/2007/07/sovereign-funds.html/> (July 30, 2007, 09:04 GMT).

<sup>104</sup> *Sarkozy Outlines 'Refoundation' of Capitalism*, EURACTIV, Oct. 22, 2008, <http://www.euractiv.com/en/financial-services/sarkozy-outlines-refoundation-capitalism/article-176571> (last visited Dec. 27, 2009).

<sup>105</sup> See, e.g., Richard A. Epstein & Amanda M. Rose, *The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow*, 76 U. CHI. L. REV. 111, 132 (2009).

<sup>106</sup> See Katharina Pistor, *Global Network Finance: Institutional Innovation in the Global Financial Market Place*, 37 J. COMP. ECON. 552, 552 (2009). This notion of “global network finance” will be considered *infra* in Part V.

### B. Treasury: The Navigator

As mentioned above in Part II.B of this article, the first public comments about SWFs by the U.S. Treasury came in a conference presentation by Mr. Clay Lowery, then Acting Under Secretary for International Affairs at the Treasury.<sup>107</sup> In this context, Lowery publicly discussed, for the first time, a proposal for developing “best practices” for SWFs that would involve some form of “joint task force” through the IMF and World Bank.<sup>108</sup> In doing so, Lowery was well aware of the possible protectionist backlash SWFs might create in the U.S. Congress,<sup>109</sup> particularly at a time when the U.S. Congress was reconsidering the CFIUS regulations.<sup>110</sup>

Mr. Lowery, in his June 2007 speech, indicated that the U.S. Treasury was taking a careful look at SWFs in order to develop a broader, more informed position on SWFs and their possible impact on the international and U.S. financial systems.<sup>111</sup> In so doing, he provided a glimpse of the behind-the-scenes efforts of the Treasury regarding SWFs. For example, he indicated that at an April 2007 meeting of the G7 Finance Ministers and Central Bank Governors the Treasury hosted a “special outreach dinner” with Russia, Saudi Arabia and the UAE, during which SWFs were discussed.<sup>112</sup> Further, he stated that in May 2007, the Treasury, along with the Federal Reserve and the South African Treasury and Reserve Bank, hosted a meeting of G20 Finance Ministers and Central Bank Officials on “Commodity Cycles and Financial Stability” where SWFs were also discussed.<sup>113</sup> In addition, Lowery mentioned that Deputy Secretary of the Treasury Kimmitt in early 2007 “has been traveling in Beijing and Moscow meeting with government officials and business leaders to promote open investment policies and to gain clarity on their new investment laws and to better understand the nature and investment priorities of their soon to be established sovereign wealth funds.”<sup>114</sup>

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<sup>107</sup> Lowery Speech, *supra* note 55.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; *see also infra* note 154 (listing recent legislative reforms pertaining to the CFIUS).

<sup>111</sup> Lowery Speech, *supra* note 55.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* It also appears that in March 2007, the Treasury engaged the President’s Working Group on Financial Markets with respect to SWFs. *See*

Taking the speech as a whole, one can readily see where the U.S. Treasury was heading: to set the stage for developing a multi-lateral approach at the October 2007 G7 Finance Ministers meeting that would request/direct the IMF to develop a set of best practices for SWFs. Though perceiving SWF expansion as “understandable,” Lowery also cautioned that if SWFs obtain operational control of the companies in which they invest, it may lead to “additional scrutiny” by governments and may “fuel financial protectionism.”<sup>115</sup> In a follow-up question and answer session, Lowery indicated that CIC’s recent investment in Blackstone would most likely raise Congressional eyebrows and that China needed to become more adept in understanding the political dynamics at play in the U.S.<sup>116</sup>

Lowery “also recommended greater transparency and more integration with the international financial system for sovereign wealth funds.”<sup>117</sup> “He suggested that they show their transparency so people won’t be fearful of them.”<sup>118</sup>

Also, the Treasury’s Spring 2007 position on SWFs needs to be read in the context of President Bush’s preference for strong “open market” foreign policy,<sup>119</sup> along with his position of developing stronger and more constructive relationships with China during his second term.<sup>120</sup> Amplifying President Bush’s policy positions was the fact that then Secretary of the Treasury, Henry Paulson, was the former head of Goldman Sachs, a prestigious and successful global investment banking firm, and for many years had

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Press Release, U.S. Dep’t of the Treasury, Prepared Statement by Treasury Under Secretary David H. McCormick in Advance of G-7 Finance Ministers and Central Bank Governors Meeting (Oct. 8, 2008), <http://www.treas.gov/press/releases/hp1190.htm>.

<sup>115</sup> Lowery Speech, *supra* note 55.

<sup>116</sup> See *China Likely to See US Friction Over Blackstone Deal—US Official*, ABCMONEY.CO.UK, June 22, 2007, <http://www.abcmoney.co.uk/news/22200791835.htm#> (last visited at Dec. 31, 2009).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See Press Release, President George W. Bush, Open Economies Policy Statement (May 10, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070510-2.html>.

<sup>120</sup> See, e.g., Posting of Elliot Ng to CNReviews.com, US-China Relations: George W. Bush’s Uncharacteristically Nuanced Approach, [http://cnreviews.com/china/us-china\\_relations\\_george\\_w\\_bushs\\_uncharacteristically\\_nuanced\\_approach\\_20080808.html](http://cnreviews.com/china/us-china_relations_george_w_bushs_uncharacteristically_nuanced_approach_20080808.html) (Aug. 8, 2008) (detailing some of President Bush’s efforts to promote U.S.-China relations).

been a fervent promoter of stronger ties with China.<sup>121</sup> Despite this strong support from the executive branch, as greater public focus on China’s decision to establish the CIC began to develop in the Summer of 2007 (though the CIC was, in fact, not established until September 2007 and did not start investing immediately), it became clear to any observer that China/the CIC could become a controversial matter in the U.S. Congress.<sup>122</sup> Also, as the Summer and Fall of 2007 developed, the Treasury discovered that a number of major U.S. global financial institutions were in search of significant injections of fresh capital and that SWFs were being courted in this regard.<sup>123</sup>

In the January/February 2008 issue of *Foreign Affairs*, Robert M. Kimmitt, Deputy Secretary of Treasury, published a widely-read article entitled “Public Footprints in Private Markets: Sovereign Wealth Funds and the World Economy.”<sup>124</sup> Stating that SWFs had already become “systemically significant” and would be increasingly so, Kimmitt sets out a number of “legitimate policy questions” of possible governmental concern, including:<sup>125</sup> (1) Whether SWFs “perpetuate[] undesirable underlying macroeconomic and financial policies.”<sup>126</sup> Here, Kimmitt expresses a concern that noncommodity funds not become a vehicle for accumulating foreign assets so as to avoid currency appreciation—an indirect reference to the Chinese situation. (2) The potential impact of SWFs on financial stability.<sup>127</sup> Although Kimmitt seems “reassured” on this point due to the nature of SWFs, he does state that a lack of Fund transparency could lead to market rumors that might cause the private sector to react. (3) The “most critical set of issues” concerns SWF investments

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<sup>121</sup> See Henry M. Paulson, Jr., *A Strategic Economic Engagement: Strengthening U.S.-Chinese Ties*, FOREIGN AFF., Sept./Oct. 2008, at 59 *passim*; HENRY M. PAULSON, JR., ON THE BRINK: THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM 32-33, 52-55 (2010).

<sup>122</sup> See *supra* note 99 and accompanying text.

<sup>123</sup> See *Citigroup Abu Dhabi Deal Signals Trouble Ahead*, REUTERS, Nov. 27, 2007, <http://www.reuters.com/article/idUSN2752968520071127>; Press Release, Merrill Lynch, Merrill Lynch Enhances Its Capital Position by Raising Up to \$6.2 Billion From Investors, Temasek Holdings and Davis Selected Advisors (Dec. 24, 2007), [http://www.ml.com/index.asp?id=7695\\_7696\\_8149\\_74412\\_86378\\_87784](http://www.ml.com/index.asp?id=7695_7696_8149_74412_86378_87784).

<sup>124</sup> Kimmitt, *Public Footprints*, *supra* note 78.

<sup>125</sup> See *id.* at 119, 122-23.

<sup>126</sup> *Id.* at 122.

<sup>127</sup> *Id.* at 122-23.

that involve taking active control of private firms—the major concern here being that of national security interests.<sup>128</sup>

Kimmitt also highlighted the need of recipient countries of SWF investments to “do no harm”—i.e., to “maintain their unequivocal support for international investment” and not to fall into a pattern of protectionism.<sup>129</sup> Furthermore, Kimmitt does not favor a policy of mandated “reciprocity”—i.e., “reciprocal openness to investment”—between the SWF sponsoring country and the SWF recipient country.<sup>130</sup> By the time Kimmitt’s article was published, the G7 meeting of Finance Ministers had already met in October 2007 and had charted out the roles for the IMF and the OECD.<sup>131</sup> The “game plan,” as orchestrated by Secretary Paulson and the Treasury, was effectively in place.

On March 5, 2008, David H. McCormick, the new Under Secretary for International Affairs and the former Deputy National Security Advisor to the President for International Economic Affairs, testified about SWFs before joint subcommittees of the House of Representatives.<sup>132</sup> He had previously testified along similar lines, before the Senate Committee on Banking, Housing and Urban Affairs on November 14, 2007.<sup>133</sup> In his March 2008 testimony, McCormick set out numerous benefits of SWFs, stressed that the U.S. “remains committed to open investment” and delineated the numerous benefits foreign investment has brought to the U.S. economy, including tying foreign investors’ economic interests more closely to those of the U.S.<sup>134</sup> McCormick specifically pointed out that SWFs have an “interest in and a responsibility for financial market stability.”<sup>135</sup> He set out a series of policy steps that the

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<sup>128</sup> *Id.* at 123.

<sup>129</sup> *Id.* at 124.

<sup>130</sup> *Id.* at 128.

<sup>131</sup> See *infra* note 199 and accompanying text.

<sup>132</sup> *Foreign Government Investment in the U.S. Economy and Financial Sector Before Subcomm. on Domestic and International Monetary Policy, Trade and Technology and Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services* 110th Cong. (2008) [hereinafter McCormick (2008)] (statement of David H. McCormick, Under Secretary for International Affairs, U.S. Department of the Treasury), available at <http://financialservices.house.gov/hearing110/mccormick030508.pdf>.

<sup>133</sup> McCormick (2007), *supra* note 25.

<sup>134</sup> McCormick (2008), *supra* note 132.

<sup>135</sup> *Id.*

Treasury was pursuing to “ensure that the United States can continue to benefit from open investment while addressing . . . potential concerns [about SWFs].”<sup>136</sup> In his concluding remarks, McCormick assured the subcommittees that the “Treasury Department will continue its work on sovereign wealth funds through sound analysis and focused bilateral and multilateral efforts to help ensure the United States shapes an appropriate international response to this issue, addresses legitimate areas of concern, and together with other countries, remains open to foreign investment.”<sup>137</sup> These assurances of ongoing Treasury vigilance were obviously intended to head-off any adverse Congressional actions against SWFs.

Of further major significance, on March 20, 2008, Secretary of the Treasury Paulson, the heads of the Abu Dhabi SWF and one of the two Singapore SWFs (GIC), along with the Abu Dhabi and Singapore governments, agreed that all their SWF investments would be based solely on commercial grounds and that these funds would work toward increasing the disclosure of information and making sure they have strong risk management and governance controls. They also agreed that countries that receive investment should not set up protectionist barriers and should have consistent, non-discriminatory investment rules.<sup>138</sup> The announcement of these nine “Policy Principles” caught many by surprise, as Treasury and the G7 had set into play the IMF- OECD agenda to arrive at “best practices.”<sup>139</sup> One could only surmise that this was Paulson’s posturing to put pressure on and to provide specific direction to the IMF-OECD efforts. As such, these agreed upon “Principles” would be the benchmark to consider for other SWFs, the IMF and OECD in arriving at their sets of “best practices.” A subsequent Treasury Release indicated the Singapore Principles would “support” the IMF-OECD efforts.<sup>140</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See Gov’t of the Republic of Sing., Joint Release of Policy Principles for Sovereign Wealth Funds and the Countries Receiving Sovereign Wealth Fund Investment by the United States, Abu Dhabi and Singapore, at app. A (Mar. 21, 2008) (available at <http://www.channelnewsasia.com/annex/210308swf.pdf>); see also Press Release, U.S. Dep’t of Treasury, Treasury Reaches Agreement on Principles for Sovereign Wealth Fund Investment with Singapore and Abu Dhabi (Mar. 20, 2008) (available at <http://www.ustreas.gov/press/releases/hp881.htm>) [hereinafter *Singapore Principles*].

<sup>139</sup> See *infra* Part IV.

<sup>140</sup> See *Singapore Principles*, *supra* note 138.

### C. The Bank and Securities Market Regulators: The Federal Reserve and the SEC

As mentioned above, as early as Spring 2008,<sup>141</sup> the Treasury had been consulting with the other members of the President's Working Group on Financial Markets ("PWGFM") with respect to SWFs.<sup>142</sup> In the U.S., responsibility for vetting foreign bank operations rests with the Federal Reserve Board ("FRB") under the 1978 and 1991 international banking legislation and related FRB regulations. In effect, for most purposes—including for the purposes of the Bank Holding Company Act ("BHCA") and the Change in Bank Control Act ("CIBCA")—foreign banking institutions are under the same regulation as their domestic counterparts.<sup>143</sup> In this context, it is significant that most of the recent SWF investments in U.S. financial institutions were structured to consist of non-controlling interests below 10% of voting equity stock.<sup>144</sup> In effect, these investments were structured as passive investments, thus not triggering the 25% control threshold under the BHCA and the 10% threshold under the CIBCA.<sup>145</sup> If either of these thresholds were

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<sup>141</sup> See Press Release, U.S. Dep't of the Treasury, Prepared Statement by Treasury Under Secretary David H. McCormick, *supra* note 114 (discussing achievements by the International Working Group of Sovereign Wealth Funds).

<sup>142</sup> The PWGFM was set up by Presidential Executive Order 12631 and signed into law by President Reagan on March 18, 1988 as a reaction to the "Black Monday" stock market crash of October 19, 1987. This group is comprised of the Treasury Secretary, the Chairman of the Federal Reserve Board of Governors, the Chairman of the Securities and Exchange Commission, the Chairman of the Commodity Futures Trading Commission, or their respective designees. See Exec. Order No. 12,631, 53 Fed. Reg. 9421 (Mar. 18, 1988), 1988 WL 311195.

<sup>143</sup> See, e.g., Federal Reserve Bank of New York, FedPoint: Foreign Banks and the Federal Reserve (April 2007), <http://www.newyorkfed.org/aboutthe-fed/fedpoint/fed26.html> (last visited Dec. 31, 2009).

<sup>144</sup> See Anna L. Paulson, Fed. Reserve Bank of Chicago, *Raising Capital: The Role of Sovereign Wealth Funds*, Jan. 2009, at 2-3, [http://www.chicagofed.org/digital\\_assets/publications/chicago\\_fed\\_letter/2009/cfljanuary2009\\_258.pdf](http://www.chicagofed.org/digital_assets/publications/chicago_fed_letter/2009/cfljanuary2009_258.pdf) (citing WILLIAM MIRACKY, ET AL., MONITOR GROUP, ASSESSING THE RISKS: BEHAVIORS OF SOVEREIGN WEALTH FUNDS IN THE GLOBAL ECONOMY (2008)).

<sup>145</sup> Joel Slawotsky, *Sovereign Wealth Funds as Emerging Financial Superpowers: How U.S. Regulators Should Respond*, THE FREE LIBRARY, <http://>

triggered by an SWF, it would be subject to a comprehensive review by the Federal Reserve. Furthermore, if an SWF came in control of or acquired a controlling interest in a U.S. banking institution, it would become subject to extensive U.S. bank regulation, including anti-money laundering, counter-terrorism and affiliate transactions regulations.<sup>146</sup> In a recent Congressional hearing, Scott G. Alvarez, the Federal Reserve General Counsel, provided testimony reassuring Congress that current federal banking laws and regulations were adequate to deal with SWFs in terms of bank regulatory and supervisory concern.<sup>147</sup>

The U.S. Securities and Exchange Commission (“SEC”) is the governmental authority responsible for the oversight of the U.S. securities markets and the enforcement of federal securities laws. The bywords for the SEC are “material disclosure/transparency” and “effective enforcement.”<sup>148</sup> The SEC had been relatively low-key with respect to addressing the SWF subject-matter. However, in 2007 and early 2008, then SEC Chairman Christopher Cox had given several public speeches in which he touched upon the subject of SWFs.<sup>149</sup> Noting the increasing convergence of capital markets around the world, the rise of borderless trading and the combination and linking of stock exchanges, Chairman Cox led into his discussion of SWFs by commenting that “we are now dealing with the growing

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[www.thefreelibrary.com/Sovereign+Wealth+Funds+as+emerging+financial+superpowers:+how+U.S....-a0215514218](http://www.thefreelibrary.com/Sovereign+Wealth+Funds+as+emerging+financial+superpowers:+how+U.S....-a0215514218) (last visited Apr. 10, 2010).

<sup>146</sup> See, e.g., Eric Dash & Andrew Ross Sorkin, *Citigroup Sells Abu Dhabi Fund \$7.5 Billion Stake*, N.Y. TIMES, Nov. 27, 2007, <http://www.nytimes.com/2007/11/27/business/27citi.html> (stating that the transaction “has been approved by federal regulators,” and that Citigroup executives “[do] not expect the deal to be derailed on regulatory . . . grounds.”).

<sup>147</sup> See *Sovereign Wealth Funds: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 110th Cong. (2008) (statement of Scott G. Alvarez, Gen. Counsel, Fed. Reserve Bd.), available at <http://www.federalreserve.gov/newsevents/testimony/alvarez20080424a.htm>.

<sup>148</sup> See U.S. Sec. & Exch. Comm’n, *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> (last visited Apr. 10, 2010).

<sup>149</sup> See, e.g., Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n, *Gauer Distinguished Lecture in Law and Policy at the American Enterprise Institute Legal Center for Public Interest: The Rise of Sovereign Business* (Dec. 5, 2007) (transcript available at <http://www.sec.gov/news/speech/2007/spch120507cc.htm>).

phenomenon of the state-owned, but publicly traded, company.”<sup>150</sup> The issues concerning Cox and the SEC included enforcement and effectiveness of cross-border governmental collaboration, conflicts of interest when the government is both the regulator and the regulated, opportunities for political corruption, market efficiency, transparency, corporate governance, investor protection and investor confidence and the impact upon the U.S. markets and the U.S. economy. Despite these concerns, Cox displayed a sense of calm by not trying to come up with quick answers to these and other questions concerning the SWFs. Rather, he encouraged the broad, collaborative analysis that was going on within the U.S. Government, the G7 and among other governments and the International Financial Institutions (“IFIs”).<sup>151</sup>

In her testimony before the Congressional U.S.-China Economic and Security Review Commission, Linda Thomsen, Director of the SEC’s Division of Enforcement, stated that many of the enforcement concerns regarding SWFs were similar to the SEC’s concerns with hedge funds, though she added that the SWF concern was more severe due to the linkage of the SWFs to government ownership.<sup>152</sup> She also expressed concerns that the overseas cooperative policing efforts through the SEC’s network of Memorandums of Understanding (“MOUs”) might be impaired in certain enforcement situations involving SWFs.<sup>153</sup>

#### **D. The CFIUS and National Security: The Executive-Congressional Linkage**

As was evident in the Spring of 2007, the Treasury was well aware of potential problems with the CFIUS<sup>154</sup> concerning the rise of

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *Testimony Concerning Sovereign Wealth Funds and Public Disclosure: Hearing Before the U.S.-China Econ. & Sec. Review Comm’n*, 110th Cong. (2008) (statement of Linda Chatman Thomsen, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm’n), available at <http://www.sec.gov/news/testimony/2008/ts0207081et.htm>.

<sup>153</sup> *Id.*

<sup>154</sup> The Treasury provides a description of the CFIUS:

The Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee authorized to review transactions that could result in control of a U.S. business by a foreign person (“covered transactions”), in

SWFs and regarding China’s CIC in particular.<sup>155</sup> The July 2007, Foreign Investment and National Security Act of 2007 (“FINSA”) legislation re-established the CFIUS under statute and pursuant to statutory procedures. The Act also added seven additional criteria to the original five criteria for the Committee to consider in its review processes, including national security considerations.<sup>156</sup> In November 2008, the Treasury enacted the final CFIUS regulations.<sup>157</sup> In effect, CFIUS and FINSA provide a nexus between the Executive and Congress in their historic tension over international economic affairs.

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order to determine the effect of such transactions on the national security of the United States. CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800. The CFIUS process has been the subject of significant reforms over the past several years. These include numerous improvements in internal CFIUS procedures, enactment of FINSA in July 2007, amendment of Executive Order 11858 in January 2008, revision of the CFIUS regulations in November 2008, and publication of guidance on CFIUS’s national security considerations in December 2008.

U.S. DEP’T OF TREASURY, OFFICE OF INV. SEC., The Comm. on Foreign Inv. in the U.S. (CFIUS), <http://www.ustreas.gov/offices/international-affairs/cfius/> (last visited Dec. 31, 2009). For a summary of the final November 2008 CFIUS Regulations, see U.S. DEP’T OF TREASURY, CFIUS REFORM: FINAL REGULATIONS ISSUED ON NOVEMBER 14, 2008 (Nov. 14, 2008), <http://www.ustreas.gov/offices/international-affairs/cfius/docs/Summary-FinalRegs.pdf>. For a copy of the CFIUS Guidance, see Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567-02 (Dec. 8, 2008), *available at* <http://www.ustreas.gov/offices/international-affairs/cfius/docs/CFIUSGuidance.pdf>. For a copy of the FINSA statute, *see* Foreign Investment and National Security Act of 2007, 50 App. U.S.C.A. § 2170 (2007) (Westlaw).

<sup>155</sup> *See* Lowery Speech, *supra* note 55.

<sup>156</sup> JAMES K. JACKSON, SPECIALIST IN INT’L TRADE & FIN., COMM. ON FOREIGN INV. IN THE U.S., CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 13 (2010), *available at* <http://www.fas.org/sgp/crs/natsec/RL33388.pdf>

<sup>157</sup> For discussion of the history and objectives of the CFIUS, *see id.* at 1-2. The CFIUS is now required to consider the twelve statutory criteria. *Id.* at 11-13.

The CFIUS, as revamped by FINSA, is intended to help diffuse this tension in the area of foreign investments and acquisitions in the U.S. and the post-9/11 national security debate. In an effort to fend off the rise of Congressional protectionism, the Treasury and the President had to posture themselves as being tough under the CFIUS, while still endeavoring to preserve the fundamental policy goal of open markets and investments. It is on this political tightrope that Secretary Paulson and the Treasury had to tread during the 2007-2008 period, when the debate over SWFs was percolating.

### **E. CRS, Congress and the U.S.-China Commission**

The U.S. Congress<sup>158</sup> receives its information from a variety of sources, two of which are reports of the Congressional Research Service (“CRS”) and Congressional Hearings.<sup>159</sup> Both of these sources can influence the legislative process and results on specific subject-matter.

The CRS has to date presented three reports to Congress in connection with the SWF subject-matter: “The Committee on Foreign Investment in the United States (CFIUS)” (Feb. 4, 2010);<sup>160</sup> “China’s Sovereign Wealth Fund” (Jan. 22, 2008);<sup>161</sup> and “Sovereign Wealth Funds: Background and Policy Issues for Congress” (Jan. 28, 2008, revised Jan. 15, 2009).<sup>162</sup> As discussed above, the CRS CFIUS Report was prepared for Congressional hearings on the overall national security implications of FDI in the U.S. These FDI national security implications became problematic again as a result of the

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<sup>158</sup> See, e.g., JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110-49 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_documents&docid=f:hd049.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:hd049.110.pdf).

<sup>159</sup> The CRS is a century-old legislative branch agency within the Library of Congress that works exclusively for the United States Congress, providing policy and legal analysis to committees and members of both the House and Senate, regardless of party affiliation—a type of independent Congressional “think-tank.” See OpenCRS, <http://opencrs.com/> (last visited Dec. 31, 2009).

<sup>160</sup> See JACKSON, *supra* note 154.

<sup>161</sup> See MARTIN, *supra* note 1.

<sup>162</sup> See MARTIN A. WEISS, ANALYST IN INT’L TRADE & FIN., CONGRESSIONAL RESEARCH SERVICE, SOVEREIGN WEALTH FUNDS: BACKGROUND AND POLICY ISSUES FOR CONGRESS (9009), available at [http://assets.opencrs.com/rpts/RL34336\\_20090115.pdf](http://assets.opencrs.com/rpts/RL34336_20090115.pdf).

2005 DP World’s bid to take over P&O’s commercial operations of U.S. ports as a lead-up to international economic affairs, and, to a lesser extent, the growing general sense of protectionism within the Congress and the American populace.<sup>163</sup> Neither this Report nor the related FINSA legislation directly considered SWFs, but the Report commented in objective and balanced terms as to state-owned/controlled FDIs in the U.S.<sup>164</sup>

The CRS’s China SWF Report provided Congress with current, relevant background information on the advent of the CIC, its structure, management, capitalization, investment strategy, operations and general implications for the Chinese economy.<sup>165</sup> This Report highlighted a series of potential risks to the U.S. economy and raised generally the issue of “reciprocity.”<sup>166</sup> Balancing these concerns, the China Report observed: “However, some commentators are concerned that increasing the regulatory review of SWFs will precipitate a period of financial protectionism. The issue is whether the value of protection obtained outweighs the foregone benefits of investments prevented in a more restrictive global financial market.”<sup>167</sup>

Of the Congressional Hearings that have been held concerning SWFs and FDI issues, the following two hearings are relevant here: (1) the November 2007 Hearing of the Senate Committee on Banking, Housing and Urban Affairs on SWFs and the economic and national security implications raised by the state-owned investment funds that invest in U.S. companies,<sup>168</sup> and (2) the February 2008 Hearings of the Joint (Senate and House) Economic Committee to consider the increased investments in the U.S. by foreign SWFs.<sup>169</sup> Both hearings contained mostly balanced and insightful testimony respecting SWFs, while raising a range of concerns.

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<sup>163</sup> See *supra* note 154.

<sup>164</sup> See JACKSON, *supra* note 154.

<sup>165</sup> See MARTIN, *supra* note 1.

<sup>166</sup> MARTIN, *supra* note 1, at 13-14.

<sup>167</sup> *Id.* at 19.

<sup>168</sup> *Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the U.S.: Assessing the Economic and National Security Implications: Hearing Before the U.S. S. Comm. on Banking, Hous. & Urban Affairs*, 110th Cong. (2007).

<sup>169</sup> See *Do Sovereign Wealth Funds Make the U.S. Economy Stronger or Pose National Security Risks?: Hearing Before U.S. S. J. Econ. Comm.*, 110th Cong. (2008).

The November 2007 Senate Banking Committee Hearing was chaired by Senator Evan Bayh.<sup>170</sup> Those testifying included Mr. David H. McCormick, Under Secretary for International Affairs, Department of the Treasury (discussed above); Mr. Alan P. Larson, Senior International Policy Advisor, Covington & Burling LLP; Dr. Edwin M. Truman, Senior Fellow, Peterson Institute for International Economics; Mr. Patrick A. Mulloy, Washington Representative, Alfred P. Sloan Foundation; and Dr. Gerard Lyons, Chief Economist and Group Head of Global Research, Standard Chartered Bank.<sup>171</sup> Mr. Truman set forth, for future discussion purposes, a possible “scorecard” for evaluating the transparency levels of the main SWFs; Under Secretary McCormick presented the Treasury’s supportive approach; while Mr. Lyons elaborated upon what he perceived as a new aspect of the global financial system—“State Capitalism.”<sup>172</sup>

In opening the U.S. Congress Joint Economic Committee Hearings in February 2008, Senator Schumer expressed some strong general concerns, though he concluded: “My hope is that sovereign wealth funds can assure us that they will behave like other economic actors, and if they do so that’s all to the good.”<sup>173</sup> Those testifying were the current Treasury Under Secretary, David McCormick, the former Deputy Secretary of the Treasury under President Clinton; former Ambassador to the European Union, Stuart Eizenstat; and prominent foreign investment expert, Douglas Rediker.<sup>174</sup> Each presented balanced and supportive perspectives on SWFs.<sup>175</sup>

Thus, we see Congressional concerns being expressed, but on balance, it appears that Congress is willing to work with the Treasury and the IFIs in setting out appropriate “rules of the road” for the SWFs. Yet, continuing to percolate under the surface were rising protectionist and Sinophobe concerns on the part of some segments of the Congress. Evidence of these concerns/fears arose from some testimony at the February 7, 2008 Hearing of the U.S.-China Economic and Security Review Commission (“USCESRC”)<sup>176</sup>

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<sup>170</sup> *Sovereign Wealth Fund Acquisitions*, *supra* note 166.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Do Sovereign Wealth Funds Make the U.S. Economy Stronger*, *supra* note 167, at 4 (statement of Sen. Charles E. Schumer).

<sup>174</sup> *Id.* at III.

<sup>175</sup> *See generally id.*

<sup>176</sup> J. Dennis Hastert provides a description of the USCESRC:

on “Implications of Sovereign Wealth Fund Investments for National Security.”<sup>177</sup> Most (but not all) of the presenters expressed a balance between benefits and concerns, and the overriding concerns of most were the need for greater transparency and accountability. The problem with considering SWFs, when the focus is on the CIC, is that discussions tend to disintegrate into broader political concerns about China (e.g., its autocratic nature, economic and currency reserve policies, human rights, etc.).<sup>178</sup>

### F. The U.S Polity: The Great Variable

Adding to the complexities of the Treasury’s and Secretary Paulson’s efforts to provide a “safe passage” for the SWFs was the presidential election campaign that was underway during the 2007-2008 period. In particular, the two main Democratic Party candidates scrambled to deal with rising issues of a failing domestic economy, protectionism (anti-North American Free Trade Agreement (“NAFTA”), anti-globalization, anti-outsourcing, etc.), immigration and national security concerns—most of which seemed to get intertwined. Falling within this web, at least momentarily, was the SWF issue.<sup>179</sup> But, as the election concluded and President Obama

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In October 2000, Congress established the U.S.-China Economic and Security Review Commission (USCESRC). The commission is a small advisory body, one of few such commissions that report to Congress rather than the President or an executive branch agency. The charter of the commission, which does not contain a time limit on its authorization, requires it to assess the national security implications of the evolving bilateral trade and economic relationship between the United States and the People’s Republic of China.

U.S. GOV’T ACCOUNTABILITY OFFICE, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION: ACTIONS NEEDED TO IMPROVE CONTROLS OVER KEY MANAGEMENT FUNCTIONS 1 (2007), available at <http://www.gao.gov/new.items/d071128.pdf>.

<sup>177</sup> See generally *Implications of Sovereign Wealth Fund Investments for National Security: Hearing Before the U.S.-China Econ. & Sec. Review Comm’n*, 110th Cong. (2008).

<sup>178</sup> See *id.*

<sup>179</sup> See, e.g., Laura Badian & Gregory Harrington, *The Evolving Politics of Sovereign Wealth Funds*, REVUE D’ECONOMIE FINANCIERE 143, 152

was sworn into office, the brouhaha about SWFs settled down and hardly a further controversial political mention of SWFs has been heard.<sup>180</sup>

#### ***IV. The International Policy Network Track***

By November 2007, in addition to the constructive engagement of the Executive Branch, the U.S. Congress, and the relevant U.S. regulators, Secretary Paulson and the U.S. Treasury were spearheading efforts to engage proactively with the international community through the G7, the IMF and its IMFC, OECD, World Bank, and the main SWFs and recipient countries.<sup>181</sup> The purpose of this international collaboration was to respond to various legitimate concerns about SWFs by arriving at a coordinated and balanced approach through setting best practice standards: a set of “best practices” (“IMF-IWG” derived) (particularly as to transparency, accountability and governance concerns) for the SWFs that would benefit the financial markets, and a set of “best practices” (OECD-derived) as to investment-related issues in order to fend off growing populist trends against globalization and free markets. It appears that the March 2008 Treasury-Singapore-Abu Dhabi Agreement, discussed above,<sup>182</sup> was the benchmark in such multilateral efforts.

##### **A. The IMF and OECD’s Respective Roles**

The IMF and World Bank’s 2007 joint Annual Meeting was scheduled for October 20-22, 2007.<sup>183</sup> Immediately prior to such

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(2009), available at [http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP\\_EvolvingPoliticsSovereignWealthFunds\\_2009.pdf](http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_EvolvingPoliticsSovereignWealthFunds_2009.pdf).

<sup>180</sup> But consider Lawrence Summer’s comments: *Posting of Lawrence Summers to the Financial Times Economists’ Forum*, *supra* note 104, and reported tough statements of President Obama’s nominee for Assistant Secretary of the Treasury for International Affairs on SWFs. See SWF Institute, *President Obama Nominee Supports Scrutiny Of Sovereign Wealth Funds*, Nov. 5, 2009, <http://www.swfinstitute.org/>.

<sup>181</sup> See *supra* Part III.

<sup>182</sup> See *Singapore Principles*, *supra* note 138.

<sup>183</sup> See 2007 Annual Meetings: World Bank Group International Monetary Fund, <http://www.imf.org/external/am/2007/index.htm> (last visited Jan. 7, 2010).

annual meeting, the G7 Finance Ministers would normally meet among themselves and then with the IMFC. At this particular annual “network gathering,” Mr. Paulson and the U.S. Treasury had arranged for the issue of the SWFs and the perceived roles of the IFIs to be put on the G7’s agenda for its October 19, 2007 meeting.<sup>184</sup> After this meeting, Mr. Paulson, as an “initial step,” hosted an “outreach dinner” with finance ministers and heads of SWFs from eight countries: China, Kuwait, Norway, Russia, Saudi Arabia, Singapore, South Korea, and the United Arab Emirates.<sup>185</sup> While indicating that countries should be open to SWF investments, Paulson commented further that it was important these countries did not use these funds for political objectives.<sup>186</sup> He also suggested that “many want countries that have these SWFs to open their own markets to investment before they are allowed to make massive investments overseas.”<sup>187</sup> Paulson viewed the dinner as a “first step toward a possible agreement on best practices for SWFs.”<sup>188</sup> Secretary Paulson then addressed the IMFC the following morning to persuade the Committee to endorse the “best practices” approach.<sup>189</sup> As such, Paulson (in his capacity as Secretary of the Treasury) was “nudging” the IMF, along with the OECD (from the FDI perspective) and the World Bank, to take on the task of overseeing the development of the SWF “best practices” project. The IMFC promptly got on board with Paulson’s SWF agenda, acknowledging the IMF’s new role with respect to SWFs.<sup>190</sup>

<sup>184</sup> See Jenilee Guebert, Senior Researcher, G8 Research Group, G7 Finance [sic] Ministers Prospects, <http://www.g7.utoronto.ca/finance/fin/2008fin.html> (last visited Jan. 7, 2010).

<sup>185</sup> See Pete Kasperowicz, *Paulson Sets Tough Goals for IMF on Sovereign Wealth Funds, Currency, Spending*, FORBES.COM, Oct. 20, 2007, <http://www.forbes.com/feeds/afx/2007/10/20/afx4242119.html>; see also Kimmitt, *In Praise of Foreign Investment*, *supra* note 78, at 71.

<sup>186</sup> See Kasperowicz, *supra* note 185; see also Kimmitt, *In Praise of Foreign Investment*, *supra* note 78, at 71.

<sup>187</sup> See Kasperowicz, *supra* note 185; see also Kimmitt, *In Praise of Foreign Investment*, *supra* note 78, at 71.

<sup>188</sup> Kasperowicz, *supra* note 185.

<sup>189</sup> See Press Release, U.S. Treasury Dep’t Office of Pub. Affairs, Statement by U.S. Treasury Secretary Henry M. Paulson, Jr., at the International Monetary and Financial Committee Meeting (Oct. 20, 2007) (available at <http://www.imf.org/External/AM/2007/imfc/statement/eng/usa.pdf>).

<sup>190</sup> See Press Release, Int’l Monetary Fund, Communiqué of the International Monetary and Financial Committee of the Board of Governors of

If one were to look back at the 2005-2007 timeframe, there was substantial doubt in the international community about the future viability of the IMF.<sup>191</sup> In addition, the IMF had come to be viewed more as a pawn of the United States and the major Western powers, having little institutional legitimacy.<sup>192</sup> While Paulson's delegation of a new task to the IMF is indicative of this latter point, the IMF nevertheless welcomed this new task.<sup>193</sup>

After the October 2007 G7 Finance Ministers' and IMFC's direction, the IMF promptly convened a "roundtable of sovereign asset and reserve managers" from twenty eight countries on November 15-16, 2007.<sup>194</sup> The IMF also embarked upon a comprehensive survey of the main SWFs, began formulating a work plan ("Work Agenda") for

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the International Monetary Fund ¶ 6 (Oct. 20, 2007) (available at <https://www.imf.org/external/np/sec/pr/2007/pr07236.htm>).

<sup>191</sup> See generally REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK (Ariel Buira, ed., 2005); JOSEPH E. STIGLITZ, GLOBALIZATIONS AND ITS DISCONTENTS (2002); G24 RESEARCH PROGRAM, REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK (Ariel Buira ed., Anthem Press 2000); NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS (2006).

<sup>192</sup> See, e.g., Chakravarthi Raghavan, *Stinging Critiques of IMF, US Treasury*, THIRD WORLD NETWORK, Apr. 12, 2000. <http://www.twinside.org.sg/title/sting.htm>.

<sup>193</sup> This SWF assignment seems to be compatible with the IMF's initiation of its multilateral consultation on global imbalances, and fits more generally within the IMF's perceived mandate to foster global financial stability and economic growth, to encourage greater transparency and accountability within the global economic order and to oversee the global currency exchange rate fluctuations and adjustments. This task also seems to be consistent with the IMF's "operational" instruments: enhanced surveillance, proactive engagement with its members through consultations and technical assistance if needed and requested. With the GFC, the IMF also found new client countries and new roles (or enhanced prior roles, such as surveillance and country consultations) in the proposed Bretton Woods II international financial architecture being put forth by the G20 Leaders and Finance Ministers. Cf. Edwin M. Truman, Senior Fellow, Peterson Inst. for Int'l Econ., Remarks delivered to the Tulsa Committee on Foreign Relations and to the Dallas Committee on Foreign Relations: The IMF and the Global Crisis: Role and Reform 1 (Jan. 22-23, 2009) (transcript available at <http://www.iie.com/publications/papers/truman0109.pdf>).

<sup>194</sup> David R. Francis, *Will Sovereign Wealth Funds Rule the World?*, THE CHRISTIAN SCIENCE MONITOR, Nov. 26, 2007, <http://www.csmonitor.com/2007/1126/p16s01-wmgn.html>.

developing best practice guidelines for SWFs, and undertook broader related international collaborative efforts so as to better evaluate the possible beneficial and negative implications of the growing presence of SWFs within the international financial system. Issues that were to be considered included the relation of SWFs (1) to financial stability and currency exchange rate impact, (2) to possible geo-political issues, such as the likelihood of government policy direction of these funds and a rise of protectionism among home or target countries, and (3) to risk management issues, including matters of transparency, accountability and governance.<sup>195</sup>

On February 29, 2008, the IMF set forth a “Work Agenda” as to its SWF assignment.<sup>196</sup> Under this Agenda, the IMF would establish a Working Group, with a SWF proposal to be presented to the IMF’s Executive Board at its Fall 2008 Annual Meeting and to take the form of “principles” and suggested “best practices.” The final proposal was to be based upon consultations with various officials of the SWF host countries (the first having occurred on April 30-May 1, 2008), their Central Banks and Finance Ministry officials and with relevant public and private parties in the investment recipient countries. The final proposal would be issued after review of the results of a detailed survey sent to these SWFs as to their composition, objectives, management and operations, and after consultations with other bodies—such as the OECD, the EU Commission and ECB, the U.S. Treasury—and other concerned finance ministries.<sup>197</sup> As surmised by Jaime Caruana (then Director of the IMF’s Monetary and Capital Markets Department, former head of the Spanish Central Bank and now General Manager of the Bank for International Settlements): “Best practices and principles could also help ease concerns about SWFs in recipient countries and contribute to an open global monetary and financial system. . . . [I]n our [the IMF’s] view, the key to a successful result is one that is based on an inclusive, collaborative, and evenhanded effort.”<sup>198</sup>

The G7 and IMFC tasked the OECD with developing a related and complementary voluntary SWF investment “code” for the recipient countries, so that free flows of global capital and foreign

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<sup>195</sup> See WORK AGENDA, *supra* note 4, at 10-16.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 21-22.

<sup>198</sup> See IMF Survey online, *IMF Board Endorses Work Agenda on Sovereign Funds*, INT’L MONETARY FUND, Mar. 21, 2008, <https://www.imf.org/external/pubs/ft/survey/so/2008/NEW032108A.htm>.

investment are not impaired by undue reactions of the recipient or targeted investment countries.<sup>199</sup> The OECD appeared to take a rather relaxed attitude, concluding that an array of existing OECD guidelines and codes should adequately address the question of appropriate host country treatment of SWF investments.<sup>200</sup> Angel Gurría, Secretary General of the OECD, commented that the OECD “had not come across an example of a sovereign wealth fund acting for any reason other than the pursuit of profit.”<sup>201</sup> Gurría went on to comment that investments by SWFs should not be subject to restrictions so long as they meet certain criteria: they are motivated by the pursuit of profit and business, they are professionally led and managed and they regularly divulge results and information in keeping with other financial institutions.<sup>202</sup>

**B. A Most Recent Hybrid Bretton Woods-II Network Process: The International Working Group (IWG)-International Sovereign Wealth Fund Forum (ISWF Forum) and the Santiago Principles (GAAP)**

**1. *The IMF/IWG, OECD and World Bank***

Being in the navigator’s seat by March 2008,<sup>203</sup> the IMF moved forward with its formal “Work Agenda.” An IWG of SWFs

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<sup>199</sup> See Statement, G-7 Finance Ministers and Central Bank Governors, G7/8 Finance Ministers Meeting (Oct. 19, 2007), <http://www.g8.utoronto.ca/finance/fm071019.htm>.

<sup>200</sup> The OECD viewed the SWF assignment as part of its pre-existing “Freedom of Investment” process. See OECD Guidance on Sovereign Wealth Funds, Org. for Econ. Co-Operation & Dev., [http://www.oecd.org/document/19/0,3343,en\\_2649\\_34887\\_41807059\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3343,en_2649_34887_41807059_1_1_1_1,00.html) (last visited Apr. 10, 2010).

<sup>201</sup> *Sovereign Wealth Funds Likely to Boost Stakes in Gulf Markets*, DUBAI CHRONICLES, May 2008, <http://www.dubaichronicle.info/2008/05/sovereign-wealth-fund-likely-to-boost.html>.

<sup>202</sup> *Grim Economy No Reason for Protectionism: OECD Chief*, FIN. EXPRESS, Mar. 28, 2008, <http://www.financialexpress.com/news/grim-economy-no-reason-for-protectionism-oecd-chief/289244/>.

<sup>203</sup> However, Mr. Paulson and the Treasury were still negotiating separately with Abu Dhabi and Singapore on the *Singapore Principles* during the

comprising senior officials from twenty five SWFs was constituted in May 2008 for the specific purpose of agreeing “on a common set of voluntary principles for SWFs, drawing on the existing body of principles and practices, to help maintain the free flow of cross-border investment and open and stable financial systems.”<sup>204</sup> Contemporaneously, considerable background research and study was being conducted by the IMF, World Bank and OECD, while the U.S. Treasury continued to engage in bilateral discussions with selective major SWFs.<sup>205</sup> In addition, the European Commission worked with the concerned EU countries to arrive at a common EU position.<sup>206</sup> “The IWG met on three occasions—in Washington, D.C., Singapore and Santiago (Chile)—to identify and to draft a set of generally accepted principles and practices (“GAPP,” also known as the *Santiago Principles*) that properly reflects their investment practices and objectives. The IWG agreed on the *Santiago Principles* at its third meeting.”<sup>207</sup> The IMF and IWG completed their survey of SWFs on September 15, 2008.<sup>208</sup>

At its September 2, 2008 meeting in Santiago, the IWG agreed preliminarily to a set of twenty four “principles” (“Generally Accepted Principles and Practices”) covering the SWF’s legal, institutional and macroeconomic setting, the SWF’s governance and

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November 2007-March 2008 period. *See supra* note 138 and accompanying text.

<sup>204</sup> *See* Press Release, Int’l Monetary Fund, International Working Group of Sovereign Wealth Funds is Established to Facilitate Work on Voluntary Principles (May 1, 2008) available at <http://www.imf.org/external/np/sec/pr/2008/pr0897.htm>; *see also supra* note 17 (discussing IWG membership).

<sup>205</sup> *See, e.g., Singapore Principles, supra* note 138.

<sup>206</sup> *See, e.g.,* COMM’N OF THE EUROPEAN CMTYS., COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: A COMMON EUROPEAN APPROACH TO SOVEREIGN WEALTH FUNDS 3 (2008), available at [http://ec.europa.eu/internal\\_market/finances/docs/sovereign\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/sovereign_en.pdf).

<sup>207</sup> INT’L WORKING GROUP OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES “SANTIAGO PRINCIPLES” 1 (2008), available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

<sup>208</sup> *See* Cornelia Hammer, Peter Kunzel & Iva Petrova, *Sovereign Wealth Funds: Current Institutional and Operational Practices* (Int’l Working Group of Sovereign Wealth Funds, Working Paper No. 08/254, 2008) (available at <http://www.iwg-swf.org/pubs/eng/swfsurvey.pdf>).

accountability arrangements, and the SWF's investment policies and risk management.<sup>209</sup> The IWG members returned home to recommend the GAPP to their respective governments and, having secured this approval, the IWG presented the GAPP to the IMFC on October 11, 2008 in Washington, D.C.<sup>210</sup> Immediately following this meeting, the IWG met with a range of officials from major recipient countries.<sup>211</sup> The GAPP were published promptly thereafter.<sup>212</sup>

At this IMFC meeting, the IWG also announced the creation of a "Formation Committee" to explore whether a permanent SWF "Standing Group" should be established.<sup>213</sup> The objective of this Standing Group would be "to facilitate dialogue with official institutions and recipient countries on developments that affect SWF operations."<sup>214</sup> Thus, inherent to the creation of the *Santiago Principles-GAPP* was the distinct possibility that there would be established some ongoing organizational mechanism to further study and monitor the implementation of these *Principles*.<sup>215</sup>

Though overshadowed by the more high profile work of the IMF regarding the development of SWF best practices, the OECD was intended to have a key parallel and coordinated role under the 2007 IMFC mandate on SWFs.<sup>216</sup> The OECD's role was to develop

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<sup>209</sup> Press Release, International Working Group of Sovereign Wealth Funds Reaches a Preliminary Agreement on Draft Set Generally Accepted Principles and Practices—"Santiago Principles" (Sept. 2, 2008) (available at <http://www.iwg-swf.org/pr/swfpr0804.htm>).

<sup>210</sup> See Press Release, International Working Group of Sovereign Wealth Funds Presents the "Santiago Principles" to the International Monetary and Financial Committee: Promotes Operational Independence in Investment Decisions, Transparency, and Accountability (Oct. 11, 2008), *available at* <http://www.iwg-swf.org/pr/swfpr0806.htm>.

<sup>211</sup> See *id.*

<sup>212</sup> *Id.*

<sup>213</sup> See H.E. Hamad Al-Hurr Al-Suwaidi, Co-Chair of Int'l Working Group of Sovereign Wealth Funds, Statement at the Meeting of the Int'l Monetary and Fin. Comm., (Oct. 11, 2008) *available at* <http://www.iwg-swf.org/pubs/eng/imfciwg.pdf>.

<sup>214</sup> See IMF Survey online, *SWF Principles Will Help Cross-Border Investment—Lipsky*, INT'L MONETARY FUND, Sept. 3, 2008, <https://www.imf.org/external/pubs/ft/survey/so/2008/NEW090308B.htm>.

<sup>215</sup> See *infra* Part V.

<sup>216</sup> See *supra* notes 138, 205 and accompanying text, discussing the *Singapore Principles*.

“best practices” for countries who receive SWF investment,<sup>217</sup> taking into account possible FDI and security issues. In October 2008, the OECD presented its final package of “guidance” for countries receiving SWF investment,<sup>218</sup> which was developed pursuant to the October 2007 G7 Finance Ministers’ mandate.<sup>219</sup> As mentioned above, the OECD’s approach essentially was to subsume the SWF issue under its “Freedom of Investment and National Security” process (“FOI” process).<sup>220</sup> Since 2006, the OECD Investment Committee has been responsible for the FOI process.<sup>221</sup> In light of the current GFC and pressures for a move toward protectionism, this process has been ramped up to provide “a forum for intergovernmental dialogue on how governments can reconcile the need to preserve and expand an open international investment environment with their duty to safeguard the essential security interests of their people and take action to recover from the crisis” with a series of investment policy reports being issued to date and to be issued throughout 2010.<sup>222</sup> This enhanced process extended and intensified the OECD tradition of ongoing “dialogue” beyond its member

<sup>217</sup> Kimmitt, *Public Footprints*, note 78, at 129-30.

<sup>218</sup> See Org. for Econ. Co-Operation & Dev., Message by the OECD Secretary-General to the International Monetary and Financial Committee 1 (Oct. 11, 2008) (available at <http://www.oecd.org/dataoecd/0/23/41456730.pdf>).

<sup>219</sup> The Finance Ministers issued the following statement:

[W]e agreed that sovereign wealth funds (SWFs) are increasingly important participants in the international financial system and that our economies can benefit from openness to SWF investment flows. We see merit in identifying best practices for SWFs in such areas as institutional structure, risk management, transparency and accountability. For recipients of government-controlled investments, we think it is important to build on principles such as nondiscrimination, transparency, and predictability. . . . We ask the IMF, World Bank, and OECD to examine these issues.

Statement, G-7 Finance Ministers and Central Bank Governors, *supra* note 199.

<sup>220</sup> See OECD Guidance on Sovereign Wealth Funds, *supra* note 200.

<sup>221</sup> See OECD Directorate for Financial and Enterprise Affairs, Protecting freedom of investment at the OECD, [http://www.oecd.org/document/7/0,3343,en\\_2649\\_34887\\_37363207\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,3343,en_2649_34887_37363207_1_1_1_1,00.html) (last visited Apr. 11, 2010).

<sup>222</sup> *Id.*

countries—its efforts being to promote progressive investment practices of non-discrimination, liberalization, transparency and strengthened the “peer monitoring” of country development.<sup>223</sup>

The umbrella component of the OECD SWF Report that was presented to the IMFC on October 8, 2008 was a “Declaration on Sovereign Wealth Funds and Recipient Country Policies” that had been issued previously by the OECD Ministerial Council on June 5, 2008.<sup>224</sup> This declaration recognized that there were “legitimate national security concerns” if SWF investments “were motivated by political rather than commercial objectives.”<sup>225</sup> It also welcomed the “constructive contribution that [SWFs] make to the development of home and host countries” and emphasized that SWFs to date “have been reliable, long-term, commercially-driven investors and a force for global financial stability.”<sup>226</sup> It then connected the OECD’s best practices efforts with those of the IMF and embraced the OECD Investment Committee’s April 2008 Report on Recipient Countries.<sup>227</sup> It also extended a set of investment principles to SWFs that are consistent with OECD’s general investment policies and principles.<sup>228</sup> Accompanying the Declaration and as part of the OECD SWF Report were statements on the “OECD General Investment Policy Principles,”<sup>229</sup> on “OECD Guidelines for Recipient Country

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Org. for Econ. Co-Operation & Dev., Message by the OECD Secretary-General, *supra* note 218, at 2.

<sup>226</sup> Org. for Econ. Co-Operation & Dev., Message by the OECD Secretary-General, *supra* note 218, at 2.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* The OECD investment principles are rooted in the OECD’s 1961 Code of Liberalization of Capital Movements and Declaration on International Investment and Multinational Enterprises and related Decisions, Including National Treatment 1976-2000. *See generally* ORG. FOR ECON. CO-OPERATION & DEV., OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (2009), available at <http://www.oecd.org/dataoecd/10/62/39664826.pdf>; ORG. FOR ECON. CO-OPERATION & DEV., NAT’L TREATMENT FOR FOREIGN-CONTROLLED ENTERS.: INCLUDING ADHERING COUNTRY EXCEPTIONS TO NAT’L TREATMENT (2009), available at <http://www.oecd.org/dataoecd/32/21/1954854.pdf>; ORG. FOR ECON. CO-OPERATION & DEV., THE OECD DECLARATION & DECISIONS ON INT’L INV. & MULTINATIONAL ENTERS.: BASIC TEXTS (2000), available at <http://www.oecd.org/dataoecd/10/62/39664826.pdf>

Investment Policies Relating to National Security”<sup>230</sup> and on the FOI process.<sup>231</sup> The OECD SWF Report to the IMFC was not based solely upon input from the thirty OECD members, but also from a broader group of non-members including Brazil, China, Russia and South Africa.<sup>232</sup>

Also, it should not be forgotten that in the G7 Finance Ministers October 2007 mandate, the World Bank was specifically included as one of the IFI collaborators in the SWF best practices process, though (unlike with the IMF and OECD) the Bank was given no specific task.<sup>233</sup> Exactly why Secretary Paulson and the Treasury, the G7 Finance Ministers and the IMFC thought that the Bank was necessary to this process is unclear. Yet the Bank’s involvement would seem to make sense for a variety of reasons, which could include: many of the SWFs are from developing countries;<sup>234</sup> a number of SWFs have been and will be investing in developing countries;<sup>235</sup> the Bank has extensive technical assistance

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[www.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/\\$FILE/00085743.PDF](http://www.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/$FILE/00085743.PDF).

<sup>230</sup> Org. for Econ. Co-Operation & Dev., Message by the OECD Secretary-General, *supra* note 218, at 4-5. These principles are of much more recent vintage, being derived from the May 25, 2009 OECD Council Recommendation, adopting these general Guidelines. ORG. FOR ECON. CO-OPERATION & DEV., GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY: RECOMMENDATIONS ADOPTED BY THE OECD COUNCIL ON 25 MAY 2009, at 2 (2009), available at <http://www.oecd.org/dataoecd/11/35/43384486.pdf>. National security was a large concern in the development of these guidelines. *Id.*

<sup>231</sup> Org. for Econ. Co-Operation & Dev., Message by the OECD Secretary-General, *supra* note 218, at 6.

<sup>232</sup> Org. for Econ. Co-Operation & Dev., OECD Guidance on Sovereign Wealth Funds, [http://www.oecd.org/document/19/0,3343,en\\_2649\\_34887\\_41807059\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3343,en_2649_34887_41807059_1_1_1_1,00.html) (last visited Apr. 11, 2010).

<sup>233</sup> See Guebert, *supra* note 184.

<sup>234</sup> Eighteen of the twenty-six IWG SWF countries are developing countries. See generally *supra* note 17.

<sup>235</sup> See, e.g., Press Release, United Nations Conference on Trade and Dev., Sovereign Wealth Funds Beginning to Play Major Role in Foreign Direct Inv. Through Mergers & Acquisitions (Sept. 24, 2008) available at <http://www.unctad.org/Templates/webflyer.asp?docid=10478&intItemID=1465&lang=1>.

(“TA”) expertise (including providing TA to SWFs);<sup>236</sup> and over the past decade there has been a trend for greater IMF-World Bank collaboration in the areas of TA, country consultations and program assessments.<sup>237</sup>

In the SWF best practices process, the World Bank generally stayed on the sidelines as to the policy debate. As noted above,<sup>238</sup> it was a “permanent observer” as to the IWG, but there does not seem to be any reported express, specific Bank input. This being said, the Bank’s President has been promoting his concept of a “One-percent Solution,” whereby SWFs would commit to invest one percent of their equity holdings in Africa.<sup>239</sup>

## 2. *The Santiago Principles (GAPP) as Substance*<sup>240</sup>

While the OECD SWF Report was built largely upon pre-existing OECD reports, practices and processes, the IMF-IWG’s efforts to produce its set of “best practices” came from whole cloth. These efforts, however, were not embarked upon in isolation. Not only were twenty-nine SWFs from twenty-six countries members of the IMF, input was also sought from a group of key recipient countries, the World Bank, the OECD and European Commission.<sup>241</sup>

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<sup>236</sup> See Posting of James Seward, Should There Be Common Standards for Sovereign Wealth Funds in Asia? (Feb. 26, 2008, 12:30), <http://blogs.worldbank.org/eastasiapacific/comment/reply/2801>.

<sup>237</sup> See, e.g., INT’L MONETARY FUND & WORLD BANK, STRENGTHENING IMF-WORLD BANK COLLABORATION ON COUNTRY PROGRAMS AND CONDITIONALITY (2001), available at <http://siteresources.worldbank.org/PROJECTS/Resources/imf-wb-conditional-08-22-01.pdf>.

<sup>238</sup> See *supra* note 17.

<sup>239</sup> See Press Release, The World Bank, Sovereign Wealth Funds Should Invest in Africa, *supra* note 8.

<sup>240</sup> See SANTIAGO PRINCIPLES, *supra* note 18. The acronym GAPP is merely the initials for “generally accepted principles and practices,” emphasizing that the documents has been “generally accepted” by the participating parties” and is an amalgam of principles and practices. The pronunciation of this acronym somewhat confusing sounds like the U.S. accounting industry term of “generally accepted accounting principles.” This confusion perhaps is not all that bad as GAAP refers to the framework of financial accounting principles and rules applicable to major business entities—not a bad analogy for the SWF GAPP.

<sup>241</sup> See *id.* at 2.

In this sense, the IWG “Secretariat” (i.e., the IMF acting in this informal capacity) made efforts to seek as much knowledge as it could about the existing practices of the SWFs and about recipient country concerns, and to build the “best practices” on this knowledge base. Additionally, the IWG-IMF, to avoid the perception of a top-down process, sought to engage the SWFs and recipient countries in a collaborative manner.<sup>242</sup>

The GAPP were designed to be a “voluntary set of principles and practices.”<sup>243</sup> They were conceived of as voluntary for a variety of reasons. The IWG is an informal, ad hoc and self-generated body that has no formal legal authority. The SWFs, at the end of the day, would be subject to the law and practical control of the home country.<sup>244</sup> This effort in bringing together the SWFs within an international forum or grouping was totally “new territory.” Goodwill and mutual benefit would drive the integration of participating parties and their home countries. Yet, the process was never fully voluntary, as it was to operate within a complex of considerable overt and latent pressures from the U.S. Treasury, the G7 (and now the G20) and the IMFC. While none of these latter parties could exert any formal authority over the SWFs and their home countries, the pressures on the SWFs, their home countries and on the recipient countries to participate constructively and in good faith were considerable.

Once the SWFs bought into the overall process and became more comfortable with the other involved parties, a sense of “club law” began to develop, or at least an aura of influencing peer/group pressure.<sup>245</sup> While recognizing differences in the stages of evolution of the various SWFs and the need to allow for transitional arrangements and some necessary variances, the end goal of the process was not a “cafeteria style” set of principles and practices but rather a common set of “generally agreed” principles derived from the practices of the

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<sup>242</sup> See WORK AGENDA, *supra* note 4, at 4.

<sup>243</sup> See SANTIAGO PRINCIPLES, *supra* note 18, at 5.

<sup>244</sup> See *id.* at 5.

<sup>245</sup> The concept of “peer group review” is implied in the GAPP in GAPP Principle 24, as developed in the Kuwait Declaration. See International Working Group of Sovereign Wealth Funds, “Kuwait Declaration,” *supra* note 19; see also discussion *infra* subsection 3 (stating that the purpose of the forum “will operate in an inclusive manner and facilitate communication among SWFs.”).

SWFs and embraced by all the endorsing parties.<sup>246</sup> As a corollary, the *Santiago Principles* process is *sui generis*, as it does not create a conventional “self-regulatory” regime, system of private-regulation or a code of conduct due to the mix of participants and to the complex set of overriding pressures referred to above. At best, the environment would be quasi-self regulatory or self-regulatory in a very constrained manner.<sup>247</sup>

Because the GAPP are designed as “principles” and not detailed rules, a knee-jerk reaction would be to then consider the set of best practices as purely aspirational or even “fluff.” Such a view would not do justice to the GAPP. First, the document is intended to serve as a “framework” within which more detailed rules would evolve over time; that is, a work in progress but with a direction.<sup>248</sup> Second, the GAPP’s twenty four main “Principles”<sup>249</sup> cover the key SWF areas in a relatively comprehensive manner: Part A covers “Legal Framework, Objectives and Coordination with Macroeconomic Policies;”<sup>250</sup> Part B addresses “Institutional Framework and Governance Structure;”<sup>251</sup> Part C touches upon “Investment and Risk Management Framework;”<sup>252</sup> and the twenty fourth Principle speaks to ongoing issues as to “Implementation.”<sup>253</sup> In addition, in Appendix 1, the GAPP present an agreed definition of an SWF with explanatory notes; Appendix II identifies the list and the representatives of the IWG members (including permanent observers) and of the participating recipient countries; Appendix III presents summary information of each of the participating SWFs; and a list of key SWF references is set forth at the end of the document.<sup>254</sup>

The two core elements of disclosure and accountability permeate the *Principles*. For example, public disclosure is suggested

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<sup>246</sup> See SANTIAGO PRINCIPLES, *supra* note 18, at 6 (“[T]he GAPP is formulated broadly enough so that underlying principles and practices can be accommodated in different institutional, constitutional, and legal settings in various countries.”).

<sup>247</sup> Cf. RESPONSIBLE BUSINESS: SELF GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS (Olaf Dilling et al. eds. 2008).

<sup>248</sup> See SANTIAGO PRINCIPLES, *supra* note 18, at 4-6.

<sup>249</sup> See, e.g., SANTIAGO PRINCIPLES, *supra* note 18, at 7-9 (listing the *Santiago Principles*, some of which have Subprinciples).

<sup>250</sup> SANTIAGO PRINCIPLES, *supra* note 18, at 11 (Principles 1-5).

<sup>251</sup> *Id.* at 15 (Principles 6-17).

<sup>252</sup> *Id.* at 20 (Principles 18-23).

<sup>253</sup> *Id.* at 20 (Principle 24).

<sup>254</sup> *Id.* at 27-49.

for SWF sources of funds, purposes, legal structure, governance structure, investment policy, general approach to risk management and ownership rights.<sup>255</sup> In a general sense, this represents an SWF group sensitivity to pursue a culture of openness and transparency with respect to owners, recipient countries and relevant regulators. However, it is clear from the heterogeneous nature of the SWFs that the different stages of development and the different investment strategies that give effective meaning to disclosure and its implementation will face considerable definitional, operational and policy tensions with respect to the various types of disclosure that should be made, the adequacy of the various disclosures, the recipients of specific disclosures, and the timing of the specific disclosures.<sup>256</sup> These will not be easy issues for the SWFs and the ISWF Forum to address and it will have to be done over time and after much ongoing consultation and "trust-building."<sup>257</sup>

With respect to accountability, the GAPP provides: "The accountability framework for the SWF's operations should be clearly defined in the relevant legislation, charter, other constitutive documents, or management agreement."<sup>258</sup> Further the SWF's "governance framework" should "facilitate accountability and operational independence."<sup>259</sup> In addition, an SWF annual performance and operational report with accompanying financial statements, "prepared in a timely fashion and in accordance with recognized international or national accounting standards in a consistent manner," is required.<sup>260</sup> In a practical sense, this opens the door to the major global accounting firms to take a role in shaping these "standards" for the SWFs.<sup>261</sup> Moreover, the GAPP provide for clearly defined "professional and

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<sup>255</sup> *Id.* at 12, 14, 17, 19-22, 24. (Subprinciple 1.2, Principle 2, Subprinciples 4.1 and 4.2, Principle 5 (as to owners), Principles 11, 15-17, Subprinciple 18.3, Subprinciple 19.1, Principle 21 and Subprinciple 22.2).

<sup>256</sup> *See, e.g.*, NAT'L UNIV. OF SINGAPORE FACULTY OF LAW & ASIAN SOC'Y OF INT'L LAW, CONFERENCE REPORT, SOVEREIGN WEALTH FUNDS: GOVERNANCE AND REGULATION 3 (2009), available at [http://law.nus.edu.sg/asiansil/conference/sovereignwealth/doc/SWF%20Report\\_FINAL.pdf](http://law.nus.edu.sg/asiansil/conference/sovereignwealth/doc/SWF%20Report_FINAL.pdf).

<sup>257</sup> *See, e.g., id.*

<sup>258</sup> *See* SANTIAGO PRINCIPLES, *supra* note 18, at 17 (Principle 10).

<sup>259</sup> *Id.* at 15 (Principle 6).

<sup>260</sup> *Id.* at 17-18 (Principles 11 and 12).

<sup>261</sup> *Cf.* Deloitte, Minding the GAPP: Sovereign Wealth, Transparency, and the "Santiago Principles" 12 (2008), <http://www.iasplus.com/dttdpubs/0811sovereignwealth.pdf> (last visited Apr. 11, 2010).

ethical standards . . . [for] the SWFs,”<sup>262</sup> and for SWF compliance “with all applicable regulatory and disclosure requirements of the countries in which they operate.”<sup>263</sup> Of significance to the issue of accountability, the GAPP contemplate SWF self-assessments and even possibly peer review.<sup>264</sup> Again, this notion of self-assessment and review invites the intervention of external consultants to assist in the assessment process and, thus, to help shape the process itself.<sup>265</sup>

What is perhaps most significant about the GAPP is that each of the Principles is accompanied by an “Explanation and commentary” that endeavors to develop and to interpret the substantive issues related to each Principle. This approach is intended to provide general principles and practices that “are potentially achievable by countries at all levels of economic development.”<sup>266</sup> In going forward with the ISWF Forum process, the Forum should find this attribute of the GAPP most helpful. The GAPP should not be considered a final product, but rather a starting point in an ongoing dialogue concerning SWFs and their role in the international financial and economic systems. For the more established SWFs, the GAPP should serve more as minimum best practices; for the newer and less-developed SWFs, the GAPP should be considered targets to be achieved within a practical and foreseeable timeframe.<sup>267</sup>

The *Principles* come with a statement of “Objectives and Purpose,” a sort of preamble. While some may have a misplaced impression that such a statement is largely extraneous to the overall document, the statement provides the policy context upon which the *Principles* are based and by which they can be interpreted and developed further. The GAPP’s “guiding objectives” for the SWFs are:

- i. To help maintain a stable global financial system and free flow of capital and investment;

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<sup>262</sup> See SANTIAGO PRINCIPLES, *supra* note 18, at 18 (Principle 13).

<sup>263</sup> *Id.* at 19 (Principle 15).

<sup>264</sup> *Id.* at 25 (commentary and explanation to Principle 24).

<sup>265</sup> See, e.g., AFSHIN MEHRPOUYA, CHAONI HUANG & TIMOTHY BARNETT, IRRC INSTI. & RISKMETRICS GROUP, AN ANALYSIS OF PROXY VOTING & ENGAGEMENT POLICIES & PRACTICES OF THE SOVEREIGN WEALTH FUNDS 97 (2009), available at [http://www.irrcinstitute.org/pdf/Sovereign\\_Wealth\\_Funds\\_Report-October\\_2009.pdf](http://www.irrcinstitute.org/pdf/Sovereign_Wealth_Funds_Report-October_2009.pdf).

<sup>266</sup> See SANTIAGO PRINCIPLES, *supra* note 18, at 5.

<sup>267</sup> *Id.* at 5-6.

- ii. To comply with all applicable regulatory and disclosure requirements in the countries in which they invest;
- iii. To invest on the basis of economic and financial risk and return-related considerations; and
- iv. To have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability.<sup>268</sup>

The primary “purpose of the GAPP is to identify a framework of generally accepted principles and practices that properly reflect appropriate governance and accountability arrangements as well as the conduct of investment practices . . . on a prudent and sound basis.”<sup>269</sup> Moreover, the GAPP “aims to contribute to the stability of the global financial system, reduce protectionist pressures, and help maintain an open and stable investment climate.”<sup>270</sup>

Thus, the GAPP are designed to foster prudent and sound SWFs while contributing to desired global economic and financial objectives. From the U.S. Treasury’s initial attempts to achieve some rather limited and immediate objectives, the IWG-ISWF Forum process has evolved into a relatively mature (though still evolving) scheme that entails broad micro- and macro-economic objectives that have come to the forefront as a result of the GFC. Of note, the *Santiago Principles* have been referred to by the European Commissioner’s representative to the IWG as a “public good”.<sup>271</sup>

The principles and practices of the GAPP amount to a global public good that can help foster trust and confidence between sovereign wealth funds, their originating countries, and the recipient countries. This is what we need in these turbulent times: a strong commitment to enhance mutual trust and

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<sup>268</sup> *Id.* at 4.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> IMF Survey online, *IMF Intensifies Work on Sovereign Wealth Funds*, INT’L MONETARY FUND, Mar. 4, 2008, <http://www.imf.org/external/pubs/ft/survey/so/2008/pol03408a.htm>.

maintain and preserve an open investment environment.<sup>272</sup>

While not precipitated by the GFC, the IWG-ISWF Forum process has the capacity to become one component (albeit somewhat tangential) to the Bretton Woods II overall approach to global financial stability, market integrity and economic openness.

### 3. *The IWG-ISWF Forum as Process*

As good lawyers come to realize, the efficacy of law (“hard” or “soft”) is dependent on the quality of the related procedures (processes).<sup>273</sup> Certainly, it is premature to denote the GAPP as “soft law” or “soft administrative regulation,” but it is clear that the ISWF process—particularly in light of the subsequent April 2009 *Kuwait Declaration*, the establishment of the permanent ISWF Forum and a permanent Forum Secretariat—has been transformed into an ongoing and sophisticated procedural construct within which the *Santiago Principles* and the OECD “best practices” can be further developed, monitored and assessed.<sup>274</sup>

As to the actual IWG-ISWF Forum process at the moment, the IWG at its April 6, 2009 meeting in Kuwait City announced (the so-called *Kuwait Declaration*) the formation of the ISWF Forum, a “voluntary” group of SWFs whose primary purpose is “to meet, exchange views on issues of common interest, and facilitate an understanding of the Santiago Principles and SWF activities.”<sup>275</sup> The

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<sup>272</sup> See Press Release, IWG-SWF, Statement by the European Commissioner on the Santiago Principles (Oct. 11, 2008) (available at <http://www.iwg-swf.org/pr/swfpr0808.htm>); see also IMF Survey online, *supra* note 271.

<sup>273</sup> Cf. the classic article: Edson R. Sunderland, *An Inquiry Concerning the Functions of Procedure in Legal Education*, 21 MICH. L. REV. 372, 372-92 (1923) (emphasizing the importance of teaching procedure in law school).

<sup>274</sup> See *supra* Part IV.A-B.2. On the *Kuwait Declaration*, see International Forum of Sovereign Wealth Funds, *supra* note 19.

<sup>275</sup> International Working Group of Sovereign Wealth Funds, *supra* note 19. The IWG-ISWF Forum also offered an expanded version of its purpose:

The Forum will act as a platform for:

1—exchanging ideas and views among SWFs and with other relevant parties. These will cover, *inter alia*, issues such as trends and developments pertaining to SWF activities, risk management, investment regimes, market and institutional conditions affecting investment opera-

*Declaration* not only stresses the “voluntary character” of this new Forum but also that “[t]he Forum shall not be a formal supranational authority and its work shall not carry any legal force.”<sup>276</sup> While it is understandable why the Forum members would wish to make such qualifications, the reality is that the Forum does represent a “global community” of SWFs that has come about through the mandate of the G7, G20 and IMFC, and that remains accountable to the G20 and IMFC. Further, though SWFs are commercial investors, they remain controlled, directly or indirectly, by their home country governments, and these governments maintain some level of accountability through the G20 and/or IMFC.

In terms of the Forum’s structure, it will be developed as an “inclusive” body, open to all entities meeting the SWF definition under the *Santiago Principles* and agreeing to accept and foster those *Principles*.<sup>277</sup> In addition, it appears that the Forum is willing to continue, from its predecessor IWG, the practice of offering “permanent observer” and possibly other forms of “associate” status.<sup>278</sup> More generally, the ISWF Forum will not only be a vehicle for facilitating communication and an exchange of views among its members and their respective governments, but will also open up communication among recipient country officials, representatives such as the OECD and World Bank and even with the private sector.<sup>279</sup>

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tions, and interactions with the economic and financial stability framework;

2—sharing views on the application of the Santiago Principles including operational and technical matters; and

3—encouraging cooperation with investment recipient countries, relevant international organizations, and capital market functionaries to identify potential risks that may affect cross-border investments, and to foster a non-discriminatory, constructive and mutually beneficial investment environment.

<sup>276</sup> International Working Group of Sovereign Wealth Funds, *supra* note 19.

<sup>277</sup> International Working Group of Sovereign Wealth Funds, *supra* note 19.

<sup>278</sup> *See id.*

<sup>279</sup> See Jukka Pihlman, *Sovereign Funds Set Up Permanent Representative Forum*, IMF SURV. MAG., May 6, 2009, <http://www.imf.org/external/pubs/ft/survey/so/2009/NEW050609A.htm>.

The ISWF will maintain a professional secretariat, with the IMF agreeing to serve initially in this capacity.<sup>280</sup> The head of the Australian SWF will serve as the initial Chair of the Forum, with Deputy Chairs drawn from the Chinese and Kuwaiti funds.<sup>281</sup> The Forum also may establish “subgroups” that consist of “Forum members and external experts with a proven record and expertise as determined by the Forum.”<sup>282</sup> It appears there will initially be three subgroups, and they will work on “application of the Santiago Principles; investment and risk management practices; and the international investment environment and recipient country relationships, including cross-border investment regime issues.”<sup>283</sup> In addition to assisting in orchestrating the IWG process, the IMF has also been conferring regularly with the major SWFs on a bilateral basis as part of its “surveillance” role in the global economy.<sup>284</sup>

Perhaps somewhat overstated, yet nevertheless significant, H.E. Mustafa J. Al-Shimali, Chairman of the Kuwaiti SWF and Kuwait’s Minister of Finance, has commented that the *Santiago Principles* are based on “an innovative, postmodern approach to global governance.”<sup>285</sup> It appears he was referring to a system of “peer review” to which member SWFs have committed themselves.<sup>286</sup> How this “self-regulatory” process will work remains to be seen, but this sort of process is not without precedent in the international financial arena.<sup>287</sup> However this ISWF Forum “peer review” process unfolds, it will not be a purely internal process but, instead, will be part of a process that includes the “global community” of SWF interests.

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> International Working Group of Sovereign Wealth Funds, *supra* note 19.

<sup>283</sup> Pihlman, *supra* note 279.

<sup>284</sup> WORK AGENDA, *supra* note 4, at 5, 17.

<sup>285</sup> Press Release, Int’l Working Group of Sovereign Wealth Funds, Working Group Announces Creation of International Forum of Sovereign Wealth Funds (Apr. 6, 2009) available at <http://iwg-swf.org/pr/swfpr0901.htm>.

<sup>286</sup> *Id.*

<sup>287</sup> See generally Douglas W. Arner & Michael W. Taylor, *The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?* (Asian Inst. of Int’l Fin. Law, Working Paper No. 6, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1427084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427084).

In order to root the IWG-ISWF Forum in an incipient framework of legitimacy, accountability and transparency (the trilogy of criteria by which SWF regulation should be evaluated) that is capable of maturing over time, one first should identify the framework’s “constituencies” or “stakeholders” and then closely assess each of these three criteria in relation to each constituent/stakeholder—a rather daunting task that is outside the scope of this article.<sup>288</sup> However, purely on a preliminary observational basis, it appears that the possible constituents/stakeholders are quite numerous. For example, because SWFs are directly or indirectly controlled by governments—or more specifically, by organs of governments—the respective controlling governmental bodies are primary constituents, though any evaluation could vary depending on the nature of the governmental organ as well as the degree, level and source of governmental control being exercised.<sup>289</sup> Going a step further, subject to the level of democratic culture, transparency and/or the attitudes of a taxpaying public in a particular home country, the home country citizenry may reasonably be considered to be a constituent group. In addition, SWFs may have significant relationships with investors and counterparties other than their home states, such as co-venturers, affiliates, creditors, swap parties and others. Such parties might possibly be comprised of SOEs, other SWFs, private or government-owned banks, investment firms, hedge

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<sup>288</sup> As mentioned above regarding Truman’s Blueprint for SWFs, *supra* note 83, initial attempts have been made to assess the legal and governance structures of SWFs relating to their investment policies and operation. In fact, on the basis of his thirty three element assessment scheme, Truman has preliminarily evaluated the *Santiago Principles*-GAPP, giving the *Principles* a “score” of seventy-four (within rating of the top half of the forty-six SWFs he originally assessed). Edwin R. Truman, Peterson Institute for International Economics, Real Time Economic Issues Watch: Making the World Safe for Sovereign Wealth Funds (Oct. 14, 2008), <http://www.petersoninstitute.org/realtime/?p=105>.

<sup>289</sup> For example, Temasek was established as an autonomously and professionally managed investment house under an independent board, the Norwegian government’s pension fund was set up in a manner that separates politics from operational functions, and the CIC has a special statutory mandate. For consideration of the different structures of the Forum’s member SWFs, including the three just mentioned, see *SANTIAGO PRINCIPLES*, *supra* note 18, app. 3 at 31-49. As an aside, the Forum might be able to serve as a buffer and communication vehicle between the funds and their respective governments.

funds, private equity funds or other “shadow banks,” each of which will have differing expectations and risk-protection requirements of any particular SWF.

Further, the recipient countries have separate constituent/stakeholder interests from the entities in which the SWF may invest by debt or equity. Moreover, as discussed above, SWFs, as a group, have become major players in global capital markets,<sup>290</sup> which means that the markets will (or should) require a sufficient level of sound governance structures and transparency in order to protect the market’s integrity and other market players and investors. Thus, those private and public bodies responsible for the orderly and sound functioning of the global capital markets might be considered constituents/stakeholders. In addition, as most of the financial funds supporting an SWF will come from a government’s excess external reserves or other sources of governmental funds, special governmental policy concerns may arise in areas like monetary and government safety nets; thus, the relevant government bodies responsible for those areas may also have a stakeholder’s interest.<sup>291</sup> Also, over the past two years since the IWG-ISWF Forum process commenced, it has become apparent to the IMF and the G20, that the SWFs themselves, the EU and others in the international community that the SWFs have a relationship to the global goals of sustainable

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<sup>290</sup> See *supra* notes 4, 34 and accompanying text.

<sup>291</sup> Cf. Donghyun Park, *Capital Outflows, Sovereign Wealth Funds, and Domestic Financial Instability in Developing Asia* (Asian Dev. Bank Econs. Working Paper Series, Paper No. 129, 2008) (detailing that Asian SWFs, which are largely funded by central bank reserves of foreign exchange, represent a shift in investing those reserves into higher-risk higher-return investments resulting in downside risks for the region’s commercial banks, which implies that the central banks also carry downside risk as they are the governmental bodies responsible for maintaining the monetary safety net that is critical for the success of their countries’ commercial banks); Razanov, *supra* note 53. In this respect, “government” should not be viewed as a unitary construct but as differing governmental bodies with different policy objectives and concerns that may be impacted by the conduct of SWFs.

financial stability.<sup>292</sup> Accordingly, those bodies responsible for global financial stability (e.g., the G20, the IMF and FSB) could be viewed as having constituent or stakeholder interests. Additionally, since most of the main SWFs have now confirmed a permanent grouping in the form of the ISWF Forum, the various SWF members, permanent observers and even non-member SWFs have constituent/stakeholder interests.

Thus, there is a broad and complex array of possible constituents and stakeholders who, ideally, will need to be accommodated by having the ISWF Forum provide a viable, ongoing, administrative-type process for monitoring, evaluating and supporting the SWFs. In light of this, quite remarkably and without any real all-encompassing or coordinated policy forethought, many of the possible constituents appear already to have been interconnected in some manner with the enhanced ISWF Forum process. From a top-down perspective, there are the G20 Finance Ministers and Leaders, the IMF and its IMFC, and the OECD and the World Bank—all of which were initially brought into the process and all remaining a part of the process.<sup>293</sup> Within the Forum, partially within the G20 and the OECD (but all within the membership of the IMFC and the World

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<sup>292</sup> See, e.g., SANTIAGO PRINCIPLES, *supra* note 18, at 3; see also Press Release, IWG-SWF, *supra* note 272. Further, note the so-called “Baku Statement” issued at the ISWF Forum’s (IFSWF’s) inaugural meeting in Baku, Azerbaijan on October 8-9, 2009:

We welcome the international efforts aimed at maintaining supportive fiscal, monetary, and financial sector policies until a durable recovery is secured; completion of the financial sector and regulatory reforms without delay, and avoidance of protectionism in all its forms. To support this global commitment and to live up to its objectives, the IFSWF agrees to: (i) encourage recipient countries to continue making their investment regimes more transparent and nondiscriminatory, avoid protectionism, and foster a constructive and mutually beneficial investment environment; (ii) continue to assess the application of the Santiago Principles; (iii) continue to place emphasis on adequate operational controls, risk management, and accountability; and (iv) encourage capacity building among IFSWF members.

*Int’l Forum of Sovereign Wealth Funds*, Sovereign Wealth Funds Issue “Baku Statement” Reaffirming the Need for Maintaining Open Inv. Env’t (Oct. 9, 2009) (available at <http://www.ifswf.org/pr/pr2.htm>).

<sup>293</sup> See *supra* Part IV.B.1-2.

Bank) the relevant SWF home country governments and the key recipient countries are interconnected with the process. Also, linked to the IMF and the G20 Finance Ministers, the ISWF Forum is positioned to be linked further to most of the key institutions that are concerned with global financial stability issues. With the considerable publicity and published reports and hearings devoted to the SWF phenomena over the past two years, the awareness of the citizenry in the key home and recipient countries regarding these issues has been significantly enhanced. Moreover, with the global accounting and consulting firms' involvement with the major SWFs, an indirect connection with the actual financial markets and their standards, requirements and practices is being forged. But this latter connection to the financial markets (particularly the capital markets) remains tenuous and incomplete.

**V. *Concluding Observations: The ISWF Forum Process—  
Quo Vadis?***

In the two-year (2007-2009) ad hoc saga involving the SWFs and the IWG-ISWF Forum processes reviewed and analyzed in this article, we see a curious, initially unplanned and largely disjointed pattern of “multilevel global governance” among major national and regional actors (e.g., the U.S. Treasury and the European Commission) triggered by a concern regarding a possible “Bretton Woods II” subject-matter (i.e., the rise of the SWFs). The U.S. largely dealt with this concern domestically through the efforts of then Secretary of the Treasury Hank Paulson and the Treasury Department. Paulson in turn placed this issue squarely on the G7 (and subsequently the G20) Ministerial and Leaders levels and the IMF's International Monetary and Financial Committee (“IMFC”), with the G7/20 Ministers and Leaders and the IMFC providing the direction and delegating follow-up responsibilities to the IMF, the World Bank and the OECD.<sup>294</sup> In this process, the concerns for the SWFs were brought within (or at

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<sup>294</sup> As mentioned elsewhere in this article, Secretary Paulson's initial concerns for the SWF (and more specifically the CIC) do not appear to be systemic in nature or truly global in policy scope. He was more concerned with heading off possible or probable domestic resistance to the SWFs and their investment in the U.S.

least to the edges of) the G20 “Bretton Woods II Action Plan” for restructuring the global financial architecture in light of the GFC.<sup>295</sup>

In effect, what this ad hoc and *sui generis* process generated is a working “global policy network” in the form of the IWG-ISWF Forum comprised of twenty-six SWFs (twenty-three as members and three as permanent observers). This group of SWFs collaborated with the IMF, the OECD, the World Bank and the key recipient countries in formulating a set of international standards/best practices—a “global public good”—in the *Santiago Principles* and in establishing the structure of the ISWF Forum as a nascent, ongoing vehicle and process for continuing communication, monitoring and evolution of the SWF grouping. What is unique in this situation is that this emerging “global policy network” not only affects the subject SWFs, but also the home government entities (most often accountable to the respective Ministries of Finance and Central Banks, some of whom themselves are also members of the G7 Ministers and/or the IMFC) that effectively control these SWFs. The network now centers around the agreement/consensus arrived at with respect to their own operational “international standards” (the *Santiago Principles-GAPP*). Tangentially, the OECD, in collaboration with this grouping, has compiled its own “Guidelines” for the recipient countries as to their treatment of SWF investments.

So where does this “global policy network” go from here, as the “heat” appears to have been taken away from the SWF phenomenon and as the GFC appears to have bottomed out?<sup>296</sup> There are the possibilities (1) that the SWF issue may become marginalized

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<sup>295</sup> See generally Declaration, G20 Leaders, Summit on Financial Markets and the World Economy (Nov. 15, 2008) (available at [http://www.g20.org/Documents/g20\\_summit\\_declaration.pdf](http://www.g20.org/Documents/g20_summit_declaration.pdf)). This was followed up in subsequent Declarations, Communiqués and Reports by the G20 Leaders and Finance Ministers at the April, 2, 2009 London G20 (Leaders) Summit and more recently at the September 25, 2009 G20 (Leaders) meeting in Pittsburgh. See G20 Publications, [http://www.g20.org/pub\\_communiques.aspx](http://www.g20.org/pub_communiques.aspx) (last visited Jan. 24, 2010).

<sup>296</sup> See, e.g., Posting of Adam O. Emmerich, Wachtell Lipton Rosen & Katz, Sovereign Wealth Funds Adopt Voluntary Best Practices, Harvard Law School Forum on Corporate Governance and Financial Regulation (Nov. 1, 2008, 12:49 p.m.), <http://blogs.law.harvard.edu/corpgov/2008/11/01/sovereign-wealth-funds-adopt-voluntary-best-practices/> (“Despite the great uncertainty of the current environment, the Santiago Principles represent a positive step toward depoliticizing SWF investing and disarming potential political confrontation with SWFs and their sovereign sponsors.”).

as the G20, the IMF and others involved have to cope with broader and more fundamental matters dealing with restructuring of the global economy and financial system; or (2) that the SWFs (or at least certain of them) may retract from pushing the ISWF Forum process forward and return to “business as usual.”<sup>297</sup> Hopefully, neither will be the case.

I would suggest that—in the interest of the SWFs themselves and their home countries, the recipient countries, the global financial markets, and the long-term stability of the global financial system—the ISWF Forum process should continue to mature and become a proactive, contributing component to the new “Bretton Woods II” global financial architecture. How can this be brought about? Let me make six modest suggestions:

First, the ISWF Forum needs to have a serious institutional and individual member commitment to ensuring that the Forum becomes a more inclusive body and that it takes the leading role in helping, over time, to enhance standards of greater transparency, better corporate governance and higher levels of accountability for the SWF community.

Second, the Forum needs fully to recognize and appreciate that the SWFs are already major players in global capital markets and that this position as to these markets and to the broader global financial system will be magnified in coming years. All of this will have significant implications for the sound functioning and integrity of the markets and for the stability of the financial system. As such, the Forum should seek further links to the financial markets and to the global policymakers responsible for global financial stability. In this regard, the Forum should seek close ties through “affiliate” status<sup>298</sup> with the International Organization of Securities Commissions (“IOSCO”), the international standard-setter in the securities

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<sup>297</sup> It needs to be kept in mind that the SWFs were never viewed as contributing to the causes of the GFC. Further, certain SWFs and home countries such as Saudi Arabia have never been overly enthusiastic about the IWG-ISWF Forum process and remain only “permanent observers.”

<sup>298</sup> IOSCO has three levels of membership: ordinary, associate and affiliate. Affiliate members, of which there are seventy-two bodies, include stock exchanges, an array of private financial groupings and various international and regional organizations. There are 110 ordinary members representing domestic securities authorities and 11 associate members comprising other securities authorities. See IOSCO Membership and Committees Lists, <http://www.iosco.org/lists/> (last visited Jan. 24, 2010) (follow “Ordinary,” “Associate,” or “Affiliate” hyperlinks).

law area.<sup>299</sup> Since the SWFs are one of the dominant capital market participants, it will be increasingly important for the Forum to take an active role in the IOSCO process and to interact with the various levels of IOSCO members.

Third, the major concern with the GFC was its non-transparent interconnectedness and counterparty arrangements that had proliferated among the banks and the “shadow bank” sector. Looking forward, these interconnections will most likely continue, though on a more transparent and risk-managed basis. It appears that the SWFs will be joining, at times, with other SWFs, banks and non-bank financial institutions. In this context, the Forum should consider being more openly and actively involved with the private players in the capital markets by associating and exchanging views with the major private international capital markets bodies such as the private, self-regulatory International Capital Market Association (“ICMA”),<sup>300</sup> the Hedge Fund Association<sup>301</sup> and the International Investment Fund Association.<sup>302</sup>

Fourth, and perhaps most importantly, the G20 Finance Ministers and the IMFC, in consultation with the Forum, should

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<sup>299</sup> The mandate of IOSCO’s members is:

to cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets; to exchange information on their respective experiences in order to promote the development of domestic markets; to unite their efforts to establish standards and an effective surveillance of international securities transactions; [and] to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.

Media Release, Int’l Org. of Sec. Comm’ns, IOSCO Technical Committee Statement on Accounting Standards Development and Enforcement, at 2-3 (Oct. 21, 2008) (available at <http://www.iasplus.com/iosco/0810techcommittee.pdf>); General Information on IOSCO, <http://www.iosco.org/about/> (last visited Jan. 24, 2010).

<sup>300</sup> See International Capital Market Association, <http://www.icmagroup.org/> (last visited Jan. 24, 2010).

<sup>301</sup> See The Hedge Fund Association, <http://www.thehfa.org> (last visited Jan. 24, 2010).

<sup>302</sup> See International Investment Funds Association Statement of Principles, <http://www.iifa.ca/about/objectives.aspx> (last visited Jan. 24, 2010).

consider a way to fit the ISWF Forum within the newly revised “Bretton Woods II framework” involving the IMF and FSB.<sup>303</sup>

Fifth, the Forum and its members need to be tied into and committed to the IMF’s bilateral surveillance initiatives of financial stability analyses. In addition, the Forum should explore—with the aid of the IMF, the World Bank and the OECD—possibilities both of TA for assisting SWFs in upgrading their governance structures and in some form of periodic voluntary “assessment” for SWFs. This further involvement with the IMF would be in addition to the IMF serving as the initial Secretariat for the Forum.

Sixth, in terms of interfacing the Forum with the FSB, one point of commonality is that a part of the FSB’s role is overseeing international financial standards, and the *Santiago Principles* are *de facto* now a part of such standards. In addition, the FSB’s expanded mandate is to address vulnerabilities and to develop and implement strong regulatory, supervisory and other policies in the interest of financial stability,<sup>304</sup> and, as discussed above, a consensus has developed among the international policymakers and the SWFs themselves that the SWFs have a direct relationship to global financial stability. As such, some form of “association” should be arranged between the FSB and the ISWF Forum. The FSB is an ideal umbrella framework for the ISWF Forum to come under, as the FSB includes central banks and various central bank subcommittees,

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<sup>303</sup> See Declaration, G20 Leaders, *supra* note 295.

<sup>304</sup> See Financial Stability Board Overview, <http://www.financialstabilityboard.org/about/overview.htm> (last visited Jan. 24, 2010). The mandate of the FSB is to:

assess vulnerabilities affecting the financial system and identify and oversee action needed to address them; promote co-ordination and information exchange among authorities responsible for financial stability; monitor and advise on market developments and their implications for regulatory policy; advise on and monitor best practice in meeting regulatory standards; undertake joint strategic reviews of the policy development work of the international standard setting bodies to ensure their work is timely, coordinated, focused on priorities, and addressing gaps; set guidelines for and support the establishment of supervisory colleges; [and] manage contingency planning for cross-border crisis management, particularly with respect to systemically important firms; and collaborate with the IMF to conduct Early Warning Exercises.

financial regulators and authorities, the IMF, World Bank, OECD, the European Commission and the various other international standard setters (e.g., the Basel Committee on Banking Supervision, IOSCO, the International Association of Insurance Supervisors and the International Accounting Standards Board (“IASB”)).<sup>305</sup>

The author believes that the aforementioned six suggested private and public links can be achieved in large measure through a series of particularized (but coordinated) MOUs between the ISWF Forum and the relevant bodies/authorities. In part, it will be these MOUs that will form the foundation that will help the Forum successfully and effectively evolve into a responsible participant in the global financial markets, the international investment environment and the global financial stability policymaking processes of Bretton Woods II. The Forum’s success will depend in part upon it internally developing as a quasi-global administrative body with a sound basis of legitimacy as to its numerous constituents and stakeholders and with heightened institutional transparency, good governance and accountability.

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<sup>305</sup> For the full list of the FSB members, see Links to FSB Members, <http://www.financialstabilityboard.org/members/links.htm> (last visited Jan, 24, 2010). For further discussion of the FSB, see Arner & Taylor, *supra* note 287.