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Sovereignty, Accountability, and the Wealth Fund Governance Conundrum

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Sovereignty, Accountability, and the Wealth Fund Governance Conundrum

Anna Gelpern*

Abstract

Sovereign wealth funds—state-controlled transnational portfolio investment vehicles—began as an externally imposed category in search of a definition. SWFs from different countries had little in common and no particular desire to collaborate. But SWFs as a group implicated the triple challenge of securing cooperation between deficit and surplus states, designing a legal framework for global capital flows, and integrating state actors in the transnational marketplace. This Article describes how an apparently artificial grouping of investors, made salient by the historical and political circumstances of their host states in the mid-2000s, became a vehicle for addressing some of the hardest policy problems of the past century and a site for innovation in international law-making and institution-building. I argue that the funds' hybrid public-private and transnational character makes them hard to define and govern, but also makes them exceptionally apt reflections of contemporary global finance and its multiple constituents. I elaborate this character in a four-part accountability matrix. The task of governing SWFs, just like the task of governing global finance, is about negotiating among public, private, internal and external demands for accountability in the absence of a stable hierarchy among them.

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I. Introduction

The lingering financial crisis has created an opening for reform in national regulation and global economic governance. The Group of Twenty rich and middle-income states (G-20) has seamlessly edged out the Group of Seven rich ones (G-7) as the indispensable forum for economic policy coordination.¹ Long-defeated ideas, from regulating derivatives to a global reserve currency, are surfacing in polite conversation and the occasional communiqué; some are on the brink of legislative reality.² The International Monetary Fund (IMF) has reinvented itself after a near-death experience,³ successfully fighting off competition from new regulatory fora and regional power groupings.⁴ Yet at the heart of reform are three pieces of unfinished business, some dating back to World War II and the Great Depression: securing cooperation between deficit (debtor) and surplus (creditor) states, designing a legal framework for global capital flows, and integrating state actors in the transnational marketplace.

¹ See G-20, *Summit Declaration*, The Toronto Summit 2010, ¶ 1 (26-27 June 2010), available at http://www.g20.org/Documents/g20_declaration_en.pdf G-20; see also G-20, *Leaders' Statement*, The Pittsburgh Summit 2009, ¶ 19 (24-25 Sept. 2009), available at <http://www.pittsburghsummit.gov/mediacenter/129639.htm> (Item 19, designating the G-20 "the premier forum" for international economic cooperation for the first time); see also The Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System, *Recommendations*, ¶ 47 (19 Mar. 2009) (arguing for a "new Global Reserve System"). G-7 members are the United States, the United Kingdom, France, Germany, Canada, Japan and Italy. The G-20 adds South Africa, Mexico, Argentina, Brazil, China, South Korea, India, Indonesia, Saudi Arabia, Russia, Turkey, Australia and the European Union. *But see* Anders ASLUND, Editorial, *The Group of 20 Must Be Stopped*, THE FINANCIAL TIMES (London), 27 Nov. 2009, at 11 (arguing that G-20 is illegitimate).

² See Sewell CHAN, *Reconciliation for 2 Financial Overhaul Bills*, N.Y. TIMES, 21 May 2010, at B1 (reporting the passage of a Senate bill including provisions for derivatives regulation). The Restoring of American Financial Stability Act of 2010, S. 327, 111th Cong. § 8(2) (2010); S. COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS REP. NO. 111-176 (2010) (Conf. Rep.).

³ Barry EICHENGREEN, *The IMF Adrift on a Sea of Liquidity*, in REFORMING THE IMF FOR THE 21ST CENTURY 495 (Edwin M. TRUMAN ed., 2006) [hereinafter, TRUMAN, ED.]; see Anthony FAIOLA, *IMF to Offer Buyouts to About 500 Employees*, WASH. POST, 30 Apr. 2008, at D8 (reporting staff cutbacks).

⁴ See, e.g., G-20, *Communiqué*, Meeting of Finance Ministers and Central Bank Governors, (23 Apr. 2010), available at http://www.g20.org/Documents/201004_communique_WashingtonDC.pdf [hereinafter *G-20 Washington Communiqué*] 2-3 (concerning cooperation between the IMF and Financial Stability Board); Tony BARBER, *EU Ditches Doubt to Back IMF Role*, THE FINANCIAL TIMES (London), 3 May 2010 (describing Europe's initial desire to resolve its financial crisis without the IMF); Press Release, Executive Board of the IMF, IMF Executive Board Approves €30 Billion Stand-By Arrangement for Greece, No. 10/187 (9 May 2010); *Full Text of EU Crisis Mechanism Agreement*, REUTERS, 10 May 2010, available at <http://www.reuters.com/article/idUSTRE6490A820100510> (establishing an EU financial support mechanism in cooperation with the IMF); see generally C. Randall HENNING, *Regional Arrangements and the International Monetary Fund*, in REFORMING THE IMF FOR THE 21ST CENTURY 171 (Edwin M. TRUMAN ED., 2006) (discussing the IMF's relationship with regional arrangements).

Sovereign Wealth Funds (SWFs) embody all three unfinished tasks. They are state-controlled portfolio investment vehicles that deploy surplus state capital in deficit countries, where they face political opposition and a shifting legal environment. This Article explores the place of SWFs in the current reform moment. I argue that SWFs, which began as an externally imposed category in search of a definition, gained prominence in part because, as a group, they stand at the intersection of so many urgent governance concerns at once. Figuring out how to govern SWFs may yield substantive policy pay-off—engaging surplus states, advancing broad-based norms on cross-border investment, and regulating state participation in the financial markets—and help elaborate new legal, institutional and governance models for the global financial system beyond SWFs.

Sovereign portfolio vehicles grew dramatically over the past decade, reaching an estimated \$3 trillion under management in just a few years. Yet, as I highlight in Part II of this Article, SWFs as a category emerged under protest from the funds themselves. SWFs' governments, friends and many observers argued that lumping the funds together in one term made no sense. SWFs are so diverse that commentators have yet to agree on a single authoritative definition. They come from all continents, from all along the national income spectrum, and are sponsored by all manner of governments. They adopt a variety of legal forms, some of which translate poorly across legal systems. They have different goals and investment strategies: some seek to smooth volatile commodities profits, some save for future generations, yet others just want to earn more on official reserves. It is a puzzle that despite such diversity, the term SWF stuck, and soon a political grouping arose to fit the term. This Article sets out how it happened, and suggests some implications of the episode for global economic governance.

In addition to the diversity among them, SWFs harbor internal tensions. Most SWFs are state-owned actors in state-dominated economies; yet when they go abroad, they claim forcefully to act as if they were private firms. Many funds come from countries that had been on the margins of the global financial system, and some are very poor; they invest most visibly in rich countries that had long dominated this system. SWFs are often compared to hedge funds and private

equity funds—private players at the cutting edge of international finance⁵—but when they invest in Europe and North America, SWFs elicit fears of state interference and political capture.⁶ In sum, they are complex and contradictory institutions that occupy a critically important policy space.

I discuss the policy context for SWFs' emergence in Part III of this Article. I suggest that SWFs' stint at the center of policy debates is another puzzle, even putting aside the grouping's apparent artificiality and its internal contradictions. Despite recent growth, SWFs remain far behind official reserves and a small fraction of private mutual funds as sources of global investment capital.⁷ Meanwhile, state-owned enterprises (SOEs) are much more overt in projecting state power across national borders.⁸ It follows that those concerned with imbalances between surplus and deficit countries might more profitably focus on reserve accumulation and management;⁹ those worried about capital mobility, on private investment funds; those worried about foreign direct investment and state control, on SOEs. Put differently, if size and activism were proxies for importance, SWFs might be described as a secondary symptom of some big policy problems. But even if SWFs were not the leading exponent of any single policy worry, they have shown a rare capacity to reflect multiple worries at once.

I argue further that SWFs' hybrid character has helped capture public, market and official imaginations even after it turned out that early size estimates were overblown, and despite the funds' record of relatively passive investment so far. Unlike the more explicitly public or private

⁵ McKinsey Global Institute, *The New Power Brokers: How Oil, Asia, Hedge Funds, and Private Equity Are Shaping Global Capital Markets* (Oct. 2007) [hereinafter, McKinsey NPB 2007] (describing a new category of large global liquidity providers).

⁶ *Infra* note ___ and accompanying text.

⁷ See Brad SETSER & Rachel ZIEMBA, *How Much Do Sovereign Wealth Funds Manage?*, 2 Aug. 2009, <http://blogs.cfr.org/setser/2009/08/02/how-much-do-sovereign-wealth-funds-manage/> (estimating total sovereign wealth fund assets at \$1.5 trillion, substantially less than the \$7 trillion held as reserves); John GIEVE, Deputy Governor of the Bank of England, *Sovereign Wealth Funds and Global Imbalances*, Speech at the Sovereign Wealth Management Conference (14 Mar. 2008) in Bank of England Quarterly Bulletin (2008 Q2) at 198 (estimating SWF holdings at "less than one 20th" of private sector investment funds).

⁸ See e.g., Lydia POLGREN, *As Chinese Investment in Africa Drops, Hope Sinks*, THE N.Y. TIMES (25 Mar. 2009) (describing Chinese SOE investment in Africa); Anders ASLUND, *Focus on Gazprom, Not Sovereign Wealth Funds*, MOSCOW TIMES (8 Nov. 2007) (noting interference in European politics by the Russian SOE). The term SOE traditionally refers to operating companies, as distinct from portfolio investment vehicles.

⁹ This view is implicit in BRAD W. SETSER, COUNCIL ON FOREIGN RELATIONS, SOVEREIGN WEALTH AND SOVEREIGN POWER (2008), available at <http://www.cfr.org/publication/17074> [hereinafter "SETSER REPORT"].

vehicles such as reserves or mutual funds, SWFs must respond to simultaneous and conflicting demands from many diverse constituents in today's international finance.¹⁰ I illustrate these demands in Part IV of this Article, and suggest that SWFs embody tensions in the system as a whole in ways that more “pure” participants with fewer and more discrete constituencies cannot. For example, when they operate as private actors, SWFs answer to their immediate owners and creditors, and have responsibilities to their targets and host state regulators. At the same time, SWFs are state actors that must be broadly accountable to the people of their home country,¹¹ and are subject to a wide range of international legal norms, including treaty commitments of their home states.¹² Capacity to negotiate overlapping private and public, domestic and external demands for accountability is essential for a regime that aspires to govern a global marketplace where capital roams free and radically diverse actors and political systems transact side by side with little regard for territorial boundaries. The international financial system responds to multiple constituencies and multiple legal regimes at once. SWFs' experience in managing the demands of this plural order in the absence of a settled hierarchy offers a valuable window on how international finance is governed.

How SWFs go about this task is as important as the outcome. Early proposals for formal rules and sanctions to govern SWFs have produced minor changes in domestic law, whose effect has been uncertain. These gave way to artifacts of soft law such as nonbinding principles, private “naming and shaming” indices, informal alliances and “soft institutions”—voluntary fora that lack legal personality. Most important among these, the nonbinding Generally Applicable Principles and Practices announced by a group of SWFs in Santiago in mid-2008 (GAPP, or the Santiago Principles)¹³ have since led to the creation of a standing SWF forum.¹⁴ Part V of this

¹⁰ See Larry Catá BACKER, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TULANE LAW REVIEW 1801, 1804 (2008), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1135798 [hereinafter BACKER, *Private Law of Public Law*] (arguing that the boundary between public and private functions in the marketplace is breaking down); Larry Catá BACKER, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 425 (2010) [hereinafter BACKER, *Regulatory Chameleons*].

¹¹ The form of accountability is a domestic political matter. See note __ infra and accompanying text.

¹² See Simon CHESTERMAN, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 577, 584 (2008) (discussing Norway's use of multilateral treaties in its SWF investment policies).

¹³ Generally Accepted Principles and Practices, International Working Group of Sovereign Wealth Funds, October 2008, [hereinafter Santiago Principles or GAPP] available at <http://iwg-swf.org/pubs/gapplist.htm>.

Article reviews the public and private, formal and informal efforts to discipline SWFs, which culminated in the Santiago Principles. These efforts were dynamic and interactive, borrowing one another's insights and methods, and competing for market and political space.

There are several explanations for why soft measures have prevailed in SWF governance so far; these lead to different predictions about their likely success and different implications for governing international finance. At one extreme, if SWFs chose a voluntary code to boost the public perception of their law-abiding character with no intention to comply, then the code may be useless at best or help cover up anti-social behavior at worst.¹⁵ On the other hand, if soft law gives SWFs a way to negotiate the demands of diverse legal and political systems, then it can help create a site where new actors engage with the existing order. With the Santiago Principles barely two years old, it is too early to choose between these explanations; the answer is likely in-between. But even if the second explanation is only partly right, the evolution of SWFs is a valuable case study of soft law as a response to the pluralism of law in international finance, and an experiment in new governance techniques.

This Article proceeds as follows: Part II briefly elaborates the SWF phenomenon and the struggle to define it. I argue that defining SWFs has been hard for a reason: they are, by definition, many things to many people, which is also what makes them fertile ground for governance research. The remainder of the Article situates SWFs at three intersections: the intersection of substantive economic policy problems, the intersection of accountability demands, and the intersection of legal and institutional approaches. Thus Part III puts SWFs in the context of three policy imperatives: securing cooperation between surplus and deficit states, the search for global investment norms, and integrating state actors in the financial markets. Part IV considers the competing demands on SWFs among their different constituents, and groups them along four dimensions of accountability using case studies to illustrate. Part V describes

¹⁴ Press Release, International Working Group of Sovereign Wealth Funds, Working Group Announces Creation of International Forum of Sovereign Wealth Funds, No. 09/01 (6 Apr. 2009) available at <http://iwg-swf.org/pr/swfpr0901.htm>.

¹⁵ Stephen S. COHEN & J. Bradford DELONG, *THE END OF INFLUENCE: WHAT HAPPENS WHEN OTHER COUNTRIES HAVE THE MONEY* 4 (2010) ("The great and the good seek codes of behavior that aim to oblige sovereign wealth funds—in a nonbinding way—to pretend that they are market actors")

the legal and institutional response to these demands. Part VI concludes with implications for governing global finance and further research in the field.

II. Identity Politics

This much is agreed: Kuwait established the first SWF in 1953;¹⁶ SWFs grew dramatically in the first decade of the twenty-first century;¹⁷ Andrew Rozanov first used the term “sovereign wealth fund” in 2005;¹⁸ and there is no universally agreed definition of SWFs.¹⁹ Estimates of their number and size are usually contested by those who define the category differently. Leading estimates range from about 70-80 funds managing about \$4 trillion in international assets in 2009²⁰ to less than half this number and amount.²¹ Continued struggles to define SWFs are among the oddest and most telling attributes of their recent history.

Rozanov, an economist with a private investment firm, first described SWFs in the negative as “neither traditional public-pension funds nor reserve assets supporting national currencies.”²² To constitute a SWF, a pool of funds would have to be managed separately under guidelines distinct from those applicable to central bank reserves, to achieve “more broadly diversified and risk-tolerant sovereign wealth.”²³ Nearly three years later, the IMF’s first major public product dedicated to SWFs had an appendix-full of formal definitions, highlighting the magnitude (or

¹⁶ See, e.g., GIEVE, *supra* note 7.

¹⁷ *Id.*

¹⁸ Andrew ROZANOV, *Who Holds the Wealth of Nations?*, 15 CENTRAL BANKING JOURNAL 52 (May 2005).

¹⁹ EDWIN M. TRUMAN, SOVEREIGN WEALTH FUNDS: THREAT OR SALVATION? (forthcoming 2010) [hereinafter, TRUMAN, THREAT OR SALVATION].

²⁰ *Id.* Truman’s estimates are at the high end of the spectrum because his definition of SWF includes government-controlled pension funds.

²¹ See, e.g., *Weathering the Storm: Sovereign Wealth Funds in the Global Economic Crisis of 2008*, Monitor Group-Fondazione Eni Enrico Mattei, SWF Annual Report 2008 (Apr. 2009) [hereinafter, Monitor 2008]. The Monitor-FEEM definition includes government ownership, independent management, a diversified investment strategy “in pursuit of commercial returns” and significant publicly-reported international investments, but excludes funds that have “predominant explicit pension obligations.” *Id.* at 7. The result is a list of 31 funds with \$1.8 trillion under management. *Id.* at 6.

²² ROZANOV, *supra* note 18, at 1.

²³ ROZANOV, *supra* note 18, at 1, 4.

futility) of the classification challenge.²⁴ Universally shared SWF characteristics were limited to state control and macroeconomic purpose.²⁵

Disagreements reflect the competing concerns of definition proponents. The SWF category was launched in 2005 entirely as seen from the outside, and initially developed unconstrained by the self-perceptions of the funds' owners and managers.²⁶ Early "definers" fell roughly into three groups: market actors whose business was affected by the rise of SWFs;²⁷ host country governments managing the political fallout from SWF investments;²⁸ and academic and civil society observers engaged in policy advocacy.²⁹ The three groups used the term "sovereign" to emphasize different things. Thus for market participants, sovereign often meant autonomous, somewhat insulated from market pressures, and therefore freer to take longer-term risks;³⁰ for host country governments, sovereignty stood for responsible public behavior;³¹ and for the civil

²⁴ INTERNATIONAL MONETARY FUND, SOVEREIGN WEALTH FUNDS—A WORK AGENDA 37–38. (29 Feb. 2008) available at <http://www.imf.org/external/np/pp/eng/2008/022908.pdf>. The Fund had previously included analysis of SWFs in its macroeconomic and country surveillance work. See, e.g., generally INTERNATIONAL MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT (Apr. 2007).

²⁵ *Id.* at 4, defining SWFs as "government-owned investment funds, set up for a variety of macroeconomic purposes."

²⁶ David LAWDER & Gleb BRYANSKI, *Putin-No Sovereign Wealth Fund in Russia Yet*, REUTERS (30 June 2008) at <http://www.reuters.com/article/etfNews/idUSL3028241920080630> (describing a misunderstanding between Russian Prime Minister Vladimir Putin and U.S. Treasury Secretary Henry Paulson surrounding Russia's definition of SWF).

²⁷ See Stephen JEN, *Currencies: The Definition of Sovereign Wealth Fund*, Morgan Stanley (25 Oct. 2007), at <http://sovereignwealthfunds.files.wordpress.com/2008/01/the-definition-of-a-sovereign-wealth-fund-morgan-stanley-october-2007.pdf>; ROZANOV, *supra* note 18; McKinsey NCB 2007, *supra* note 5.

²⁸ See, e.g., U.S. DEPARTMENT OF THE TREASURY, REPORT TO CONGRESS ON INTERNATIONAL ECONOMIC AND EXCHANGE RATE POLICIES (Dec. 2007) available at <http://www.treas.gov/offices/international-affairs/economic-exchange-rates/>; Clay LOWERY, Acting Under Secretary for International Affairs, Remarks on Sovereign Wealth Funds and the International Financial System, U.S. Dept. of the Treasury, 21 June 2007, at <http://www.ustreas.gov/press/releases/hp471.htm>. (Lowery reprised the formal definition in the Report to Congress, and elaborated on it several times in the summer and fall of 2007).

²⁹ E.g., Edwin M. TRUMAN, *A Blueprint for Sovereign Wealth Fund Best Practices*, Policy Brief (Peterson Institute for International Economics), Apr. 2008, available at <http://www.petersoninstitute.org/publications/pb/pb08-3.pdf> [hereinafter TRUMAN, *Blueprint*]; SETSER & ZIEMBA, *supra* note 7; COHEN & DeLONG, *supra* note 15.

³⁰ See, e.g., ROZANOV, *supra* note 18; JEN, *supra* note 29. Jen's SWF characteristics are: "(1) sovereign, (2) high foreign currency exposure; (3) no explicit liabilities; (4) high risk tolerance; and (5) long investment horizon." *Id.* Risk tolerance is quite different from responsible investing in the preceding paragraph. A risk tolerant investor can wait to maximize returns; a responsible investor may sacrifice financial returns for a higher purpose.

³¹ See, e.g., Robert M. KIMMITT, *Public Footprints in Private Markets: Sovereign Wealth Funds and the World Economy*, FOREIGN AFFAIRS (Jan./Feb. 2008), available at <http://www.foreignaffairs.org/20080101faessay87109/robert-m-kimmitt/public-footprints-in-private-markets.html> [hereinafter KIMMITT, *Public Footprints*]; Clay LOWERY, U.S. Dept. of the Treasury Assistant Secretary for International Affairs, *The Role of Sovereign Wealth Funds in the Global Economy*, Remarks at Barclays Capital's 12th Annual Global Inflation-Linked Conference (12 Feb. 2008), available at <http://www.ustreas.gov/press/releases/hp836.htm> [hereinafter Lowery *Role of Sovereign*].

society observers, it could imply a fiduciary relationship with the people or some subset thereof.³²

While not part of any formal definition of SWFs, perceptions of their “sheer size and scope” drove policy and market interest.³³ A big reason SWFs mattered was that as a group, they looked big and grew fast. In just a few years, SWFs grew from a few million to nearly \$3 trillion in assets under management (not including state pension funds), surpassing hedge funds; early on, they were expected to triple in five years.³⁴ The highest estimates were probably unrealistic all along; regardless, the financial meltdown has tempered the trend substantially: many funds lost money on investments, and some governments had to dip into SWF savings to manage the crisis.³⁵ Nevertheless, and despite their continued lagging behind reserves and mutual funds, SWFs’ combined size by most definitions and estimates made SWF policy a matter of global financial stability.

As noted earlier, SWF sponsors first reacted to being thus combined with bewildered indignation. For them, the term “sovereign wealth fund” purported to describe competitors with little in common, most of which had not interacted (much less collaborated) until they became the target of host country hostility. SWFs come from rich European states like Norway, and new, impoverished, conflict-ridden ones like Timor Leste, with the likes of Abu Dhabi, Alaska, Azerbaijan, Botswana, Chile, China, Russia and Singapore in between. Every continent and form of government is represented, though relatively few SWF home states conform to Western

³² See, e.g., TRUMAN, *Blueprint*, supra note 29; Sven BEHRENDT & Bassma KODMANI, Eds., *Managing Arab Sovereign Wealth in Turbulent Times—and Beyond*, Carnegie Papers No. 16 (Apr. 2009) at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=23044&prog=zgp&proj=zie,zme>.

³³ ROZANOV, supra note 18, at 1.

³⁴ See, e.g., Nandini SUKUMAR, *Sovereign Wealth Fund Assets Could Triple by 2013*, BLOOMBERG (23 July 2008), available at <http://www.bloomberg.com/apps/news?pid=20601014&refer=funds&sid=a.GQvK6z8x8g>; JEN, supra note 29; see also Lawrence GOODMAN & Georgia BLUME, *Sovereign Wealth Funds: Future Direction, Opportunities and Uncertainties*, Bank of America Global Currency Strategy Report (31 Mar. 2008).

³⁵ Brad SETSER & Rachel ZIEMBA, *GCC Sovereign Wealth Funds: Reversal of Fortune*, Council on Foreign Relations CGS Working Paper (Jan. 2009) [hereinafter SETSER & ZIEMBA, *Reversal*], available at <http://www.cfr.org/publication/18017/>; Rachel ZIEMBA, *Are Sovereign Wealth Funds Back? A Roundup* (8 Oct. 2009), available at <http://www.roubini.com>. But see McKinsey Global Institute, *The New Power Brokers: How Oil, Asia, Hedge Funds and Private Equity Are Faring in the Financial Crisis* (Jul. 2009) [hereinafter McKinsey NPB 2009] (citing no decline in SWF assets under management, at \$3.2 trillion for 2008, and projecting continued albeit slower growth).

notions of representative democracy.³⁶ Some funds have decades of investment experience, but more than half are brand new.³⁷ Their stated goals vary widely, from basic macroeconomic policy to long-term development. Some invest at home, others abroad; many do both.³⁸ Sources of funds range from export revenues to foreign aid inflows.³⁹ Some SWFs invest net government savings, others borrow from their central banks; very few borrow from the markets.

Not until late 2008, as the Santiago Principles were unveiled at the height of the financial crisis, did a group of SWFs proffer their own definition, which effectively set forth criteria for membership in the new club:

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.⁴⁰

This definition specifically excluded traditional reserves, SOEs, purely domestic funds, and pension funds. It retained for SWF states the flexibility to organize the funds as they saw fit under domestic laws, and left unaddressed the tension between “macroeconomic [=public policy] purposes” and “financial [=apolitical] objectives”.⁴¹ Nor did it formalize the funds’ role as passive long-term portfolio investors, an aspect of SWF history that the funds and their supporters had stressed to relieve host anxiety.

Reading between the lines of SWF definitions and commentary reveals a jumble of contradictions: public money that pledges to act private, vast pools of capital that promise not to move markets, non-controlling investors that manage centrally controlled economies; and public fiduciaries that balk at corporate governance of their investment targets. The next Part tries to

³⁶ See, e.g., Ashby H.B. MONK, *Recasting the Sovereign Wealth Fund Debate: Trust, Legitimacy, and Governance*, 14 NEW POLITICAL ECONOMY 451 (2009).

³⁷ See, e.g., John LIPSKY, First Deputy Managing Director of the International Monetary Fund at the seminar, *Sovereign Funds: Responsibility with Our Future* organized by the Ministry of Finance of Chile (3 Sept. 2008), *text as prepared for delivery available at* <http://www.imf.org/external/np/speeches/2008/090308.htm>. This figure is somewhat misleading, since many of the new funds are small. The large funds tend to be older.

³⁸ See, e.g., Arina POPOVA, *Sovereign Wealth Funds: To Be or Not To Be Is Not the Question; Which One To Choose, Is*, 40 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 1191, 1198 (2009) (describing Russia’s diverse SWFs).

³⁹ ROZANOV, *supra* note 18, at 1.

⁴⁰ GAPP, *supra* note 13, at 27.

⁴¹ *Id.*

make sense of the SWF phenomenon by locating it at the intersection of long-festering policy arguments.

III. Unfinished Business

From the start, SWFs emerged as exponents of intractable policy problems. These problems were historically distinct, if often related. Each had its political constituents, legal and policy tool kits. This Part elaborates three especially long-running and prominent substantive policy debates associated with SWFs, and how SWFs got caught up in their simultaneous inflections around the middle of the 2000s.

A. *Asymmetry and Imbalance*

By first describing a typical SWF as “a by-product of national budget surpluses . . . trade and fiscal positions,”⁴² Rozanov located SWFs at the heart of an old controversy that had become, again, the defining economic policy preoccupation of its day.

John Maynard Keynes and Harry Dexter White, the architects of the post-World War II economic order, both said that stability and growth depended on getting deficit and surplus countries to act in the common interest.⁴³ Although both aspired to symmetry, they came to the negotiating table with different mandates. Keynes sought to create an international institution with the power to force deficit countries to adjust, but also to tax countries that accumulated excess reserves, pressuring them to revalue.⁴⁴ Influential voices in the U.K. argued that “outright confiscation of excess balances” was needed to make the new fixed exchange rate system workable.⁴⁵ Because everyone expected the United States to be the biggest creditor of all, U.S.

⁴² ROZANOV, *supra* note 18.

⁴³ JOSEPH GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM (1981), 259-60.

⁴⁴ *Id.* at 260. According to Keynes, “[t]he object is that the creditor should not be allowed to remain entirely passive. For if he is, an intolerably heavy task may be laid on the debtor country, which is already for that very reason in the weaker position.” J. M. KEYNES, *quoted in id.* See also J. KEITH HORSEFIELD, ANNALS OF THE FUND, 1945-1965 (1969) at 15, 31, 38, 40.

⁴⁵ HORSEFIELD, *supra* note 46, at 31, citing E.F. SCHUMACHER, *The New Currency Plans*, INSTITUTE OF STATISTICS BULLETIN (Oxford, England), Vol. 5, Supp. 5 (7 Aug. 1943) at 17.

negotiators opposed aspects of the Keynes proposal that would impose such muscular sanctions; they preferred reports and reprimands.⁴⁶

The compromise Articles of Agreement of the IMF permit sanctions against surplus countries in limited circumstances.⁴⁷ However, the relevant provisions are narrowly drawn and have never resulted in punishment.⁴⁸ As a practical matter, the Articles gave the IMF powers to condition balance-of-payments support on policy adjustment in deficit countries, even as it could only lecture the capital hoarder.⁴⁹ Yet deficit country sanctions are also incomplete: members that can finance their deficits without recourse to the Fund need not submit to its discipline.⁵⁰

The asymmetric discipline compromise reflected and entrenched the post-war order, as did the IMF's formal governance structure. Voting was tied to contributions, which were tied to the size of the members' economies, trade volumes and exchange reserves, adjusted for the day's politics.⁵¹ Changing the formula significantly to realign the votes at a minimum would be a major political event, and could require a high supermajority of member votes and approval by national authorities.⁵²

⁴⁶ HORSEFIELD, *supra* note 46, at 23, 45, 65; GOLD, *supra* note 45, at 296-97.

⁴⁷ The so-called "Scarce Currency Clause," Article VII of the Articles of Agreement of the International Monetary Fund allows the Fund to designate a currency as "scarce" either in general or in the context of the Fund's own holdings. A finding of scarcity would authorize other members to use bilateral sanctions against the surplus state. In addition, Article IV(1)(iii) of the Articles of Agreement states that members shall "avoid manipulating exchange rates . . . in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage . . ."

⁴⁸ GOLD, *supra* note 45, at 296-97, 301-02. Keynes considered the U.S. agreement to sanctions under the scarce currency clause a major achievement. *Id.* at 296. However, even significant surpluses did not necessarily result in currency scarcity under the Articles; moreover, members were reluctant to authorize sanctions because apportioning blame for scarcity was both empirically and politically difficult. For the contemporary relevance of the scarce currency clause see Eric HELLEINER, *The Contemporary Reform of Global Financial Governance: Implications of and Lessons from the Past*, G-24 Discussion Paper No. 55, United Nations Conference on Trade and Development (Apr. 2009).

⁴⁹ GOLD, *supra* note 45, at 260, 294-303; Barry J. EICHENGREEN, *GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919-1939*, 398 (1995).

⁵⁰ EICHENGREEN, *supra* note 3 at 495. See also GOLD, *supra* note 45, at 262. This is particularly true of members whose currencies could function as "reserve currencies" for the rest of the world. The U.S. dollar has been the dominant (and until recently the only) reserve currency in the post-war era.

⁵¹ The arrangement reflected the U.S. imperative "that [the formula] should yield a quota of about \$2.5 billion for the United States, about half this for the United Kingdom, and such figures for the U.S.S.R. and China as should assure them third and fourth places, respectively" HORSEFIELD, *supra* note 46, at 74.

⁵² Articles of Agreement of the International Monetary Fund, Art. III(2) (requiring eighty-five percent of the voting power to change member quotas); Bretton Woods Agreements Act of 1945, Pub. L. No. 79-171, 59 Stat. 512, Sec. 5 (codified in scattered sections of 22 U.S.C.) (requiring congressional authorization to change the U.S. quota).

A quarter century later, post-war assumptions had failed.⁵³ The United States suffered a succession of capital outflows and declining exports, and could not sustain its role as the world's monetary anchor. In August of 1971, it notified the IMF that it would no longer convert the dollar freely into gold.⁵⁴ This marked the end of the dollar-centered fixed exchange rate system at the heart of the postwar institutional design,⁵⁵ and the rise of informal coordination arrangements to underpin floating exchange rates.⁵⁶ Since then, the United States trade deficit has worsened,⁵⁷ so that by 2005—the year the term “sovereign wealth fund” first appeared in print—the United States was far and away the world's biggest debtor.⁵⁸

Unlike earlier U.S. and European deficits, which were financed by private investors and governments in closely allied states such as Germany and Japan,⁵⁹ the new deficits were bigger and relied more on funding from China, Russia, and oil producers in the Middle East.⁶⁰ And in contrast to the world in 1944, many capital-exporting states were poor and new to governing international finance. The new creditors accumulated trillions of dollars from export revenues in an effort to self-insure against future shocks and avoid IMF discipline, but also to keep down the value of their currencies.⁶¹ Experts said that the enormous imbalances put the world in peril:

⁵³ Some commentators have argued that the system only worked as designed for a much shorter period of nine years (1959-1968). Peter M. GARBER, *The Collapse of the Bretton Woods Fixed Exchange Rate System*, in MICHAEL BORDO & BARRY EICHENGREEN, Eds., *A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM*, 461 (1993).

⁵⁴ *Id.*; MARGARET GARRITSEN DE VRIES, *THE INTERNATIONAL MONETARY FUND 1966-1971*, vol. 1 (1976) 527-529; GOLD *supra* note 45, at 268; KENNETH W. DAM, *RULES OF THE GAME* (1982).

⁵⁵ GARRITSEN DE VRIES, *supra* note 56, at 530.

⁵⁶ See, e.g., Andrew CROCKETT, *International Institutions, Surveillance, and Policy Coordination*, in Jacob A. FRENKEL & Morris GOLDSTEIN, *Functioning of the International Monetary System*, vol. 1 (1996) 60-82. The Group of Seven wealthy industrial states were a prime exponent of this new muscular informality.

⁵⁷ *International Economic Accounts*, Bureau of Economic Analysis (29 May 2010 1:45:47 PM), www.bea.gov/international/index.htm#bop (estimating fourth-quarter 2009 current account deficit at \$115 billion).

⁵⁸ See, e.g., William R. CLINE, *Preface to The United States as a Debtor Nation*, at xi (2005); International Monetary Fund, *Global Financial Stability Report: Statistical Appendix*, at 3, fig. 1, April 2010.

⁵⁹ See, e.g., C. Fred BERGSTEN & C. Randall HENNING, *Global Economic Leadership and the Group of Seven* 50, 60-61, 64 (1996).

⁶⁰ Compare U.S. Dep't of Treasury, Table, Major Foreign Holders of Treasury Securities, Mar. 2010, <http://www.ustreas.gov/tic/mfh.txt> (showing large-scale participation of China and oil-exporting states in the U.S. Treasury market); and U.S. Dep't of Treasury, Table, Historical Major Foreign Holders of Treasury Securities, Apr. 2010, <http://www.ustreas.gov/tic/mfhhis01.txt> (showing China's holdings increase from \$60 billion in 2000 to about \$900 billion in 2009).

⁶¹ See Eswar PRASAD, Raghuram RAJAN, & Arvind SUBRAMANIAN, *The Paradox of Capital*, Fin. and Dev., Mar. 2007, at 1.

rebalancing was inevitable, and would require painful adjustment for debtors, creditors, and bystanders alike.⁶² In response, creditors blamed spendthrift debtors and debtors accused creditors of mercantilist manipulation.⁶³

Formal Bretton Woods structures and informal mechanisms grounded in economic and political alliance, such as the G-7, were at a loss to deal with this shifting direction of capital flows.⁶⁴ Asian exporters, notably China and Singapore, and a number of oil producers, notably the United Arab Emirates (UAE), were under-represented in the IMF.⁶⁵ Russia's status in the G-7 finance circles was provisional at best.⁶⁶ Meanwhile, the world's biggest debtor continued to dominate international institutions and issue the leading reserve currency, which gave it policy autonomy from the IMF. The dire warnings and the circle of blame brought about no visible change in behavior on either side.⁶⁷ The IMF could no more influence China's exchange rate management than U.S. tax policy.

Thus by 2005, the Bretton Woods compromise that rejected institutionally robust, symmetrical discipline on surplus and deficit countries was coming back to haunt its leading proponent in an unexpected, ironic way. The United States avoided IMF policy discipline imposed on the likes of South Korea during the Asian financial crisis ten years earlier, because the private market

⁶² See Olivier BLANCHARD & Gian Maria MILESI-FERRETTI, *Global Imbalances: In Midstream?* IMF Staff Position Note SPN/09/29 (Dec. 22, 2009) (including figure showing absolute values of current account balances). For prominent warnings, see Maurice OBSTFELD & Kenneth ROGOFF, *The Unsustainable US Current Account Position Revisited* (Nov. 30, 2005); Nouriel ROUBINI & Brad SETSER, *The US as a Net Debtor: The Sustainability of the US External Imbalances* (Nov. 2004).

⁶³ See, e.g., Harold JAMES, *A Blame Game at Globalisation's Unravelling*, THE FINANCIAL TIMES (London), 27 May 2010 (criticizing the politics of global and intra-European imbalances).

⁶⁴ See also Steven DUNAWAY, *Global Imbalances and the Financial Crisis*, Council on Foreign Relations Special Report No. 44 (Mar. 2009) at 7-10, available at <http://www.cfr.org/publication/18690>. See generally Eric HELLEINER, *International Payments Imbalances and Global Governance*, CIGI Policy Brief No. 8 (Nov. 2008) at 2.

⁶⁵ Edwin M. TRUMAN, *Rearranging IMF Chairs and Shares: The Sine Qua Non of IMF Reform*, in TRUMAN, ED., *supra* note 3, at 214.

⁶⁶ This was so despite Russia's participation in the G-8 Heads of State forum. See, e.g., Carnegie Endowment for Int'l Peace, *Russia as the Chairman of the G-8*, (21 Sept. 2005), available at, <http://www.carnegieendowment.org/files/0921carnegie.pdf>; Mark MEDISH, *Russia—Odd Man Out in the G-8*, GLOBALIST (24 Feb. 2006), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18063> (discussing Russia's tenuous position).

⁶⁷ See, e.g., Morris GOLDSTEIN, *Currency Manipulation and Enforcing the Rules of the International Monetary System* in TRUMAN, ED., *supra* note 3, at 141; Timothy D. ADAMS, *The IMF: Back to Basics* in TRUMAN, ED., *supra* note 3, at 133; EICHENGREEN, *supra* note 3.

continued to fund the United States . . . except that surplus country governments, which now included South Korea, became an indispensable part of the “private” market for U.S. government debt. The same U.S. official who had, in a prior life, argued for robust IMF programs in crisis-stricken countries in Asia,⁶⁸ would soon return to Asia on a reassurance tour of America’s creditors.⁶⁹ On the other hand, having deliberately deprived the IMF of meaningful leverage over surplus countries, the United States had to face the frustration of being the largest shareholder in what increasingly looked like an irrelevant institution.⁷⁰

The sharp spike in the number of SWFs in the 2000s was a symptom of global imbalances, which the existing order looked powerless to address. The number of funds had always grown in spurts reflecting rising export revenues, especially in oil and other commodities.⁷¹ It is just that the latest spurt was enormous. As before, surplus country holdings initially took the form of central bank purchases of U.S. Treasury and agency securities. Over time, they began moving into riskier, less liquid assets,⁷² such as U.S. and European equities, as well as infrastructure and extraction projects in Africa. New investment strategies begat new institutional forms: SWFs became a prominent source of portfolio investment in G-7 economies.

⁶⁸ See PAUL BLUSTEIN, *THE CHASTENING: INSIDE THE CRISIS THAT ROCKED THE GLOBAL FINANCIAL SYSTEM AND HUMBLING THE IMF* (2001) at 137.

⁶⁹ *Preview: Geithner to Reassure Gulf Allies on Dlr Assets*, REUTERS, Jul. 13, 2009, available at <http://www.reuters.com/article/asianCurrencyNews/idUSL35935520090713>; *China Skeptical about Geithner Message*, AMERICAN PUBLIC MEDIA, 1 June 2009, available at http://marketplace.publicradio.org/display/web/2009/06/01/pm_geithner_in_china/.

⁷⁰ BUREAU OF INTERNATIONAL AFFAIRS, U.S. DEPARTMENT OF THE TREASURY, REPORT TO CONGRESS ON IMPLEMENTATION OF THE INTERNATIONAL MONETARY FUND’S 2007 DECISION OF SURVEILLANCE OVER MEMBERS’ POLICIES 2 (2008), available at <http://www.ustreas.gov/press/releases/reports/82808report.pdf>.

⁷¹ GIEVE, *supra* note 7, at 197.

⁷² Joshua AIZENMAN & Reuven GLICK, *Sovereign Wealth Funds, Governance, and Reserve Accumulation*, VOX, 16 Jan. 2009, <http://www.voxeu.org/index.php?q=node/2799>; see also Joshua AIZENMAN & Reuven GLICK, *Sovereign Wealth Funds: Stylized Facts About Their Determinants and Governance* 27 (National Bureau of Economic Research, Working Paper No. 14562, 2008) (finding that once foreign reserves become large, SWFs become more attractive to their sponsors). For an example of prominent advocacy for reserve diversification, see Lawrence H. SUMMERS, Harvard University, *Reflections on Global Account Imbalances and Emerging Markets Reserve Accumulation*, L.K. JHA Memorial Lecture, Reserve Bank of India, Mumbai, India (24 Mar. 2006).

B. Local Fears and Global Failures

SWFs flared up in host country politics between the attacks of September 11, 2001 and the financial collapse of September 2008.⁷³ The term SWF, introduced as a technical description, entered mainstream vocabulary as a rolling reflection of host country fears: the fear of foreign invasion, the fear of state takeover, the fear of debt, the fear of big money, and the fear of irrelevance. Chameleon-like, SWFs had the capacity to evoke color-coded security alerts, Wall Street's desperate hunt for capital, the failure of financial regulation, and massive concentration of wealth in the hands of governments that the hosts had long regarded with deep suspicion.

Perhaps the most curious thing about this turn of events was that few of the early public anxieties about SWFs were triggered by entities now defined as SWFs. In the United States, the SWF debate erupted on the heels of mishandled attempts by SOEs, operating companies from the Persian Gulf and China, to buy into U.S. oil and port facilities, which raised the specter of strategic takeover by un-democratic, anti-market, and potentially unfriendly states.⁷⁴ When Dubai Ports, an SOE from the United Arab Emirates, bid for a British firm that operated U.S. ports, U.S. media reports highlighted the fact that two of the 9/11 hijackers came from UAE.⁷⁵ And even those who said there was no reason to oppose the acquisition of Unocal by China's state oil company noted its state-run economy and its status as creditor to the U.S. government.⁷⁶ In the United States and Europe, SWF controversy also followed an inflection of concern with "private pools of capital" (hedge funds and private equity),⁷⁷ to which SWFs were often compared. The "pools" were large, fast-growing privately owned investment vehicles that often

⁷³ ROZANOV, *supra* note 18.

⁷⁴ Press Release, Office of Public Affairs, U.S. Department of the Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (24 Feb. 2006), *available at* <http://www.treas.gov/press/releases/js4071.htm>.

⁷⁵ *Documents Show Conditions for Dubai Deal*, MSNBC (Feb. 22, 2006), *available at* <http://www.msnbc.msn.com/id/11494815>.

⁷⁶ *Is CNOOC's Bid for Unocal a Threat to America?* Knowledge @Wharton, 21 Nov. 2005, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1240> (last visited 31 May 2010).

⁷⁷ Press Release, U.S. Dep't of the Treasury, President's Working Group Releases Common Approach to Private Pools of Capital (22 Feb. 2007) *available at* <http://www.ustreas.gov/press/releases/hp272.htm>; Ashley SIEGER, *Germany Pledges Code to Regulate Hedge Fund 'Locusts,'* THE GUARDIAN, 19 May 2007, *available at* <http://www.guardian.co.uk/business/2007/may/19/germany.internationalnews>.

had short time horizons, profited from market volatility,⁷⁸ and took an increasingly active role in managing their investments. Although they had the capacity to transmit risk through the financial system, they seemed impervious to regulation.⁷⁹ In sum, in the public imagination SWFs looked big, hostile, and uncontrollable, if only by analogy.

From the perspective of SWFs and their supporters, host country critics were being willfully ignorant at best, protectionist and bigoted at worst; regardless, they “had the wrong guy.” To be sure, SWFs were large and state-owned. But most SWFs, unlike SOEs, refrained from active management of their targets. In contrast to hedge funds and private equity, SWFs were “patient capital.” Their long investment horizons promised to stabilize volatile markets even where their strategies were more aggressive than those of traditional reserve managers.⁸⁰ By 2008, opponents of sovereign investment also stood accused of biting the hand that fed them: SWFs were among the scarce few sources of funding for the tottering financial sector in New York and London.⁸¹

Such arguments were no more effective than protestations of SWF diversity discussed earlier. SWFs struck a raw nerve in investment host states at a particularly vulnerable time. Calls for new foreign investment restrictions came naturally, framed in terms of sovereignty and national security,⁸² in tandem with the equally predictable protests against protectionism.⁸³

⁷⁸ *Id.*; see also *Interview with Rob Johnson*, Frontline, “The Crash” (1999), available at <http://www.pbs.org/wgbh/pages/frontline/shows/crash/interviews/johnson.html> (describing “currency attacks” that drew attention to hedge fund investment strategies in the late 1990s).

⁷⁹ The President's Working Group on Financial Markets, Report, *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management* (28 Apr. 1999), available at <http://www.ustreas.gov/press/releases/reports/hedgfund.pdf> (reporting on the systemic impact of one hedge fund's near-failure in 1998, but arguing against direct regulation).

⁸⁰ See, e.g., Mohamed A. EL-ERIAN, *Towards a Better Understanding of Sovereign Wealth Funds*, Presentation at the Peterson Institute for International Economics 7, 19 Oct. 2007, available at <http://www.petersoninstitute.org/publications/papers/el-erian-on-truman.pdf>. SWFs' long time horizons also distinguish them from traditional central bank reserve managers, for whom liquidity is paramount.

⁸¹ See, e.g., Steven SCHWARTZMAN, *Reject Sovereign Wealth Funds at Your Peril*, THE FINANCIAL TIMES (London), 20 June 2008, available at <http://www.ft.com/cms/s/0/405b8888-3dff-11dd-b16d-0000779fd2ac.html>. Henry M. PAULSON, U.S. Treas. Sec'y, Statement at the International Monetary and Financial Committee Meeting (20 Oct. 2007) available at <http://www.imf.org/External/AM/2007/imfc/statement/eng/usa.pdf>.

⁸² Evan BAYH, *Time for Sovereign Wealth Rules*, WALL STREET JOURNAL, 13 Feb. 2008, at A26.

⁸³ DAVID M. MARCHICK & MATTHEW J. SLAUGHTER, COUNCIL ON FOREIGN RELATIONS, GLOBAL FDI POLICY: CORRECTING A PROTECTIONIST DRIFT 10 (2008), available at <http://www.cfr.org/publication/16503/>.

The U.S. investment regime reflects a compromise between openness and national security, shaped in large part by the last influx of petrodollars in the 1970s and a wave of Japanese acquisitions in the 1980s.⁸⁴ Against the presumption of openness, the Committee on Foreign Investment in the United States (CFIUS) in the Executive Branch decides whether an investment poses a national security threat. Where it does, CFIUS recommends changes or blocks the deal. The Dubai Ports bid was the biggest test for this compromise in the new financial and security environment, where economic imbalances and terrorism fears ran rampant.⁸⁵ CFIUS allowed the acquisition; public outrage framed the legislative response, and colored the subsequent debate on SWFs.⁸⁶ CFIUS went from obscurity to celebrity overnight.⁸⁷ It became an emblem of the controversy over sovereign investment, a prominent early site of the policy battle, and inspired imitators around the world.⁸⁸ By the summer of 2007, a new law in the United States made minor tweaks to the open investment framework established in the 1980s, to reflect national security concern about foreign government investments in general; however, policy focus then turned to SWFs in particular—perhaps reflecting heightened awareness of the many forms and implications of sovereign investment, growing worries about macroeconomic imbalances and financial stability, and above all a need to preempt more damaging political surprises.⁸⁹ Eager to avoid new legislative restrictions, U.S. Administration officials preached transparency and made SWFs promise to act commercially.⁹⁰ Other hosts went through similar debates.⁹¹

⁸⁴ U.S. DEPARTMENT OF THE TREASURY, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, available at <http://www.treas.gov/offices/international-affairs/cfius/> (last visited 27 June 2008) (includes summaries and links to the relevant statutes).

⁸⁵ Press Release, Office of Pub. Affairs, U.S. Department of the Treasury, *supra* note 77.

⁸⁶ MSNBC, *supra* note 75 (also notes that two of 9/11 hijackers came from UAE).

⁸⁷ See Editorial, *Heavy-handed CFIUS*, THE FINANCIAL TIMES (London), 28 Feb. 2007, at 16, available at <http://www.ft.com/cms/656f55d4-c6d0-11db-8f4f-000b5df10621.html> (arguing that previously obscure CFIUS must consider commercial necessities).

⁸⁸ A description of CFIUS authority and activities is available on the website for the United States Department of the Treasury. U.S. DEPARTMENT OF THE TREASURY, *supra* note 86. MARCHICK & SLAUGHTER, *supra* note 85 (describing a global protectionist trend in investment regulation).

⁸⁹ Foreign Investment and National Security Act of 2007 (“FINSA”), Pub. L. No. 110-49, 121 Stat. 246 (amending § 721 of the Defense Production Act of 1950 (“DPA”). The amendment included stricter requirements for state-controlled investments. For an overview of U.S. legislative perspectives on SWFs, see Martin WEISS, *Sovereign Wealth Funds and the United States Congress*, in MALAN RIETVELD, ED., NEW PERSPECTIVES ON SOVEREIGN ASSET MANAGEMENT (2008). The U.S. Treasury hosted a G-20 meeting on SWFs in May 2007, before FINSA’s passage, and Treasury officials began publicly speaking on the subject in June. LOWERY, *supra* note 28. See Press Release, U.S. Dep’t of the Treas., Under Sec’y for Int’l Affairs David H. McCORMICK Testimony before the Joint Economic Comm. (13 Feb. 2008) available at <http://www.ustreas.gov/press/releases/hp823.htm>.

⁹⁰ See, e.g., KIMMITT *Public Footprints*, *supra* note 31; LOWERY, *Role of Sovereign*, *supra* note 31; U.S. TREASURY DEPARTMENT OFFICE OF PUBLIC AFFAIRS, U.S. FACT SHEET: FOURTH CABINET-LEVEL MEETING OF THE

The dominance of domestic law early in the SWF controversy was partly attributable to another piece of unfinished international business: the failure to reach multilateral consensus on investment norms in the 1990s. Rich states in the Organization for Economic Cooperation and Development (OECD) tried and failed to produce a global investment treaty a decade before global imbalances in general, and SWFs in particular, attracted attention. The OECD was then the leading broker of global investment norms. But it faced growing criticism as an exclusive club dominated by wealthy capital exporters in Europe and North America.⁹² Negotiations of the Multilateral Agreement on Investment (MAI) collapsed for lack of domestic and international legitimacy, under pressure from civil society groups and states on the economic and political periphery that felt shut out.⁹³ At the time, the United States and Europe saw themselves primarily as investors, not investment hosts. In retrospect, this crisis of OECD legitimacy foreshadowed the power shifts to come. Since MAI failed in 1996, the OECD has struggled to recover credibility in the investment field;⁹⁴ meanwhile, the task of regulating investment capital flows fell to domestic laws, bilateral treaties, and industry codes of conduct.

Yet pointing to old and new domestic laws did not lay the SWF controversy to rest in host states, while the benefits of bilateral treaties remained uncertain.⁹⁵ The security-protectionism

U.S.-CHINA STRATEGIC ECONOMIC DIALOGUE 2-3 (18 June 2008), available at <http://www.treas.gov/press/releases/reports/sedusfactsheet.pdf>.

⁹¹ MARCHICK & SLAUGHTER, *supra* note 85, at 7-12; Guy DINMORE, *Italy Set to Curb Sovereign Wealth Funds*, THE FINANCIAL TIMES (London), 21 Oct. 2008, at 10. In Europe, the SOE investment concerns were heightened by Gazprom's actions; these in turn helped exacerbate worries about SWFs. *E.g.*, ASLUND, *supra* note 8.

⁹² See James SALZMAN, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 776 (2000) (arguing the the OECD is a "Rich Man's Club," allowing an open forum for wealthy nations to ignore developing nations); see also Katia TIELEMAN, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Policy Network*, Case Study, U.N. Vision Project, 16 (2005) available at http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf (tracing the history of the MAI and NGO complaints of exclusion); Ward MOREHOUSE, *The Multilateral Agreement on Investment: An International Human Rights Crisis*, 2 Dec. 1997, available at <http://www.hartford-hwp.com/archives/25/043.html> (calling the OECD a rich man's club imposing its will on nonmembers).

⁹³ Organization for Economic Co-Operation & Development, *Multilateral Agreement on Investment*, available at http://www.oecd.org/document/35/0,2340,en_2649_201185_1894819_1_1_1_1,00.html (last visited 27 June 2008). Contains negotiation history and document links.

⁹⁴ *Id.*

⁹⁵ See *supra* note 31 (statements by U.S. officials); see also Edward F. GREENE & Brian A. YEAGER, *Sovereign Wealth Funds: A Measured Assessment*, 3 CAPITAL MARKETS LAW JOURNAL 247 (2008); Paul ROSE, *Sovereigns as Shareholders*, 83 NORTH CAROLINA LAW REVIEW 102 (2008) (describing the considerable domestic law safeguards

argument continued unabated; the financial crisis exacerbated host fears of dependence on foreign governments, but also fears of financial loss on the part of SWF home states.⁹⁶ SWF sponsors saw the continuing controversy as both an economic and a political threat. To the people at home, SWFs stood variously for economic security, political autonomy and global prestige. Even in states where the masses had little knowledge or influence over how public money was invested, governments could lose face by making too many concessions to host country fears, not to mention by losing money.⁹⁷ In the end, SWFs turned out to be bigger than the national security-open investment quarrel attending their rise.

C. State Commerce Revisited

As investors, SWFs fit uneasily in the host states' regulatory paradigm, premised on the existence of an ascertainable boundary between public and private capital.⁹⁸ The poor fit had two explanations: first, state and private ways of doing transnational business were generally converging and getting harder to tell apart;⁹⁹ and second, many SWF sponsors had very different ideas about the state's role in the economy from those of their hosts.

already in place for foreign, foreign government and controlling investments); Efraim CHALAMISH, Rethinking Global Investment Regulation in the Sovereign Wealth Funds Era (9 Sep. 2009) (unpublished manuscript), available at <http://www.asil.org/files/chalamish.pdf> (arguing for the use of bilateral investment treaties against barriers to SWF investments). [NOTE TO EDITORS: May be best to cite to the article in this volume.]

⁹⁶ See Daniella MARKHEIM, The Heritage Foundation, Sovereign Wealth Funds and U.S. National Security, 6 May 2008, <http://www.heritage.org/Research/Lecture/Sovereign-Wealth-Funds-and-US-National-Security> (arguing that, properly regulated, SWF are not a threat to United States security); Simon JOHNSON, The Rise of Sovereign Wealth Funds, *Finance & Development*, Sep. 2007, 56, 57 (raising concerns about protectionism); Rita RAAGAS DE RAMOS, *Crisis Reshapes Role of Sovereign Wealth Funds*, *BUSINESS WEEK*, 21 Aug. 2009, available at http://www.businessweek.com/globalbiz/content/aug2009/gb20090821_639782_page_2.htm (reporting host state fears of SWF shareholder activism and the SWF response, including GAPP); John NUGEÉ, *Sovereign Wealth Funds' Coming of Age: Unrivaled Titans to Uncertain Mortals*, State Street Vision Paper, September 2009, available at http://www.statestreet.com/vision/downloads/Vision_SovereignWealth_2009_IV-1.pdf (discussing SWF losses due to the financial crisis, and the domestic criticism).

⁹⁷ Concessions by SWFs to increase transparency of their performance drew criticism at home when their investments turned sour. See Ian FRASER, *Sovereign Funds Chastened*, *QFINANCE*, 29 Sept. 2009, <http://www.qfinance.com/blogs/ian-fraser/2009/09/29/sovereign-funds-chastened> (tracking how signing GAPP can backfire when SWFs report losses from the financial crisis); See also NUGEÉ, *supra* note 98, at 5 (highlighting the "vehement criticisms" SWFs face in their home countries).

⁹⁸ See BACKER, *Private Law of Public Law*, *supra* note 10, at 13 (arguing that corporate and government actions are treated differently by host states, even when they are functionally identical).

⁹⁹ See *id.* at 4 (positing that states act increasingly within, rather than on, markets).

Political scientists were early to highlight the first explanation, framing the rise of SWFs as a step in the erosion of the boundary between states and markets.¹⁰⁰ The erosion accelerated with the financial crisis, as governments in the United States and Europe extended public safety nets to more and more parts of their economies, including cross-border financial conglomerates.¹⁰¹ This in turn moved SWFs closer to the heart of the policy controversy in major financial centers.

The second explanation evokes Cold War and post-colonial history: in this view, SWFs and the debate about them reflected the latest round of culture clashes in global economic integration; however, thanks to capital flow reversals, the process no longer looked like an exercise to

¹⁰⁰ See Giselle DATZ, *Governments as Market Players: New Forms of State Competition, Adaptation and Innovation in the Global Economy*, 62 JOURNAL OF INTERNATIONAL AFFAIRS, 62, 35-49 (2008); Eric HELLEINER & Troy LUNDBLAD, *States Markets and Sovereign Wealth Funds*, GERMAN POLICY STUDIES (Fall 2008); Memorandum from Philip G. CERNY, Rutgers University—Newark, to International Political Studies Association Annual Convention (26-29 Mar. 2008), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/1/7/3/pages251735/p251735-1.php. These articles continue a long-running debate about financial globalization and the evolution of the state in political science. See e.g., Philip G. CERNY, *Power, Markets and Authority: The Development of Multi-Level Governance in International Finance*, in *Governing Financial Globalization* (Andrew BAKER, Alan HUDSON and Richard WOODWARD, eds., 2005). Larry Catá BACKER was among the first law scholars to deploy this argument in the SWF context. BACKER, *Private Law of Public Law*, *supra* note 10; see also Larry Catá BACKER, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONNECTICUT LAW REVIEW 1739 (2007) [hereinafter BACKER, *Economic Globalization*]. Early political science treatments of SWFs that place more emphasis on national security include Benjamin J. COHEN, *Sovereign Wealth Funds and National Security: The Great Tradeoff* (2008), available at www.polsci.ucsb.edu/faculty/cohen, and Daniel W. DREZNER, *Sovereign Wealth Funds and the (in)Security of Global Finance*, 62 JOURNAL OF INTERNATIONAL AFFAIRS 115 (2008).

¹⁰¹ See William K. SJOSTROM JR., *The AIG Bailout*, 66 Washington & Lee Law Review 943 (2009); Mark J. ROE & David A. SKEEL JR., *Assessing the Chrysler Bankruptcy*, 108 Michigan Law Review 727 (2010); Adam SMITH, *Britain Sets Details of Huge Bank-Bailout Plan*, Time, 13 Oct. 2008, available at <http://www.time.com/time/business/article/0,8599,1849612,00.html>; Parmy OLSEN, *French Bailout Boosts Europe*, Forbes.com, 21 Oct. 2008, available at http://www.forbes.com/2008/10/21/briefing-europe-morning-markets-equity-cx_po_1021markets06.html; *The Bottomless Pit*, Spiegel Online, 23 Dec. 2008, available at <http://www.spiegel.de/international/business/0,1518,598207,00.html>.

As part of its crisis response, the United States took a 36% ownership stake in Citigroup. Citi also attracted “private” capital from GIC. CitiGroup, Inc., Offer to Exchange (Amend. 5 to Form S-4), at 70 (2009 July 17), available at <http://www.sec.gov/Archives/edgar/data/831001/000119312509150642/ds4a.htm>. Citi’s newly public ownership ran afoul of the laws in foreign jurisdictions where it had bank subsidiaries. For a time, the markets fretted that Citi would be forced to sell Banamex, a profitable bank and Mexico’s second largest. A flurry of diplomatic efforts brought promises of emergency legislation in Mexico and elsewhere. See *Mexico Treasury Seeks Measure Favoring Citigroup*, N.Y. TIMES DEALBOOK BLOG (20 Mar. 2009, 7:23 AM), <http://dealbook.blogs.nytimes.com/2009/03/20/mexico-treasury-seeks-measure-favoring-citigroup/>. It is tempting to see this incident as a turning of the tables on U.S. protectionists, and there is a sense in which it is. But it may make more sense to see this and other developments since 2005, including the financial crisis, as part of the evolution of a global financial system where pure forms are increasingly scarce, and everyone is a hybrid.

reshape the world in the Anglo-American image.¹⁰² In 2005, state commerce—and with it the debates about state role in the marketplace—looked quite different from the way they looked fifty years earlier.

In 1952, the top lawyer at the U.S. State Department informed his counterpart at the Justice Department that the United States would no longer support sovereign claims of absolute immunity in U.S. court cases involving commercial activity by another state. The law was keeping pace with the international economy:

[L]ittle support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity [T]he department feels that the widespread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.¹⁰³

The United States sought to make its firms more competitive against growing state commerce from the Soviet bloc; old doctrine was putting private firms at a disadvantage to state firms, which could not be sued. Under new doctrine, operating “not as a regulator of a market, but in the manner of a private player within it”¹⁰⁴ exposed trading firms from state socialist economies to lawsuits in U.S. federal courts.

This commercial activity exception to sovereign immunity, now well-established in U.S. and international law, is an example of legal doctrine that was from the start a way of mediating U.S. interaction with countries that held different views of the state’s role in the economy. But because the dominant mode of economic interaction between the United States and the Soviet Union in 1952 was trade, the way the Soviets organized their internal affairs was unimportant—

¹⁰² Yvonne C L LEE, *A Reversal of Neo-Colonialism: The Pitfalls and Prospects of Sovereign Wealth Funds*, 40 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 1103, 1116 (2009) (suggesting that concern over SWFs prompted hosts to deploy arguments previously used against Western colonialism).

¹⁰³ Letter from Jack B. TATE, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. PERLMAN (19 May 1952), reprinted in 26 DEPARTMENT STATE BULL 984, 984–85 (1952).

¹⁰⁴ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). However, an activity that may be private for foreign sovereign immunity purposes may be public in other areas of the law: Argentina’s market borrowing is patently commercial; Kentucky’s is “quintessentially public”. *Department of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801, 1810 (2008). Identity matters.

the exception to sovereign immunity would help level the playing field for U.S. firms, not manage their acquisition by the Soviet state.

Fifty years later, with a new wave of sovereign commerce, hereto irrelevant details of how other states run their economies have become critical. SWFs practice investment, not trade, potentially on a vastly larger scale than the state investors that came before. To the extent they have the latent capacity to control their U.S. investment targets,¹⁰⁵ their hosts care about who controls SWFs and how. To rephrase Justice Scalia,¹⁰⁶ SWFs can operate *both* as regulators of the market and as private players within it, and can choose and switch between such roles. This in turn exposes the funds to potentially contradictory legal and political demands.

Most SWFs are wholly state-owned and controlled, but engage in commercial activity within the meaning of relevant U.S. law.¹⁰⁷ However, in the new mode of sovereign commerce, SWFs raise concerns under a broader range of domestic laws. Thus scholars have questioned whether SWFs should be treated as private shareholders under state corporate law when they buy stock in U.S. firms,¹⁰⁸ but also whether they should benefit from tax exemptions for foreign governments.¹⁰⁹ And even though the staff of the U.S. Securities and Exchange Commission (SEC) has dealt with sovereign issuers for decades, its chairman expressed doubt about his ability to charge a foreign government with insider trading.¹¹⁰

¹⁰⁵ Although control is usually associated with foreign direct investment, there is no reason in principle why sovereign portfolio investors could not acquire effective control of a firm either through large equity stakes or informal influence.

¹⁰⁶ *Weltover*, 504 U.S. at 614; see DATZ *supra* note 100 for examples.

¹⁰⁷ Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. 1602.

¹⁰⁸ Ronald J. GILSON & Curtis J. MILHAUPT, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STANFORD LAW REVIEW 1345 (2008). *But see* ROSE, *supra* note 95 (highlighting existing safeguards).

¹⁰⁹ Victor FLEISCHER, *A Theory of Taxing Sovereign Wealth*, 84 NEW YORK UNIVERSITY LAW REVIEW 440 (2009) (finding that the current exemption is based on traditional state sovereignty and arguing that due to SWFs similarity to private investors, they should be treated as such). *But see* Ruth MASON, *Efficient Management of the Wealth of Nations*, 20 TAX NOTES 1321, 1322 (2008) (noting favorable aspects of SWF investments).

¹¹⁰ Chairman Christopher COX, U.S. Securities and Exchange Commission, *The Role of Governments in Markets*, Keynote Address and Robert B. Glauber Lecture at the John F. Kennedy School of Government, Harvard University (24 Oct. 2007) available at <http://www.sec.gov/news/speech/2007/spch102407cc.htm>. See also GREENE & YEAGER, *supra* note 95 (acknowledging enforcement concern and highlighting existing protections).

In sum, SWFs are part of a new generation in state commerce where diverse economic, political and legal systems come in continuous, intimate contact. SWFs are public and private at the same time; as such, they do not fit into neat legal and regulatory boxes. Even when they act commercially, SWFs are sovereign—profit will drive them, until it does not.¹¹¹ States may not respond to regulatory incentives as private actors do; yet they are often subject to the same laws. SWFs have separate information and communication channels to regulators, raising the possibility of both insider trading and regulatory capture. Their decision-making may be insulated from politics and markets alike, or exposed to both. More daunting yet, each state is different: Brazil, China, Norway, Qatar and the United States mix public and private in different ways. When their hybrids go global, they expose distinct tensions in the law and structure of global finance.¹¹²

IV. Axes of Accountability

Finding themselves at the center of high-profile policy debates in host states, SWFs had limited flexibility to respond. Their sponsors and their hosts had very different needs and expectations. Moreover, diversity among SWFs meant that each fund was potentially subject to a unique set of legal and political demands reflecting its provenance, constitution, and investment targets. This would make it hard for SWFs to coordinate among themselves—their objectives and constraints differ—and hard for SWF hosts to devise a unified response to something that is not a unified phenomenon. Put differently, a fund from China or Abu Dhabi would have trouble operating in a framework designed for Norway, and vice versa.¹¹³ This part of the Article maps four categories of demands on SWFs, and illustrates them with case studies. The goal is to understand to whom they answer, so as to decide to whom they should answer and find ways to resolve conflicts among SWFs' constituencies.

¹¹¹ See COHEN & DeLONG, *supra* note 15, at 66. Backer observes that similar reasoning led the European Commission and the European Court of Justice to conclude that states are essentially incapable of acting commercially. BACKER, *Private Law of Public Law*, *supra* note 10, at 1809-11.

¹¹² HELLEINER & LUNDBLAD, *supra* note 102.

¹¹³ This observation is distinct from a view on the merits of either framework.

SWFs are not unique for juggling conflicting demands. Any firm operating across national boundaries must to some extent answer to home and host state demands. Similarly, public-private hybrids like government-sponsored enterprises must reconcile duties to their shareholders with duties to the public.¹¹⁴ Transnational hybrids such as SWFs face a four-fold challenge: they are accountable to constituencies at home and abroad;¹¹⁵ to the public at large, and to a narrower set of stakeholders defined by their organizational form and business practices. With multiple sovereigns involved in multiple capacities, there is no obvious hierarchy among such demands for accountability. In place of a hierarchy, an effective framework for governing SWFs must enable ongoing negotiation among the four dimensions of accountability.

First, there is *public internal accountability*, achieved within the political system of the capital-exporting state. As government institutions, SWFs must further domestic public purpose. The state may be democratic, in which case SWFs answer to elected officials, or not, in which case they might answer to the monarch and her five cousins. I illustrate this set of demands using Russia's recent SWF experiments and an old scandal involving Kuwait's SWF.

Second, *private internal accountability* refers to SWFs' duties to a subset of shareholders, creditors, or other stakeholders, which stem predominantly from their charters and contracts. Public and private internal accountability may conflict where, for example, a fund formed to save for future generations is raided to advance unrelated strategic goals.¹¹⁶ Transparency can expose internal accountability tensions. A transparent SWF set up to maximize financial returns may have to forego opportunities in politically unpopular sectors or countries to maintain public support.¹¹⁷ I illustrate private internal accountability with examples from Singapore and Abu Dhabi.

¹¹⁴ See A. Michael FROOMKIN, *Reinventing the Government Corporation*, 1995 UNIVERSITY OF ILLINOIS LAW REVIEW 543, 562-574 (1995). The most prominent examples of hybrids in the financial sector are U.S. housing finance agencies Fannie Mae and Freddie Mac prior to government takeover in 2008.

¹¹⁵ See Ashby H.B. MONK, *supra* note 38.

¹¹⁶ More prosaically, Norway's SWF has financed the government beyond the limits established by its internal guidelines. TRUMAN, *Blueprint*, *supra* note 29, at 9.

¹¹⁷ SCHWARTZMAN, *supra* note 83.

Third, *public external accountability* implies a duty of state-owned funds to adhere to international norms. Although public international law increasingly seeks to bind private parties directly, states remain its principal subjects. Acting as a market participant does not absolve the state of its basic public duties,¹¹⁸ for example, not to fund genocide. I illustrate this dimension below on the example of Norway's State Pension Fund.

Fourth, *private external accountability* describes SWFs as subjects of host country laws and norms applicable to private market participants. Compliance with host legal regimes designed for private firms can have far-reaching effects on SWF sponsors' domestic economic management and their investment policies worldwide. It can also conflict with domestic priorities and demands for internal accountability. I illustrate the dilemma of SWF accountability as participants in host country markets on the example of Chinese banks' entry in New York.

A. Public Internal Accountability: Russian Experiments and Kuwaiti Scandals

Public internal accountability describes SWFs' duties as custodians of public funds to the domestic public at large, expressed directly or through formal government structures. Such accountability demands surface most often at the time of SWF establishment, or at crisis points, when the public finds out either that the fund failed to live up to its mission, or that the mission itself was flawed. In this sense, public internal accountability relies on the availability of information that strikes a domestic political nerve. It benefits from the growth of information media, but does not require it. It has played an important role in the newest and oldest SWFs alike. In this section, Russia's repeated attempts to establish a sovereign wealth fund illustrate the role of domestic political pressures in SWF policy; a 1993 scandal involving the world's oldest SWF in Kuwait shows the capacity of SWFs to catalyze public demands for broader political liberalization.

¹¹⁸ Cf. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995) (making a similar argument in the U.S. domestic context).

Russia came late to the SWF scene. As recently as June 2008, Prime Minister Putin told the visiting U.S. Treasury Secretary that Russia had no SWF. This was true in the sense that the state investment vehicles Russia had established beginning in 2004 still held primarily high-quality foreign government paper, much like official reserves.¹¹⁹ On the other hand, Russia's plans to run a more diversified and aggressive fund on the model of other oil-exporting states made it a poster child for host state fears.¹²⁰ Commentators criticized the "semi-authoritarian" habits of Russia's government and pointed to the history of crude political interventions by its SOEs.¹²¹

Against this background the vigor of Russian domestic political debates about SWF policy, and the government response, are instructive. Not only were SWF policies hotly contested in the press, but the government reorganized the funds at least twice in their brief history, apparently in response to popular pressure.

Russia had barely recovered from its 1998 financial crisis when it began considering, with IMF support, a fiscal stabilization fund financed from excess oil revenues.¹²² After a fund was established in 2004, IMF staff and directors argued that Russia should save more oil revenues to insure itself against future price declines, control government spending, and temper inflation.¹²³ However, much of the domestic commentary favored a development fund model investing in infrastructure and domestic enterprise.¹²⁴ At the outset, Russia formed a basic stabilization fund holding safe foreign government debt; some excess oil revenues were also used to meet pension

¹¹⁹ LAWDER & BRYANSKI, *supra* note 28.

¹²⁰ See Anders ASLUND, *The Truth About Sovereign Wealth Funds*, Foreign Policy (3 Dec. 2007) (criticizing popular perceptions that "[t]he Arabs, the Chinese, and the Russians are about to buy up large swathes of Western economies," but claiming that SWFs are typically established by "semi-authoritarian" governments in "semi-developed" countries essentially to fleece their own citizens).

¹²¹ *Id.*; ASLUND, *supra* note 8.

¹²² Staff Report, *Russian Federation: 2003 Article IV Consultation*, International Monetary Fund, IMF Country Report No. 03/144, 15-16 (10 Apr. 2003) available at <http://www.imf.org/external/pubs/ft/scr/2003/cr03144.pdf>. Similar ideas surfaced earlier in vague form, see Staff Report, *Russian Federation: 2001 Article IV Consultation and Post-Program Monitoring Discussions*, International Monetary Fund, IMF Country Report No. 02/74, 11 (15 Feb. 2002) available at <http://www.imf.org/external/pubs/ft/scr/2002/cr0274.pdf>.

¹²³ Public Information Notice, *Russian Federation: 2004 Article IV Consultation*, International Monetary Fund, IMF Country Report No. 04/112 (30 Sept. 2004) [hereinafter *2004 Article IV Report PIN*] available at <http://www.imf.org/external/pubs/ft/scr/2004/cr04112.pdf>.

¹²⁴ POPOVA, *supra* note 38.

obligations and pay down Russia's own debt.¹²⁵ But a year later, Russia broke off roughly \$9 billion from the stabilization fund to form a domestic infrastructure and growth fund. In early 2008, the government further divided up the remaining stabilization fund into a \$125 billion Reserve Fund, which continued the original mission, and a \$32 billion Fund for National Well-Being, whose mission was actively contested.¹²⁶ The smaller fund was ultimately given a public pension mandate.¹²⁷ All three funds were on-budget and reported to the finance ministry. In all, the authorities responded to domestic pressure by “splitting the baby” among their public constituents.

By the time the financial crisis hit Russia in 2008, the \$9 billion infrastructure fund had invested less than one per cent of its allocation; it was ultimately raided to cover budget deficits.¹²⁸ While the Reserve Fund was also drawn down to cover the deficits, this was consistent with its fiscal stabilization mandate. At this writing, the Reserve Fund stands at less than a third of its pre-crisis levels.¹²⁹ In contrast, the Fund for National Well-Being has grown almost threefold, to about \$90 billion since 2008.¹³⁰ However, its path to growth was unorthodox: during the crisis, the fund was used to defend the ruble, invest in the Russian stock market, and support Russian banks and “strategic” domestic firms; it also funded construction loans for the Olympic village.¹³¹ In other words, the pension-savings fund became a rescue-stimulus fund.

¹²⁵ 2004 Article IV Report PIN, *supra* note 123.

¹²⁶ See e.g., POPOVA, *supra* note 38.

¹²⁷ *Id.*; Ministry of Finance of the Russian Federation, Минфин России: Фонд национального благосостояния: Предназначение [Fund for National Well-Being: Mission] at <http://www1.minfin.ru/ru/nationalwealthfund/mission/> (last visited 31 May 2010) (defining the fund's mission as financing the public contribution to private pension savings, and covering deficits in the public pension fund).

¹²⁸ POPOVA, *supra* note 38, at 11 (examining a case study of Russia in a discussion of sovereign wealth funds).

¹²⁹ Rachel Ziemba reports a decline from \$157 billion in December 2007 to \$76 billion in September 2009, based on official figures; however, the 2007 baseline includes the \$32 billion that became the Fund for National Well-Being. Rachel ZIEMBA, *supra* note 37. The latest Russian Finance Ministry figures available at this writing have the Reserve Fund at just over \$40 billion; less than one-third of \$125 billion value at the time of its 2008 split with the well-being fund. See Russian Ministry of Finance, Table, Совокупный объем средств Резервного фонда [Aggregate Reserve Fund Volume], 2010, <http://www1.minfin.ru/ru/reservefund/statistics/volume/index.php?id4=5796>.

¹³⁰ See Russian Ministry of Finance, Table, Совокупный объем средств Фонда национального благосостояния [The Cumulative Amount of the National Welfare Fund], 2010,

<http://www1.minfin.ru/ru/nationalwealthfund/statistics/volume/index.php?id4=6412>.

¹³¹ POPOVA, *supra* note 38, at 13-14.

Russia's experience illustrates three aspects of SWF accountability that have relevance beyond Russia. First, old Western democracies do not have a monopoly on public internal accountability. Illiberal governments¹³² may alter their SWF investment strategy in response to formal and informal public pressure. Second, where public internal accountability comes in conflict with private internal accountability—for example, where crisis response imperatives conflict with the funds' charter mission (here, pension funding)—public accountability can exert a stronger pull. Put differently, domestic legal constraints do not always bind the sovereign.¹³³ Third and related, sovereigns do and must have the capacity to change their minds. Thus statements that “there is nothing in [Russian SWF] structure or goals to suggest that it could or would be used as a weapon” against other states,¹³⁴ surely overreach. At a minimum, accounts that privilege public internal accountability suggest that SWFs should be used as weapons if the domestic public so wishes. Whether the public does is a separate matter.¹³⁵

On the other hand, public outrage about SWF mismanagement can also channel demands for broader domestic liberalization, altering formal political accountability structures in SWF home countries. A 1993 scandal involving Kuwait's SWF investments in Europe appears to have played such a liberalizing role¹³⁶ long before SWFs were named, and before the latest round of democratic demands directed at Arab SWFs.¹³⁷

¹³² Fareed ZAKARIA, *The Rise of Illiberal Democracy*, FOREIGN AFFAIRS (Nov./Dec. 1997)

¹³³ See TRUMAN, *Blueprint*, *supra* note 29, at 9 (suggesting that making SWF structure too rigid is unrealistic and that SWF domestic legislation should specify a process for adapting the structure over time).

¹³⁴ Arina POPOVA, *We Don't Want to Conquer You, We Have Enough to Worry About: The Russian Sovereign Wealth Fund*, 118 YALE LAW JOURNAL POCKET PART 109 (2008), <http://thepocketpart.org/2008/11/24/popova.html>.

¹³⁵ A final irony emerged in recent intimations by former U.S. Treasury Secretary Henry M. Paulson that Russia sought to drive a sell-off in U.S. housing agency securities in retaliation for the United States' opposition to Russia's war in Georgia. Michael McKEE & Alex NICHOLSON, *Paulson Says Russia Urged China to Dump Fannie, Freddie Bonds*, BLOOMBERG (29 Jan. 2010), available at

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=afbSjYv3v814>. Barely six months earlier, Russia's finance ministry had announced that the Reserve Fund and the national well-being fund were cleared to invest in Fannie Mae and Freddie Mac. Denis MATERNOVSKY & Alex NICHOLSON, *Russian Sovereign Funds Can Buy Freddie Mac Bonds*, BLOOMBERG (21 Feb. 2008), available at

<http://www.bloomberg.com/apps/news?pid=20601087&sid=agROcOeLeK3k&refer=home>.

¹³⁶ See e.g., Kim MURPHY, *\$5-Billion Loss Riles Even Oil-Rich Kuwaitis; Scandal: Parliament's Probe of Public Funds Poses the Most Serious Challenge Ever to the Ruling Family's Power*, Los Angeles Times (10 Feb. 1993); Mark FINEMAN, *Rough-and-Tumble Democracy Has Kuwait Edgy*, Los Angeles Times (10 Apr. 1993); Caryle MURPHY, *Kuwaiti Scandal May Strengthen Parliament's Role*, Washington Post (1 Mar. 1993); Ali SALEM, *Kuwaiti MPs Override Objections to Launch KIO Probe*, Arab Times (2 Dec. 1992) reprinted in Moneyclips GCC Ltd. (2 Dec. 1992)[online]. Available: LexisNexis.

¹³⁷ BEHRENDT & KODMANI, Eds., *supra* note 32.

The entity now known as the Kuwait Investment Office in London (KIO) was established in 1953, and is widely recognized as the world's oldest SWF. Like its parent Kuwait Investment Authority (KIA), established in 1982, KIO is an asset manager for the finance ministry; it does not own the assets.¹³⁸ KIA manages the government's General Reserve Fund and the Fund for Future Generations (FFG), which has a classic SWF mandate of turning underground wealth into financial assets for intergenerational transfer. FFG receives 10% of Kuwait's annual oil revenues. The 1982 law that established KIA prohibits "disclosure to the public of any information related to KIA's work," including the value of its assets under management, privately estimated at just over \$200 billion.¹³⁹ Instead, the law mandates reporting to the Council of Ministers.¹⁴⁰ What limited public awareness there had been of KIA's and KIO's management of FFG diminished after Kuwait's parliament was disbanded in 1986. When Iraq invaded Kuwait in 1990, "KIO's holdings became the national treasury-in-exile."¹⁴¹ By the war's end, at least half of the \$85-100 billion estimated pre-war asset value had gone.¹⁴²

Although much of the money was used for war and reconstruction expenses, when the National Assembly reconvened in mid-1992, it discovered that some of the funds had simply vanished without a trace, others were used to buy bad debts reportedly owed to local banks by well-connected Kuwaitis, yet others were simply mismanaged.¹⁴³ KIO's Spanish portfolio, estimated at \$5 billion, had been lost completely to a combination of dubious investments in Spain's

¹³⁸Bader M. AL SA'AD, Managing Dir. of Kuwait Inv. Auth., Overview on the Kuwait Investment Authority and Issues Related to Sovereign Wealth Funds, Keynote Speech at the First Luxembourg Foreign Trade Conference (9 Apr. 2008), available at http://www.kia.gov.kw/En/About_KIA/Overview_of_KIA/Documents/FINA_SPCH_LUXEMBORG_APR_9_092.pdf.

¹³⁹ Transparency and Disclosure of Information, KUWAIT INVESTMENT AUTHORITY, http://www.kia.gov.kw/En/About_KIA/Transparency/Pages/default.aspx (last visited 16 June 2010) (describing disclosure prohibitions) [hereinafter KIA Transparency]; TRUMAN, THREAT OR SALVATION, *supra* note 19, at Table 1.1.

¹⁴⁰ KIA Transparency, *supra* note 136.

¹⁴¹ Kim MURPHY, *supra* note 136.

¹⁴² Caryle MURPHY, *supra* note 136 (estimating half of the pre-war value lost); *see also* Kuwait: Into a Black Hole, THE ECONOMIST, 30 Jan. 1993 (estimating \$30 billion remaining of \$100 billion pre-war value); Youssef M. IBRAHIM, *Financial Shakedown is Shaking Kuwait*, N.Y. Times, 10 Jan. 1993, <http://www.nytimes.com/1993/01/10/world/financial-scandal-is-shaking-kuwait.html?pagewanted=1> (estimating a loss of 60 to 80 per cent from \$100 billion).

¹⁴³ Caryle MURPHY, *supra* note 136; Kim MURPHY, *supra* note 139; IBRAHIM, *supra* note 145.

declining economy and suspicious fees.¹⁴⁴ Perhaps coincidentally, KIO's first big Spanish investment of \$900 million came the year parliament had been disbanded; KIO's new management was installed after losses were uncovered in 1992.¹⁴⁵

The incident became a focal point for debates in the new parliament and catalyzed the passage of a new law requiring KIA to report to the parliament twice a year on "all major state investments;" it also unleashed furious criticisms in the press framed squarely in terms of public oversight and accountability.¹⁴⁶ The authorities banned local press coverage of the incident in January of 1993; however, fears that the parliament would be disbanded again did not materialize.¹⁴⁷ To be sure, those implicated in the Spanish scandal described their predicament, and the lawsuits against them in the United Kingdom, as a post-war political witch hunt.¹⁴⁸ And even though English judges ruled in Kuwait's favor,¹⁴⁹ the full story behind the scandals remains murky. It is certain, however, that domestic public demands for SWF accountability had a political impact far beyond the fund itself, and reverberated in host states and international markets.

B. Private Internal Accountability: Form Sharing in Singapore and Abu Dhabi

Private internal accountability captures SWFs' duties to a particular group of constituents, rather than the domestic public in general; it can also describe SWF constraints under a specialized mandate. The simplest example is a pension fund managing particular citizens' retirement savings. Such a fund might be tightly integrated in state finances and used to supplement budget revenues; even so, it likely owes a distinct set of duties to a designated subset of beneficiaries.

¹⁴⁴ Roger COHEN, *Missing Millions—Kuwait's Bad Bet—A Special Report: Big Wallets and Little Supervision*, *The New York Times* (28 Sep. 1993).

¹⁴⁵ *Id.*

¹⁴⁶ *E.g.*, Kim MURPHY, *supra* note 136 (quoting the chairman of the parliamentary Finance Committee seeking to find out "who really controls the KIO": "In general, this office is not controlled by the national audit office. It is not even controlled directly by the minister of finance. ... Who controls it? ... We don't know."); Caryle MURPHY, *supra* note 136 (quoting the chairman of the parliamentary Legal Committee: "I would consider this a historic year for Kuwait concerning the control of the assembly over Kuwait's investments. ... No one could dream to do this before the invasion."))

¹⁴⁷ Kim MURPHY, *supra* note 139.

¹⁴⁸ Ahmed AL JARALLAH, *KIO Investments Lost in Politics*, *Arab Times* (20 Sep. 1993).

¹⁴⁹ B.A. TAYLOR, *Grupo Torras SA & Anor v. Royal Bank of Scotland International & Others*, 7 TRUSTS & TRUSTEES, 2001 at 25-26.

The discussion of Russia's SWFs in the previous section points to another element of private internal accountability: the legal form in which a fund is organized, its mission and its contracting practices may create demands on SWFs that complement or conflict with broader public needs. Examples from Singapore and Abu Dhabi further illustrate the significance of such factors.

Singapore and Abu Dhabi both use two distinct types of SWFs: a stabilization/savings fund invested exclusively in foreign assets, and a development fund specializing in strategic investments at home and abroad.¹⁵⁰ The stabilization/savings funds—the Government of Singapore Investment Corporation (GIC) and the Abu Dhabi Investment Authority (ADIA)—are financed from budget surpluses and foreign exchange reserves; they do not borrow in the markets. Like KIA, described in the previous section, GIC and ADIA manage, but do not own the assets attributed to them. The SWF entity is organized as a management company for public funds.¹⁵¹ In contrast, the development funds—Temasek Holdings in Singapore and Mubadala Development Company in Abu Dhabi—own the assets they manage; unusually for SWFs, they also engage in limited market borrowing.¹⁵² The use of multiple organizational forms by each government, and the similarities between SWF forms across very different economies and legal systems, help explain the funds' respective disclosure and accountability practices.

Cross-country parallels are especially revealing in view of the many differences among the four funds. ADIA, estimated at over \$600 billion, is one of the world's largest SWFs; it is about thirty times the size of Mubadala, valued at just over \$20 billion.¹⁵³ ADIA is also almost thirty years older, formed as a stand-alone legal entity in 1976 to manage the government's oil surpluses;¹⁵⁴ its current mandate is to invest government funds "to secure and maintain the future

¹⁵⁰ The government also uses other state investment vehicles, which are beyond the scope of this article. *See, e.g.*, INTERNATIONAL PETROLEUM INVESTMENT COMPANY, <http://www.ipic.ae/en/home/index.aspx> (last visited 17 June 2010).

¹⁵¹ GIC, Corporate Governance Homepage, http://www.gic.com.sg/aboutus_check.htm (last visited 17 June 2010).

¹⁵² *Mubadala Annual Report 2009*, MUBADALA, http://www.mubadala.ae/2010_annualreport/ (last visited 15 June 2010); *Temasek Review 2009*, TEMASEK, <http://review.temasek.com.sg/introduction/year-in-review> (last visited 15 June 2010).

¹⁵³ TRUMAN, THREAT OR SALVATION, *supra* note 19, at Table 1.1; *see also* SETSER & ZIEMBA, *Reversal*, *supra* note 37, at 21-22 (lower estimates for ADIA at the height of the financial crisis).

¹⁵⁴ Middle East Online, *Abu Dhabi Wealth Fund Unveils First-ever Strategy*, 15 Mar. 2010 <http://www.middle-east-online.com/english/business/?id=37836> (last visited June 26, 2010); CIA World Factbook, *Oil: Proved Reserves*

welfare of the Emirate.”¹⁵⁵ Its stated policy is to keep its equity stakes in target firms under 5%, and to refrain from voting its shares. Mubadala, formed in 2002, is a product of the most recent round of commodity price spikes.¹⁵⁶ It is charged with helping diversify the Emirate’s economy by making long-term, capital-intensive investments focusing on Abu Dhabi, UAE and the surrounding region; its mission is somewhat more specific than ADIA’s and includes delivering both a “strong financial return” and a “tangible social impact.”¹⁵⁷ Almost two-thirds of its investments are domestic; it takes significant equity stakes and does not shy away from voting them.¹⁵⁸

GIC’s estimated \$250 billion in assets are roughly double Temasek’s.¹⁵⁹ It was founded in 1981 as a reserve management vehicle for the government and the Monetary Authority of Singapore; its current mission is broadly consistent with its origins: “to achieve good long-term returns” on state assets “to preserve and enhance the international purchasing power of Singapore’s reserves.”¹⁶⁰ In contrast, Temasek started as a domestic SOE holding company in 1974; its early history and initial mandate are linked with post-independence development of Singapore, not reserve management.¹⁶¹ Neither Mubadala nor Temasek consider themselves to be SWFs, although they fit the Santiago Principles definition, and outside analysts routinely classify them as SWFs.¹⁶²

(2010) available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2178rank.html> (ranking the UAE seventh in proven oil reserves, of which Abu Dhabi owns 94%).

¹⁵⁵ ADIA ANNUAL REVIEW 2 (2009) available at http://www.adia.ae/En/pr/Annual_Review_Website2.pdf.

¹⁵⁶ See note 152 *supra*.

¹⁵⁷ Mubadala, <http://www.mubadala.ae/> (last visited June 13, 2010).

¹⁵⁸ See About Mubadala <http://www.mubadala.ae/en/category/about-mubadala/> (last visited 13 June 2010) (describing Mubadala investments); see also Robin WIGGLESWORTH, *Higher Revenue and Fair Value Boost Mubadala*, FIN. TIMES (Mar. 22, 2010) available at <http://www.ft.com/cms/s/0/101d0886-358d-11df-963f-00144feabdc0.html> (examples of Mubadala’s investment strategies).

¹⁵⁹ TRUMAN, THREAT OR SALVATION, *supra* note 19, at Table 1.1.

¹⁶⁰ GIC, About Us, http://www.gic.com.sg/aboutus_profile_mission.htm (last visited 13 June 2010); GIC, About Us Milestones, http://www.gic.com.sg/aboutus_story_milestone1.htm (last visited 13 June 2010).

¹⁶¹ Temasek at 35, <http://review.temasek.com.sg/overview/temasek-35> (last visited 13 June 2010).

¹⁶² SWF Institute, *Mubadala*, available at <http://www.swfinstitute.org/swfs/mubadala/> (last visited 30 June 2010) (“Mubadala does not consider itself a Sovereign Wealth Fund.”); Temasek *Says it is Not a Sovereign Wealth Fund*, THE STRAITS TIMES (22 Mar. 2008) available at http://www.straitstimes.com/Free/Story/STIStory_219340.html. This position may reveal a desire on the part of the smaller development funds to distance themselves from the image of SWFs as passive reserve management vehicles, to stress their commercial character and independence from the government. Nevertheless, Temasek participates in the newly established SWF forum; Mubadala does not. INTERNATIONAL FORUM OF SOVEREIGN WEALTH FUNDS, <http://www.ifswf.org/> (last visited 20 June 2010). Edwin M. TRUMAN, *A Scoreboard for Sovereign Wealth Funds*, Table 1: Sovereign Wealth Funds at 10, available at

All four funds provided very little public disclosure until recently. ADIA was particularly stark in revealing only its address and switchboard number before 2010. This opacity did not seem to pose a problem before SWF controversy erupted in mid-2000s: all but the newly formed Mubadala were well-known among international financial market participants;¹⁶³ at home, they generally reported to their government authorities behind closed doors. In response to host country hostility, the funds all ramped up public information flow in recent years; all four have also sought to emphasize their commercial character, substantial autonomy from their respective governments in selecting investments, and corporate social responsibility.¹⁶⁴ Temasek was the first of the group to release an annual report in 2004, including the total size of its holdings, earnings and portfolio information.¹⁶⁵ It has since published externally audited financial statements. GIC has released two annual reports since 2008, outlining its governance and investment objectives, though not its size or the details of its portfolio. Mubadala has published annual reports since 2008, and externally audited financial statements since 2009.¹⁶⁶ ADIA came last; its first “Annual Review” came out in March 2010, broadly addressing the firm’s mission and structure, but not its total size or investment details.¹⁶⁷

The differences between Temasek’s and Mubadala’s relatively fulsome disclosure and the more measured revelations of their bigger siblings faced with the same foreign controversy illustrate the distinct private internal accountability demands on the funds. First, Temasek and Mubadala

<http://www.iie.com/publications/papers/truman1007swf.pdf> (listing both Mubadala and Temasek among its ranked SWFs).

¹⁶³ Mohamed A. EL-ERIAN, *Sovereign Wealth Funds in the New Normal*, 47 FIN. & DEV. 44 (2010).

¹⁶⁴ See Mubadala Corporate Responsibility Homepage, <http://www.mubadala.ae/en/category/corporate-social-responsibility/> (last visited June 17, 2010) (committing to support education and cultural projects); Temasek Holdings Community Care Homepage, http://www.temasekholdings.com.sg/about_us_2.htm (last visited (June 17, 2010) (earmarking earnings for community projects); ADIA Governance, http://www.adia.ae/En/Governance/Abudhabi_Government.aspx (last visited 17 June 2010) (highlighting independence from Abu Dhabi government with respect to investment decisions); GIC, *supra* note 154 (stressing limited government control over investment decisions).

¹⁶⁵ Temasek Holdings, *Temasek Review 2004*, available at http://web.archive.org/web/20050311223354/http://www.temasekholdings.com.sg/2004review/AR_Secured.pdf; see Saeed AZHAR, *Temasek Review to Bring Leadership in Focus*, Reuters, Sept. 16, 2009, available at <http://www.reuters.com/article/idUKLNE58F02520090916>.

¹⁶⁶ MUBADALA, *Investor Relations*, <http://www.mubadala.ae/en/category/investor-relations-12/> (last visited 15 June 2010).

¹⁶⁷ Robin WIGGLESWORTH, Andrew ENGLAND & Simeon KERR, *Sovereign Wealth Funds Open Up Books*, Financial Times (17 Mar. 2010).

both issue debt securities in the international markets, where investors expect (and many regulators require) standardized financial reporting and narrative disclosure.¹⁶⁸ Second, their investment mandates, which contemplate larger stakes held for longer and managed more actively, make it more difficult to keep investments quiet. Third, if the funds abide by their long-term development objectives, this may reduce the immediate macroeconomic policy sensitivity of their disclosure: for example, they are less likely to be used for foreign exchange intervention. On the other hand, their capacity to take bigger stakes in target firms may have a bigger effect in the market.

Inasmuch as Temasek and Mubadala owe duties to their private creditors along with their state shareholders, they commit to accountability practices that may exert continuing discipline¹⁶⁹ and engender path dependence. Financial reports and credit ratings¹⁷⁰ will be compared over time, along with their investment track record at home and in different parts of the world. Such private accountability in turn has public implications. Private analysts—and with them, the media—will note and publicize disclosure cutbacks and discrepancies. Similarly, the more narrowly specified the fund's mandate and holdings, the more noticeable the deviations, even where these may serve the public interest broadly. Finally, the smaller funds' mandate of domestic and foreign asset holdings may prompt domestic and foreign audiences alike to pay attention.

Private internal accountability is best visible with, but not limited to, identifiable private constituents (creditors, pensioners) or a narrowly specified investment mandate. There is a gray area between public and private internal accountability, which GIC and ADIA governance

¹⁶⁸ Both issuers have taken advantage of exemptions from the U.S. Securities and Exchange Commission registration requirements under the Securities Act of 1933. MUBADALA, *supra* note 155; TEMASEK, *supra* note 155. They remain subject to antifraud rules under the Securities Exchange Act of 1934. Thomas Lee HAZEN, *Treatise on the Law of Securities Regulation* Vol. 2, 30 (West 2009); Securities Exchange Act of 1934, 15 U.S.C.A. § 10(b) (2010); 17 C.F.R. § 240.10b-5 (2010).

¹⁶⁹ Rawi ABDELAL, *Sovereign Wealth in Abu Dhabi*, *Geopolitics* 14:317-327 (2009) at 322-23 (describing Mubadala's debt financing as a disciplining device).

¹⁷⁰ Mubadala received an Aa3 rating from Moody's and AA from Fitch. Fitch, *FitchRatings: Mubadala Development Company*, http://www.fitchratings.com/creditdesk/ratings/issr_rtng.cfm?issr_id=88043855 (last visited 13 June 2010); Moody's, *At-A-Glance: Mubadala Development Company*, <http://v3.moody's.com/page/ataglance.aspx?orgid=821073204> (last visited 13 June 2010). Temasek received a AAA rating from both Standard and Poor's and Moody's. Standard & Poor's, *Temasek Holdings Ratings*, <http://www.standardandpoors.com/prot/ratings/entity-ratings/en/us/?entityID=277686§orCode=CORP> (last visited 13 June 2010); Moody's, *At-A-Glance: Temasek Holdings Limited*, <http://v3.moody's.com/page/ataglance.aspx?orgid=806791556> (last visited 13 June 2010).

structures illustrate. The KIA scandal discussed earlier offers an additional example. SWFs organized as government asset managers may operate under fairly specific policy guidance, and have clear reporting channels within their respective governments.¹⁷¹ To the extent specific parts of the government own the funds, and the SWFs formally answer to officials in such parts, do SWFs managers have independent duties to ascertain and advance the public interest? For example, the finance ministry “client” may be inept or corrupt in directing the SWF; fund managers may be bound to follow the directions as a matter of private accountability, but may come under pressure to disobey as a matter of public accountability.

The two examples of disclosure and bad direction suggest that private internal accountability may enhance or conflict with public internal accountability. Similarly, both forms of internal accountability may enhance or conflict with external accountability demands, which I elaborate in the remainder of this Part.

C. *Public External Accountability: Norwegian Ethics*

Much of the early host country criticism of SWFs amounted to this—why couldn’t all SWFs be like Norway’s?¹⁷² Norway’s Government Pension Fund—Global (“GPF”) began operations in the mid-1990s. At this writing, GPF’s market value is estimated at about \$430 billion, of which almost two-thirds is in equities.¹⁷³ A real-time value tracker is prominently displayed on the website of the fund’s investment manager, a division at the Norwegian central bank, as if to

¹⁷¹ See ADIA Annual Review, *supra* note 158; ADIA Governance Homepage, <http://www.adia.ae/En/Governance/Governance.aspx> (last visited 13 June 2010) (stating that while the funds belong to Abu Dhabi, the government only appoints the board of directors of the fund); GIC Report, 25 (2009) *available at* http://www.gic.com.sg/PDF/GIC_Report_2009.pdf (stating that the government of Singapore requires monthly and quarterly reports to the Accountant-General); GIC Governance Homepage, http://www.gic.com.sg/aboutus_check.htm (last visited 13 June 2010) (revealing a structure similar to the ADIA, but with direct reporting to the President of Singapore).

¹⁷² See Andrew LEONARD, *How Wall Street Broke the Free Market*, SALON, 15 Jan. 2008, *available at* http://www.salon.com/technology/how_the_world_works/2008/01/15/sovereign_wealth_funds/index.html (reporting on a Senate panel in which participants criticized the lack of transparency and standards in most SWFs at the time); *Implications of Sovereign Wealth Fund Investments for National Security: Hearing Before the U.S.-China Economic and Security Review Commission*, 110th Cong. 11 (2 Aug. 2007) (statement of Congresswoman Marcy KAPTUR, holding up Norway as the standard for transparency). *But see id.* at 114 (statement of Senator Jim WEBB highlighting the political fallout from Norway’s short sales of Icelandic bonds to illustrate the downside risks of SWF investments).

¹⁷³ Norges Bank Investment Management, <http://www.nbim.no/en/Investments/Market-Value/> (last visited 1 June 2010).

highlight the contrast with Middle Eastern oil exporters, where such disclosure is legally barred.¹⁷⁴ GPFPG was authorized by the Norwegian parliament in 1990, and operates as a finance ministry account at the central bank, holding budget surpluses from oil revenues with the twin goal of macroeconomic stabilization and saving for future generations. Unlike Norway's domestic pension fund, GPFPG only invests abroad. The fund is subject to independent audits and periodic reports to the legislature, and is required to make public disclosure of its size and investment strategy.¹⁷⁵ The combination of GPFPG's lack of separate legal personality, its policy mandate and transparency make it an interesting case study of the relationship between public internal and public external accountability.¹⁷⁶

GPFPG responds to public external accountability demands in two ways. First, its transparency practices—including comprehensive disclosure in English, and disclosure of factors such as the use of leverage and derivatives¹⁷⁷—reflect Norway's frequently voiced commitment to global financial stability, a public good, and its openness to public oversight.¹⁷⁸ Second, the fund's investments reflect the recommendations of an independent advisory body, formed to advance compliance with Norway's obligations under international law and internationally accepted ethical norms. The advisory body—initially, the Advisory Commission on International Law for the Fund, since replaced by the Council on Ethics—makes non-binding recommendations to the finance ministry, which instructs the central bank to exclude particular investment targets as appropriate.¹⁷⁹ The substantive screening methodology is in addition to the central bank's mandate to exercise strong corporate governance in connection with fund investments, so as to

¹⁷⁴ KIA Transparency, *supra* note 139; *see also* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT, SOVEREIGN WEALTH FUNDS: PUBLICLY AVAILABLE DATA ON SIZES AND INVESTMENTS FOR SOME FUNDS ARE LIMITED, No. GAO-08-946, 13-14, (September 2008) *available at* <http://www.gao.gov/new.items/d08946.pdf> (citing Kuwait as an example of such a formal prohibition, in contrast to Norway); *see also* ABU DHABI INVESTMENT AUTHORITY, ADIA REVIEW 2009 (15 Mar. 2010) *available at* http://www.adia.ae/En/pr/Annual_Review_Website2.pdf (failing to disclose value of funds under management).

¹⁷⁵ For a good overview of GPFPG's legal form and operation, *see* BACKER, *Regulatory Chameleons*, *supra* note 10, at 135-158. The fund was rebranded and reorganized several times since its establishment.

¹⁷⁶ Separate legal personality adds a heavier overlay of private internal accountability.

¹⁷⁷ Norges Bank Investment Management, Report, GIPS Mandated Performance Results, 3-4 (28 May 2010) *available at* http://www.nbim.no/Global/Documents/News/2010/Updated_GIPS%20Report_Final_20100528.pdf.

¹⁷⁸ *See* Norges Bank Investment Management, <http://www.nbim.no/en/About-us/faq/> (last visited 1 June 2010) (describing long term stability and safe financial growth for future generations as the fund's goal).

¹⁷⁹ *See* Norway Ministry of Finance, Council on Ethics Webpage, <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/the-council-on-ethics-for-the-government.html?id=447010> (last visited June 1, 2010); CHESTERMAN, *supra* note 12 for an in-depth analysis.

maximize sustainable returns for future generations.¹⁸⁰ This set of institutional mechanisms geared to good global citizenship also establishes a process by which the fund's ultimate owners ("the people of Norway, represented by the political authorities")¹⁸¹ ascertain the SWF's domestic legitimacy.¹⁸²

The content of GPFG's external accountability is revealing. In the beginning, the focus was on securing compliance with Norway's formal treaty commitments.¹⁸³ However, as the framework evolved, the fund served as a means of elaborating a broader and more complex ethical regime that included non-binding norms such as the U.N. Global Compact, which advance "public accountability" for private transnational firms,¹⁸⁴ labor and environmental standards, as well as anti-corruption norms, which had widely different legal origins and status under national and international law.¹⁸⁵ In its first two years of existence, the Council on Ethics recommended and the finance ministry proceeded to screen out firms for concerns ranging from cluster weapons to poor labor practices.¹⁸⁶ It has developed novel, quasi-legal notions of complicity to support Norway's practice of ethical investment.¹⁸⁷ GPFG has also engaged internationally alongside other SWFs, alongside private institutional investors, and directly in investor states, to advance a

¹⁸⁰ See Norway Ministry of Finance, Corporate Governance Webpage, <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments.html?id=446948> (last visited 1 June 2010).

¹⁸¹ NORWAY MINISTRY OF FINANCE, REPORT ON THE MANAGEMENT OF THE GOVERNMENT PENSION FUND IN 2008, 4 (4 Apr. 2009) available at http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/stmeld20_2008-2009/report_no20_2009.pdf.

¹⁸² Gordon L. CLARK & Ashby H. B. MONK, *The Legitimacy and Governance of Norway's Sovereign Wealth Fund: The Ethics of Global Investment*, Working Paper (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473973.

¹⁸³ CHESTERMAN, *supra* note 12 at 584.

¹⁸⁴ See U.N. Global Compact, About the Global Compact: The Ten Principles of the Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited 1 June 2010).

¹⁸⁵ CHESTERMAN, *supra* note 12, at 590; Norway Ministry of Finance, The Report From the Graver Committee § 2.1 (11 July 2003), <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/The-Graver-Committee---documents/Report-on-ethical-guidelines.html?id=420232> [hereinafter Graver Committee Report] (unofficial English Translation).

¹⁸⁶ CHESTERMAN, *supra* note 12, at 591; Kristin HALVORSEN, Norwegian Minister of Finance, speech at the 2008 OECD Forum on Climate Change, Growth, Stability, *Sovereign Wealth Funds* (3-4 June 2008), transcript available at <http://www.oecd.org/dataoecd/24/57/40760305.pdf>, at 2-3.

¹⁸⁷ See CHESTERMAN, *supra* note 12, at 607 (arguing that the Council's colloquial use of the term "complicity" is "confusing, unnecessary, and unhelpful").

framework for capital movements that is both “responsible” in the public sense and hospitable to the fund as a profit-seeking investor.¹⁸⁸

The Norwegian SWF’s experience with ethical global investment suggests that the fund’s external responsibilities as a state actor are not the mechanical output of established treaty commitments and customary international law. Instead, it is a complex product of international law, domestic and international politics, and global market socialization. The resulting mix is particular to Norway, and is being projected internationally. It is contested in many quarters, both by countries whose firms have been screened out,¹⁸⁹ and those who have found themselves on the wrong side of Norway’s market positions. For example, when Norwegian SWF managers revealed that they were among the earliest in the market to bet against Icelandic banks using derivatives, some in Iceland suggested that it was an ethical failure on Norway’s part “to invest in a little-regulated market against the financial system of a neighboring country.”¹⁹⁰ On the other hand, echoing the progressive lawmaking potential of the Norwegian SWF, scholars have recently proposed using SWFs as vehicles to advance human rights in host countries.¹⁹¹

Despite its renown and active international engagement, Norway does not give the definitive answer on the scope of SWFs’ duties to the international system. Considerable uncertainty remains about the substance and scope of responsibility, the role of “complicity” and particularly SWFs’ role as systemically significant actors in advancing global public good, including

¹⁸⁸ See GAPP, *supra* note 13; Press Release, Norges Bank, Norges Bank Contributes to U.N. Principles on Investments (27 Apr. 2006) available at <http://www.nbim.no/en/press-and-publications/News-List/2006/Norges-Bank-contributes-to-UN-principles-on-investments/>; Foreign Government Investment in the U.S. Economy and Financial Sector, Hearing Before the House Subcommittee on Domestic and International Monetary Policy, Trade and Technology, and the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, 110th Congress (5 Mar. 2008) (statement of Martin SKANCKE, Director General of the Norwegian Ministry of Finance) available at http://www.regjeringen.no/upload/FIN/Vedlegg/aff/Congress_testimony_martin_skancke.pdf.

¹⁸⁹ Mark LANDLER, *Norway Keeps Nest Egg from Some U.S. Companies*, New York Times, May 4, 2007, available at <http://www.nytimes.com/2007/05/04/business/worldbusiness/04norway.html?fta=y&pagewanted=all>.

¹⁹⁰ *Norwegian Oil Fund Betted Against Icelandic Economy*, ICELAND REVIEW ONLINE, 23 May 2010, http://icelandreview.com/icelandreview/daily_news/?cat_id=16567&ew_0_a_id=362675; Ivar SIMENSEN, *Norway Profits from Iceland*, THE FINANCIAL TIMES, 11 Apr. 2006; *Asset-Backed Insecurity*, THE ECONOMIST (London), Jan. 17, 2008, at 386, available at http://www.economist.com/finance/displaystory.cfm?story_id=10533428.

¹⁹¹ See Patrick J. KEENAN & Christiana OCHOA, *The Human Rights Potential of Sovereign Wealth Funds* (8 Apr. 2009). Illinois Public Law Research Paper No. 08-27; Indiana Legal Studies Research Paper No. 132. Available at SSRN: <http://ssrn.com/abstract=1374880>.

financial stability. When observers extol SWFs' role as "patient capital,"¹⁹² does it follow that SWFs must refrain from aggressive trading? When the United States asks China to invest commercially,¹⁹³ does it still expect China Investment Corporation (CIC) to hold U.S. financial stocks in a credit crunch? Here too transparency is a bone of contention: failure to disclose SWF positions can impede macroeconomic surveillance and potentially unsettle the markets; full disclosure might put SWFs at a disadvantage to their more opaque brethren and wholly private competitors.¹⁹⁴

D. Private External Accountability: Chinese Bank Holdings

While public external accountability captures SWFs' public duties as state actors operating transnationally, private external accountability keys off SWFs' claim that they are commercial actors in their hosts' markets. Private firms investing abroad are subject to a range of legal constraints, from specialized foreign investment and regulatory regimes (corporate, securities, banking, environmental, food and drug) to generally applicable civil and criminal laws of their host states.¹⁹⁵ I noted in Part III that regulating sovereigns operating "as private players" in foreign markets has long been a challenge for host governments. Quite apart from questions of sovereign dignity, host laws make and enforce demands on private market participants in ways that may be ineffective or inappropriate to achieve the same ends with foreign governments. Early vocal concerns about SWF compliance with host country securities laws,¹⁹⁶ along with proposals to adjust the hosts' tax and corporate laws to address SWF acquisitions,¹⁹⁷ represent the latest round in a long debate over integrating state actors in private foreign markets. The way in which this debate has evolved in U.S. bank regulation, culminating in a recent controversy over Chinese SWF investments, illustrates the work of private external accountability.

¹⁹² See Mohamed EL ERIAN, Op-ed, *Foreign Capital Must Not Be Blocked*, THE FINANCIAL TIMES (London), 3 Oct. 2007 at 13.

¹⁹³ See *supra* note 15. Similar agreements were reached with Singapore and Abu Dhabi.

¹⁹⁴ Press Conference Call Transcript No. 08/01, International Working group of Sovereign Wealth Funds (Sept. 2, 2008), available at <http://www.iwg-swf.org/tr.htm>; see also HALVORSEN, *supra* note 190, at 1-2.

¹⁹⁵ E.g., ROSE, *supra* note 95.

¹⁹⁶ COX, *supra* note 110.

¹⁹⁷ FLEISCHER, *supra* note 109; GILSON & MILHAUPT, *supra* note 108.

The June 2008 meeting of U.S.-China Strategic Economic Dialogue was getting hung up on an unlikely issue: a bank license. Dialogue meetings were launched several years earlier in response to concerns about bilateral imbalances; they had become high-level affairs at which top cabinet ministers sought to advance economic and security matters where U.S.-Chinese cooperation was key. But on the eve of the June meeting, China had publicly expressed alarm over U.S. delays in approving two Chinese banks' applications to open branches in New York, suggesting "a political ploy and part of a U.S. negotiating strategy" to gain advantage in the broader dialogue agenda.¹⁹⁸

From China's perspective, U.S. regulators must have looked improbably meddlesome and parochial. The Federal Reserve had balked at what was essentially a domestic bureaucratic reshuffle in China, where the government had decided to make its bank holding SWF, Huijin, a subsidiary of CIC, the newer SWF with a broader mandate.¹⁹⁹ From the Fed's perspective, this domestic change brought CIC squarely within the purview of the U.S. Bank Holding Company Act of 1956 ("BHC Act"), which subjects companies controlling U.S. banks to a special regulatory regime, including registration requirements, restrictions on transactions with affiliates, strict limits on non-banking and non-financial activities within the group, and Federal Reserve supervision.²⁰⁰ The BHC Act is part of a broader framework of U.S. laws separating banking from commerce, prudential regulations limiting risk to the federal deposit insurance fund, and policies addressing power concentration, conflicts of interest, credit allocation and community

¹⁹⁸ Jamil ANDERLINI & Geoff DYER, *US Delays Licenses for China's Biggest Banks*, FINANCIAL TIMES (London), 17 June 2008, available at

<http://www.ft.com/cms/s/0/4dc9a06c-3bcb-11dd-9cb2-0000779fd2ac.html> (last visited 20 June 2010).

¹⁹⁹ See Federal Reserve Board, *Order Approving Establishment of a Branch*, fn. 3, (5 Aug. 2008) available at <http://www.federalreserve.gov/newsevents/press/orders/orders20080805a1.pdf>; Letter from Robert FRIERSON, Deputy Secretary, Federal Reserve Board, to H. Rodgin COHEN, Attorney, Sullivan & Cromwell LLP (5 Aug. 2008) available at http://www.federalreserve.gov/boarddocs/legalint/BHC_ChangeInControl/2008/20080805.pdf (hereinafter Letter from FRIERSON). CIC, established in September 2007 with \$200 billion from central bank reserves, reports directly to the State Council of the People's Republic of China. Its board is made up of officials from powerful government agencies. Brad W. SETSER, *What to Do with Over Half a Trillion a Year?* *Understanding the Changes in the Management of China's Foreign Assets*, RGE MONITOR, Jan. 18, 2008, available at

http://www.cfr.org/publication/15294/what_to_do_with_over_a_half_a_trillion_a_year_understanding_the_changes_in_the_management_of_chinas_foreign_assets.html?breadcrumb=%2Fbios%2F8937%2Fbrad_w_setser%3Fgroupby%3D3%26hide%3D1%26id%3D8937%26filter%3D2008; see also MICHAEL F. MARTIN, CRS REPORT FOR CONGRESS: CHINA'S SOVEREIGN WEALTH FUND 26 (2008), available at

<http://www.fas.org/sgp/crs/row/RL34337.pdf>. CIC's holdings are currently estimated at \$300 billion. TRUMAN, THREAT OR SALVATION, *supra* note 19, at Table 1.1.

²⁰⁰ 12 U.S.C. §§ 1841-50 (2006).

development. This framework tries to insulate the insured depository institution from potential exploitation by the holding company and/or other affiliates, for example, restricting affiliates' capacity to use the bank as a cheap source of funds for their commercial or securities business. As a general purpose SWF reportedly modeled on Temasek,²⁰¹ CIC could hardly refrain from non-financial investments altogether. Moreover, since Huijin was already a bank holding company for U.S. purposes as a result of prior Chinese bank entries, the Fed's need for further regulating CIC was lost on its home authorities.

Contrary to Chinese government suspicions, it is unlikely that the Federal Reserve used the bank holding company issue as a pretext to block Chinese bank entry, gain negotiating leverage, nor even as a way to slow the influx of Asian and Gulf interests in the U.S. financial sector.²⁰² The Fed's approach came out of a thirty-year-old line of administrative decisions about the meaning of the word "company" in the BHC Act, where U.S. regulators struggled with the implications of including and exempting state-owned firms. The plain language of the BHC Act applies to a

²⁰¹ TRUMAN, THREAT OR SALVATION, *supra* note 19, at 5 (reporting that Temasek was a model for CIC). CIC appears to have at least two public missions: to reform the Chinese banking sector and to boost returns on foreign exchange reserves. The reorganization implicating Huijin complicated CIC's mandate. ChinaStakes.com, *A Simmering CIC-Huijin Separation*, July 8, 2008, <http://www.chinastakes.com/story.aspx?id=495> (last visited 14 Sep. 2008). Influential observers in the Chinese press debate other public goals, including fiscal stabilization and growing export markets. Ashby H.B. MONK, Scott MOORE & Xunyi 'Jane' XU, *A Review of Chinese Language Literature on Sovereign Wealth Funds* 11-12 (Oxford International Review Sovereign Wealth Funds Team Working Paper No. SWF001, 2008), available at <http://oxfordir.files.wordpress.com/2008/07/swf001.pdf>. This is similar to the Russian debate about SWFs' public mandate, discussed in POPOVA, *supra* note 134.

²⁰² Scott G. ALVAREZ, General Counsel for the Board of Governors of the Federal Reserve System, Testimony Before the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology, and the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, U.S. House of Representatives (5 Mar. 2008), available at <http://www.federalreserve.gov/newsevents/testimony/alvarez20080305a.htm> (elaborating the Federal Reserve's position on SWF bank acquisitions). See Nour MALAS & Mirna SLEIMAN, *Have Money, Will Travel*, Wall Street Journal, 15 Mar. 2010, <http://online.wsj.com/article/SB10001424052748704187204575101690844355062.html> (Abu Dhabi sovereign wealth funds have invested in Citigroup, Daimler AG, Advanced Micro Devices, and Barclays PLC); see also Katharina PISTOR, *Global Network Finance* (Am. Law & Econ. Ass'n. 18th Annual Meeting, Working Paper No. 54, 2008), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=2611&context=alea>.

Although the Federal Reserve's focus in this instance was on fairly technical issues state ownership, the broader legal regime for foreign bank entry, as well as the politics of Asian and Gulf state bank acquisitions in the United States were shaped in important part by the scandal surrounding the privately owned Bank of Credit and Commerce International (BCCI), which failed in 1991. A sprawling, deliberately convoluted organization with ties to Abu Dhabi, Pakistan, and several offshore jurisdictions, BCCI had established a significant banking presence in the United Kingdom, the United States and continental Europe. At the time of its failure, BCCI was implicated in money laundering, arms trading, and various other criminal schemes worldwide. For an account of the BCCI affair and its impact on U.S. bank regulation and foreign bank entry, see generally, RAJ BHALA, FOREIGN BANK REGULATION AFTER BCCI (1994).

“company” that controls a U.S. bank or another bank holding company; however, the Act specifically exempts companies majority-owned by the U.S. federal and state governments.²⁰³ Federal Reserve Board decisions going back to the 1970s affirm that foreign governments are not “companies” for purposes of the BHC Act, but refuse to extend the exemption afforded U.S. government-owned companies to companies owned by foreign governments.²⁰⁴ From the Fed’s perspective, CIC’s predicament was structurally identical to that of an Italian state bank holding company whose subsidiary sought to enter the United States twenty years earlier:

[T]he issues raised by foreign government ownership of banks operating in the United States ... present complex problems of the compatibility of the broad scope of commercial and industrial activities [of the Italian state holding company] with the stated purposes of the BHC Act -- preventing conflicts of interest, avoiding concentration of resources, and maintaining the safety and soundness of banks in the United States.²⁰⁵

The policies behind the BHC Act demanded that a separately organized, diversified foreign “company” be regulated presumptively as a private market actor even if it were owned and controlled by a foreign state. However, in deference to diplomatic and functional imperatives, the Federal Reserve was prepared to exempt a state-owned company from the strictest rules mandating separation of banking and commerce at the holding level, in exchange for contractual undertakings to restrict transactions with affiliates, refrain from cross-subsidies and cross-marketing.²⁰⁶ In effect, U.S. regulators in 1988 had synthetically replicated the BHC Act regime

²⁰³ 12 U.S.C. § 1841(a)(1) (2006) (defining “bank holding company” as “any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act.”); 12 U.S.C. § 1841(b) (2006) (defining “company” to mean “any corporation . . . partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State, and shall not include a qualified family partnership.”).

²⁰³ See Order Approving Formation of Bank Holding Company, 68 Federal Reserve Bulletin No. 7 (July 1982); Letter from William WILES, Secretary, Federal Reserve Board, to Patricia SKIGEN & John CAIRNS, Attorneys, Willkie, Farr & Gallagher (19 Aug. 1988) (hereinafter Letter from WILES).

²⁰⁴ Letter from WILES, *supra* note 203. The Italian holding company, like Huijin, had been formed to recapitalize and reform domestic banks. Compare *Supra* Letter from WILES, with Letter from FRIERSON, *supra* note 203.

²⁰⁵ Letter from WILES, *supra* note 203; 12 U.S.C. § 1843(c)(9) (2006) (granting Fed Board exemptive authority for “shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest ...”).

²⁰⁶ See Federal Reserve Board, *supra* note 203; Letter from FRIERSON, *supra* note 203 [granting Fed Board exemptive authority for “shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the

in the form of a conditional exemption for foreign state-owned firms, designed to protect U.S. depositors, taxpayers, and markets.

The Fed ultimately granted the disputed Chinese bank applications in August 2008, on much the same terms and using the same exemptive authority as it had used for the Italian state firm in August 1988.²⁰⁷ CIC and Huijin both would be bank holding companies, but could continue investing in commercial firms so long as they lived by contractual commitments that walled off the banks operating in the U.S. market. Since the decision, three Chinese banks have entered New York. Together with earlier arrivals from China, they quickly became a force in U.S. corporate lending, partly replacing the newly cautious U.S. banks as credit providers to the host economy.²⁰⁸

This relatively happy ending for the contest between internal and external accountability leaves open the question of enforcement. Enforcement is key to structuring a private external accountability regime for SWFs, since sovereigns may have trouble credibly committing to comply and have means of evasion unavailable to private firms. Ceremonial promises on the part of SWF to live by host laws that already apply to them²⁰⁹ look like feckless political theater. On the other hand, more muscular proposals to limit SWFs' capacity to "act private" may have limited practical impact. For example, formally suspending SWF shareholder voting rights to preempt noncommercial interference²¹⁰ matters less when a SWF can credibly threaten to exit even on noncommercial terms, or when its finance minister can call the CEO or her host government counterparts. Latent capacity to exert influence and get private information through government channels is a defining feature of sovereign investments; modifying corporate voting rules in a sense puts too much stock in SWF claims to private behavior, and too much faith in the traditional methods of private external accountability.

exemption would not be substantially at variance with the purposes of this Act and would be in the public interest

..."]

²⁰⁷ See Order Approving Formation of Bank Holding Company, 68 Federal Reserve Bulletin No. 7 (July 1982); Letter from FRIERSON, *supra* note 203.

²⁰⁸ Carolyn CUI, *China Finds New Market for Loans: U.S.*, Wall Street Journal (2 June 2010) available at <http://online.wsj.com/article/SB10001424052748703957604575273011917977450.html?KEYWORDS=cui>.

²⁰⁹ See *infra* notes 220-221 and accompanying text.

²¹⁰ GILSON & MILHAUPT, *supra* note 108, at 1352.

Furthermore, if the proposed restrictions were effective on their own terms, the normative assumptions behind them would still merit a closer look. Is disenfranchising public shareholders (and thereby empowering the rest) good for host corporate governance?²¹¹ Does it serve government accountability in the home country? More cynically, is depriving Russia of a formal shareholder vote worth giving up Norway's role in advancing international labor rights? Put differently, boosting private external accountability in this way may detract from other dimensions of accountability.

* * *

In this Part, I have described SWFs as subject to four distinct kinds of demands for accountability. A core argument of this Article is that such "axes of accountability" define the SWF predicament, and do not stand in a clear hierarchical relationship to one another. Privileging one set of demands may reinforce or undermine the others, depending on the circumstances. When the SWF phenomenon captured public attention at home and abroad, there was no generally accepted principle or process for resolving the conflicting demands. The next Part addresses attempts to fill the gap with private, public and hybrid governance devices.

V. Artifacts of Accountability: Principle, Practice, Scoreboard and Index

Early efforts to govern SWFs came in four basic forms. *First*, domestic legislation in host states sought some combination of limiting SWF entry and securing their compliance with host laws applicable to market participants.²¹² As products of the revised open investment compromise, these formal measures were deliberately limited in scope and perspective. Their priority was shielding the host states and their markets without driving away much-needed foreign investment or setting off a protectionist response. *Second*, less formal statements by host state officials and some joint pronouncements with SWF sponsors articulated an additional layer of expectations, usually in the form of broad guiding principles, whose stated aim was to commit SWFs to

²¹¹ Richard A. EPSTEIN & Amanda M. ROSE, *The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow*, 76 University of Chicago Law Review 111 (Winter 2009) (arguing against GILSON & MILHAUPT).

²¹² See *supra* Part III.B.

apolitical, professional, and law-abiding behavior.²¹³ *Third*, formal international institutions and instruments had a surprisingly low profile from the start of the SWF debates. This may have been due to a combination of the OECD's legitimacy crisis after MAI and its limited membership, excluding almost all key SWF sponsors,²¹⁴ coupled with the IMF's ambiguous authority over the capital account.²¹⁵ *Fourth*, work by non-government actors to define SWFs²¹⁶ often carried an embedded governance agenda. Their products ranged from research reports that sought to shape the category and make up for the lack of SWF disclosure²¹⁷ to more explicit evaluations that resembled established private ratings of government transparency and business environment.²¹⁸ Although their content is largely geared to structure and process, such private efforts have influenced both the substance of the emerging hybrid international regime to govern SWFs and the behavior of SWFs themselves. This Part analyzes the relationship among the four forms of governance, highlighting the outsize influence of private approaches on the emerging hybrid regime. I suggest that this influence is due in part to the capacity of private designs to capture the accountability demands elaborated in Part IV.

The passage of the 2007 investment legislation in the United States was a definitive accomplishment in one respect: preserving the open investment status quo in the face of strong opposition in a hostile economic and political climate. Since it was prompted by SOE acquisitions and addressed the national security implications of government-controlled

²¹³ KIMMITT, *Public Footprints*, *supra* note 31; Clay LOWERY, Acting Under Secretary for International Affairs, Remarks at Barclays Capital's 12th Annual Global Inflation-Linked Conference, U.S. Dept. of the Treasury, 25 Feb. 2008, at <http://www.treas.gov/press/releases/hp836.htm>; Press Release, U.S. Department of the 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>.

²¹⁴ See *supra* Part III; OECD, Ratification of the Convention on the OECD, List of OECD member countries, <http://www.oecd.org/membercountries>.

²¹⁵ See e.g., INTERNATIONAL MONETARY FUND INDEPENDENT EVALUATION OFFICE, THE IMF'S APPROACH TO CAPITAL ACCOUNT LIBERALIZATION 3 (2005) available at <http://www.imo-imo.org/eval/complete/pdf/04202005/report.pdf>.

²¹⁶ See *supra* Part II.

²¹⁷ See McKinsey NPB 2007, *supra* note 5; McKinsey NPB 2009, *supra* note 37; Monitor 2008, *supra* note 21.

²¹⁸ See, e.g., Transparency Int'l Surveys & Indices, http://www.transparency.org/policy_research/surveys_indices/about (last visited 26 June 2010) (explaining the organization's various indices compiled to measure perceived corruption and corruption on the buyer's side for 150 countries); Millennium Challenge Corporation, <http://www.mcc.gov/mcc/about/index.shtml> (last visited 26 June 2010) (using a composite of other organizations' indices as a basis for competitive foreign aid awards by the U.S. government). *But see* Kevin E. DAVIS & Michael B. KRUSE, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 LAW & SOC. INQUIRY 1095, 1105-09 (Fall 2007) (criticizing the World Bank's business environment indices and their use).

investment, the law did not aspire to, or achieve, an overall vision for SWF governance. As new legislative initiatives floundered, the affirmative case was left entirely to nonbinding pronouncements, such as G-8 and G-7 communiqués calling for SWF “best practices” while reaffirming the hosts’ commitment to open investment,²¹⁹ and statements of general principles by U.S. Treasury and European Commission officials.²²⁰ In March 2008, the United States, Singapore and Abu Dhabi issued a joint statement of “policy principles” for SWFs and their hosts, to serve as the basis for the work on “voluntary best practices” pursued in multilateral fora.²²¹ The principles called on SWFs to commit to act commercially, to ramp up their public disclosure of market-relevant information, to professionalize their management and internal controls, and to abide by host country laws. In return, host countries would refrain from protectionism, discrimination and interference.²²² It is hard to assess the political impact of such statements; as a legal matter, they added little if anything to the parties’ existing obligations. And the vagueness did not obscure sensitive detail—rather, the absence thereof.

Much of the operational content for SWF governance first appeared in a “scoreboard” proposed by Edwin M. Truman of the Peterson Institute of International Economics. Truman, formerly a senior U.S. finance official, published a series of comments and policy briefs in 2007 and 2008 specifically geared to influence U.S. and international policy design. Truman’s treatment of SWFs differed in important ways from other policy and academic writing of the day. Beyond taking sides in the hosts’ internal security-protectionism quarrel,²²³ Truman used the definitional and governance ambiguity that characterized SWFs to articulate the need for broad-based accountability, including recognition of the funds’ duties to “their citizens, the markets, and the

²¹⁹ G-8 Summit Declaration, *Growth & Responsibility in the World Economy*, at 4-8 (7 June 2007) available at http://www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng.templateId=raw.property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng.pdf; Statement of the G-7 Finance Ministers and Central Bank Governors (19 Oct. 2007) available at <http://www.ustreas.gov/press/releases/hp625.htm>.

²²⁰ See LOWERY, *supra* note 31; KIMMITT *Public Footprints*, *supra* note 31.

²²¹ U.S. Dep’t of Treasury, *supra* note 213.

²²² *Id.*

²²³ Edwin M. TRUMAN, *Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the United States: Assessing the Economic and National Security Implications*, Testimony before the U.S. Senate Cmte. on Banking, Housing, & Urban Affairs, at 4-7, 9 (14 Nov. 2007) available at <http://www.piie.com/publications/papers/truman1107.pdf>.

general public, including outside the country.”²²⁴ By defining SWFs to include government pension funds, Truman both sought to hold SWFs to a higher standard, and to make incipient SWF norms more broadly relevant to all very large global investors. His first “blueprint” for SWF best practices comprised Structure, Governance, Accountability and Transparency, and Behavior prongs; compliance was evaluated based on Yes/No answers to thirty-three questions, using publicly available disclosure. Defining SWFs broadly to include Northern and Western pension funds gave the resulting “scoreboard” some pragmatic credibility: at least one fund could answer “Yes” to at least one of the thirty-three questions, which could then claim to reflect existing practice. The scoreboard rewarded clear and separate organization, funding and decision-making transparency, regular public reporting, independent audits, and policies relevant to financial stability, such as the use of leverage and derivatives. It ranked SWFs on a 100-point scale. Pension funds as a group did better than non-pension funds, but with considerable variation within group scores.²²⁵

At about the same time, the Sovereign Wealth Fund Institute, an information hub run by U.S. entrepreneurs Carl Linaburg and Michael Maduell, released a SWF transparency index that measured some of the same factors as Truman’s scoreboard, but was designed to deliver information to market participants and the media, rather than push policy making. The Linaburg-Maduell Transparency Index (LMTI) defines SWFs to include several traditional reserve management vehicles, and scores all funds on a ten-point scale based on ten equally weighed questions. Like Truman, Linaburg and Maduell gave higher scores for clear organization and regular, independent disclosure. On the other hand, they bundled some factors that Truman had disaggregated (such as disclosure of ethical and investment policies), sought less information in fewer categories (hence no questions on leverage policies or the timing of audit disclosure), and weighed factors such as publishing the SWF’s address and telephone number on par with audited annual reports.²²⁶ Theirs was broadly accessible transparency

²²⁴ TRUMAN, *Sovereign Wealth Funds: The Need for Greater Transparency and Accountability*, Peterson Institute for International Economics Policy Brief PB07-6 (Aug. 2007) at 8.

²²⁵ TRUMAN, *Blueprint*, *supra* note 29, at App’x A, Tbl. A1 (Apr. 2008) available at <http://www.petersoninstitute.org/publications/pb/pb08-3.pdf>.

²²⁶ SWF Institute, Linaburg-Maduell Transparency Index, <http://www.swfinstitute.org/statistics-research/linaburg-maduell-transparency-index/> (last visited 25 June 2010).

shorthand, not a granular governance device. Funds such as ADIA and Mubadala did markedly better under LMTI than under the scoreboard; Canada did worse.

Both the scoreboard and the index caught on quickly among market participants, policy makers, and SWFs alike. They offered the hosts a metric for a category that was anything but unified, yet was publicly perceived as such. They also provided a tangible means to ground or dispel what had been inchoate host country fears:²²⁷ if one bought into the metric, a high-scoring fund should be welcomed, a low-scoring one should be shunned, and host laws should be designed to prod funds to improve their scores. For the SWFs, these private devices finally offered a standard to live up to, contest, or negotiate. Since the scoreboard and index were launched, SWFs have publicized their high rankings, challenged low ones, and engaged with the researchers on inputs and methodology.²²⁸ Thus both the Truman scoreboard and LMTI took on governance functions. Overall, rankings have gone up since 2008;²²⁹ whether this is due to materially better practices or ranking arbitrage is an interesting question beyond the scope of this Article.

The diffusion of private governance devices did not dispense with the public governance problem. Having charged the OECD and the IMF in 2007 with brokering agreement on conduct norms for SWFs' hosts and sponsors, the G-8 awaited a product that could be publicly accepted as a governance vehicle by the relevant governments and market participants. Neither the OECD nor the IMF was ideally suited to the task.

The OECD's initial reactions to the SWF controversy were as baffled as those of the SWFs themselves. Its earliest statements on SWFs highlighted existing international accords going

²²⁷ See *supra* Part III.B (discussing the variety of fears expressed during times of crises by host countries, including fear of foreign control and indebtedness).

²²⁸ See, e.g., Norway Ministry of Finance, *The Management of the Government Pension Fund in 2009*, Report No. 10, 142-43 (2009-2010) available at http://www.regjeringen.no/pages/2500165/PDFS/STM200920100010000EN_PDFS.pdf; *SOFAZ ranks high in Linaburg-Maduell Transparency Index*, NEWS.AZ (4 Nov. 2009) available at <http://www.news.az/articles/1572>.

²²⁹ Compare Linaburg-Maduell Transparency Index 1st Quarter 2008, <http://www.swfinstitute.org/research/q12008transparency.php> (last visited 27 June 2010) (showing two SWFs with the top transparency score of 10—18 over 5) with 3rd Quarter 2008 LMTI ratings, <http://www.swfinstitute.org/statistics-research/3rd-quarter-2008-lmti/> (last visited 27 June 2010) (showing four SWFs with the top transparency score of 10—20 over 5).

back to the 1960s, which committed signatories to progressive liberalization, non-discrimination and transparency, and carved out a narrow exception for “essential national security interests,” to be exercised with restraint and transparency by the investment hosts.²³⁰ Before it got the specific mandate to come up with rules for SWF hosts, the OECD’s public statements implied that SWFs simply did not present a new issue. Government ownership was not an excuse to deviate from investment liberalization or invoke national security exceptions. Existing guidelines for invoking the exceptions were sufficient to accommodate SWFs.²³¹ A series of roundtables for members and invited guests might help reinforce and disseminate the norms, but would not alter the regime.²³² In mid-2008, the OECD adopted a declaration on SWFs; later the same year it issued Guidelines for Recipient Country Investment Policies meant to cabin the use of national security exceptions²³³—both instruments in substance reiterated the OECD position that SWFs presented no new or distinct policy challenge. This position may have been principled as a formal matter, but it failed to respond to the political imperative, or leverage the process in any way. For better or worse, the public in a growing number of host and home countries had come to see SWFs as new and distinct, if only because they embodied the new financial and security landscape.²³⁴ Moreover, faced with the prospect of broad-based investment restrictions, the SWFs themselves were poised to concede the point to get stable market access.

The IMF was both a natural and an unlikely candidate to come up with norms to govern SWFs. Its macroeconomic and financial stability expertise made the IMF uniquely credible in

²³⁰ ORG. FOR ECONOMIC COOPERATION & DEV., OECD CODES OF LIBERALIZATION: A USER’S GUIDE, 10-12, 34 (2007) available at <http://www.oecd.org/dataoecd/21/23/38072327.pdf>.

²³¹ See Opening Remarks by Angel GURRIA, OECD Secretary-General, The 17th European Banking Congress: Global Capital—Threat or Salvation?, 23 Nov. 2007 (stating that the OECD first considered SWFs in their own right in 2006).

²³² See, e.g., OECD Roundables on Freedom of Investment, http://www.oecd.org/document/25/0,3343,en_2649_34887_42105753_1_1_1_1,00.html (last visited 26 June 2010) (listing 12 roundtables from 2006 to 2010 on topics including best practices for SWF).

²³³ ORG. FOR ECONOMIC COOPERATION & DEV., GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY 2-4 (2008) (specifying that restrictions should be used, if at all, only as a last resort required for the protection of national security); ORG. FOR ECONOMIC COOPERATION & DEV., OECD DECLARATION ON SOVEREIGN WEALTH FUNDS AND RECIPIENT COUNTRY POLICIES 2 (5 June 2008) (available at [http://www.ois.oecd.org/olis/2008doc.nsf/LinkTo/NT000032DE/\\$FILE/JT03247225.PDF](http://www.ois.oecd.org/olis/2008doc.nsf/LinkTo/NT000032DE/$FILE/JT03247225.PDF) emphasizing that countries should maintain open and transparent policies governing SWFs).

²³⁴ See *supra* Parts II, III.

addressing issues of concern to home and host states alike. It knew all the actors involved²³⁵ and had analyzed the advent of SWFs for some time.²³⁶ Unlike the OECD, the Fund's membership was nearly universal, though its internal governance remained controversial.²³⁷ The IMF had jurisdiction over its members' exchange rate policies, current account convertibility, and broad macroeconomic and financial policy responsibility. However, its authority over capital flows, including investment, was partial, ambiguous, and worse for wear since the capital account crises of the 1990s and early 2000s.²³⁸ As noted earlier, the Fund's recent surveillance record had been mixed at best.²³⁹ It did little to reduce the imbalances that spawned the new wave of SWFs.

In a paradox that would repeat itself in the ensuing months, the Fund's lack of legal and economic power over surplus states with SWFs might have helped make its involvement more palatable to them. It got tagged to help leading SWFs distill "best practices" for going about their business by way of compromise at its 2007 Annual Meetings.²⁴⁰ Prodded by the G-7, the IMF envisaged something along the lines of its prior forays into best practices for fiscal transparency and reserve management.²⁴¹ Yet the new project was quite different. In contrast to its prior code-making experiences, the IMF did not come to the table with authority to determine the standards, assess compliance, or sanction noncompliance. It dealt with states that by definition did not need its money and were unlikely to need it in the foreseeable future. The IMF's functions were expert, convening, and secretarial. The output was emphatically voluntary.²⁴² Meanwhile, reports on SWFs' enthusiasm for the exercise were not encouraging. Soon after receiving the assignment, one IMF official reported that the word "best" in "best practices" was too controversial for the new gathering.

²³⁵ NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS* 4 (2006) (linking the IMF's policy influence and its long-standing relationships with world governments).

²³⁶ See, e.g., generally, INTERNATIONAL MONETARY FUND, *supra* note 24.

²³⁷ See *supra* III.A; see also Press Release, International Monetary Fund, Directors Back Reforms to Overhaul IMF Quotas and Voice (Mar. 28, 2008), available at <http://www.imf.org/external/pubs/ft/survey/so/2008/NEW032808A.htm>.

²³⁸ See e.g., INTERNATIONAL MONETARY FUND INDEPENDENT EVALUATION OFFICE, *supra* note 219.

²³⁹ See *supra* III.A; BUREAU OF INT'L AFFAIRS, U.S. DEPT. OF THE TREASURY, *supra* note 72 (stating that the IMF's "implementation of the new decision can be viewed as mixed.").

²⁴⁰ Press Release No. 08/78, International Monetary Fund, Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund (Apr. 12, 2008, available at <http://www.imf.org/external/np/sec/pr/2008/pr0878.htm>).

²⁴¹ INTERNATIONAL MONETARY FUND, *supra* note 25, at 22.

²⁴² See Press Conference Call Transcript, *supra* note 198.

Nevertheless, an International Working Group (IWG) made up of two dozen or so states with SWFs²⁴³ negotiated the Santiago Principles between May and September 2008. They met three times, in Washington, Singapore and Chile, and had a drafting session in Norway. The group was chaired by two senior officials, one from ADIA and another from the IMF. Several home and host countries, along with representatives of the OECD, the World Bank, and the European Union, attended IWG meetings as observers. Some major host states, including the United States, attended as SWF sponsors in their own right.²⁴⁴ The group's agreement was announced at the meeting in Santiago on September 2, 2008. IWG member governments quickly signed off on the Santiago Principles text, whereupon it was presented to the IMF's policy-setting International Monetary and Financial Committee (IMFC) and the general IMF membership.²⁴⁵ A ritual welcome followed.

The principles do not claim to be the "best," but they do aspire to be "generally accepted", where "general" means "potentially achievable by countries at all levels of economic development."²⁴⁶ This gesture of solidarity across the income spectrum suggests a governance grouping distinct from the "Gs" that came before. Unlike the old G-7 and the G-77, which reflected national income and reinforced something like class stratification among states, and even unlike the G-20, which was designed to mimic diverse representation of wealthy and middle income countries, the Santiago Principles seem to address a more organically diverse constituency, united by the functional needs of surplus states operating in integrated financial markets.

When they were issued, the Principles projected concern with SWFs' status at home and abroad, and their competitiveness in the private financial markets. They suggested that SWFs still

²⁴³ According to the IWG website,

The IWG member countries are: 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, and the United States. Oman, Saudi Arabia, Vietnam, the OECD, and the World Bank, participate as permanent observers.

Press Release No. 08/04, *supra* note 1.

²⁴⁴ See, Alaska Permanent Fund Corporation, Homepage, <http://www.apfc.org/home/Content/home/index.cfm> (last visited 27 June, 2010) (reporting 34 billion under management).

²⁴⁵ Press Conference Call Transcript, *supra* note 194.

²⁴⁶ GAPP at 5.

occupied a contested place in home country politics and policy mix, and projected a continued sense that SWFs' decision-making was poorly understood and worrisome to the hosts – but also a suspicion on the part of many funds that they operated on hostile, unfamiliar turf that might tilt in favor of private and public competitors. The IWG product sought to reassure, but not at the expense of losing autonomy or competitive edge.

Much like Truman's scoreboard, the two dozen GAPP line items address the structure and objectives of SWFs ("legal, institutional and macroeconomic" factors), their governance practices (especially decision autonomy from the home government) and their investment and risk management policies, focusing on financial stability.²⁴⁷ The document is suffused with accountability rhetoric, which is cited in support of all but a few of the two dozen principles. At the same time, the Santiago Principles take a particular view of accountability that is distinct from earlier public statements by SWF and host governments, the scoreboard, or any other governance device. Viewed through the framework set out in Part IV of this Article, the IWG went the farthest in private accountability—internally, answering to SWFs' stakeholders under the terms of their constitutive arrangements,²⁴⁸ and externally, abiding by the laws their hosts made applicable to similarly situated (generally defined as private) investors,²⁴⁹ while participating in the global financial markets in the manner of profit-driven private investors.²⁵⁰ GAPP Principle 21 (GAPP 21) takes a forceful stand on SWFs' shareholder rights. In this view, SWFs capacity to exercise shareholder rights in their investments is an essential attribute of accountability to their own stakeholders. The way in which IWG approached this principle illustrates the tension between internal and external private accountability. On balance, GAPP 21 was a clear victory for internal accountability; however, in a nod to the external audience, the SWFs agreed to disclose their voting policies and intentions *ex ante* and their voting record *ex post*.

²⁴⁷ GAPP, *supra* note 13.

²⁴⁸ GAPP 6-10.

²⁴⁹ GAPP 15. A recent press report went so far as to designate compliance with host country disclosure laws as "the most significant of the 24 guidelines" in the Santiago Principles. *Cash in Hand*, The Economist, 19 June 2010, at 68. This characterization is somewhat puzzling since, unlike some of the other GAPP items, GAPP 15's non-binding exhortation to abide by already-binding legal rules yields no new content and uncertain additional commitment.

²⁵⁰ GAPP 2, 17, 19.

The Principles address public internal accountability primarily through disclosure; however, some of the most significant disclosure is made to the owner, not the domestic public, blurring the line between private and public accountability and effectively relying on general government channels to inform the populace and the world at large.²⁵¹ To the consternation of many long-time observers, and in notable contrast with Truman's scoreboard, IWG deemed total fund size too sensitive to require disclosure at all—one reason why GAPP as a package scores only 76 out of 100 on the scoreboard.²⁵² Some of the most forceful language in the Principles is used to disclaim “any intention or obligation to fulfill, directly or indirectly, any geopolitical agenda of the government”²⁵³—presumably, even if the public at home demands it. It is almost as if the SWFs sought to use the Santiago Principles as a commitment device for their own governments and publics, making it harder to appropriate the funds for public purpose distinct from their stated mission.

The treatment of public external accountability is similarly strained. Over half of all the Principles refer to the sentiment most clearly expressed in GAPP 19: SWFs are in the business of maximizing “risk-adjusted returns” and operate solely “based on economic and financial grounds”. Any social, ethical or religious motive is a deviation from the group norm (albeit one in which some important members like Kuwait and Norway engage), which must be specifically disclosed. Moreover, many of the disclosure obligations elsewhere in the document are justified in terms of dispelling “concern about potential noneconomic or nonfinancial objectives.”²⁵⁴ The funds' contribution to global financial stability comes not of a sense of public duty, but rather of their capacity and inclination—by virtue of their economic objective and structure—“to take a long-term view in their investments and ride out business cycles.”²⁵⁵

When IWG announced agreement on the Santiago Principles, its members were at pains to disassociate them from the IMF surveillance process: they insisted that everything about the principles was voluntary. Perhaps as a matter of preemption, the Santiago Principles

²⁵¹ GAPP 5.

²⁵² See e.g., TRUMAN, *Blueprint*, *supra* note 29 at 27; TRUMAN, *THREAT OR SALVATION*, *supra* note 19, at 112.

²⁵³ GAPP 2 Explanation and Commentary, *supra* note 13, at 12.

²⁵⁴ GAPP 21, *supra* note 13, at 23; see also, e.g., GAPP 6, GAPP 16 Explanations and Commentary.

²⁵⁵ Santiago Principles: Objective and Purpose, GAPP, *supra* note 13, at 3.

incorporated a periodic internal review mechanism.²⁵⁶ In theory, nothing prevents the IMF from considering GAPP criteria in its assessment of home and host policies implicating SWFs, just as nothing prevents a host government from using GAPP as part of its investment screen.²⁵⁷ But doing so may undermine the Principles' legitimacy in the home countries, and scuttle cooperation between new and old powers and institutions.

IWG work since the launch in Santiago confirms the view of the forum as, at least in part, an exercise in governance preemption. In the fall of 2008, the IWG secretariat released a SWF survey, reacting to calls for transparency while seizing initiative and asserting control in a field where authoritative information was scarce and analysis was dominated by private investment banks and consultancies.²⁵⁸ Six months after presenting the Principles to the IMFC, the group released the Kuwait Declaration establishing a standing forum of SWFs. IWG's successor, the International Forum of Sovereign Wealth Funds (IFSWF) is "a voluntary group of SWFs" whose membership is open to funds that meet the GAPP definition of SWF and, significantly, "endorse" the Principles. It is a soft institutional counterpart to the emphatically soft law of the Santiago Principles. The IMF has served as the Forum's interim secretariat.²⁵⁹ Since its establishment, the IFSWF has met twice, in Azerbaijan and Australia. It has issued statements advocating open investment, and has brokered a code of "good practices" on investment risk management, conducting member surveys as part of the process.²⁶⁰ The current forum Chair is from Australia; Deputy Chairs represent China's and Kuwait's SWFs.

The IWG and IFSWF effort so far builds on and borrows elements of several established species: best practices produced by and for the public sector (for example, IMF on fiscal transparency),

²⁵⁶ Press Conference Call Transcript, *supra* note 29.

²⁵⁷ Before the Santiago Principles were unveiled, some members of the U.S. Congress suggested using CFIUS review to encourage SWF compliance with best practices. See Press Release, House Financial Services Committee, Frank, Maloney, Gutierrez Call on Treasury to Address Sovereign Wealth Funds in FINSA Regulations, March 13, 2008, available at <http://financialservices.house.gov/press110/press0313082.shtml>; TRUMAN, THREAT OR SALVATION, *supra* note 19, at 100.

²⁵⁸ Sovereign Wealth Funds: Current Institutional and Operational Practices (Sep. 15, 2008), available at <http://iwg-swf.org/pubs/swfsurvey.pdf>. SETSER REPORT, *supra* note 9, at 40 (noting a decline in transparency).

²⁵⁹ International Working Group of Sovereign Wealth Funds, "Kuwait Declaration": Establishment of the International Forum of Sovereign Wealth Funds, Apr. 6, 2009, at www.iwg-wf.org/mis/kuwaitdec.htm.

²⁶⁰ Int'l Forum of Sovereign Wealth Funds, *Sovereign Wealth Funds Issue "Baku Statement" Reaffirming the Need for Maintaining Open Investment Environment*, 9 Oct. 2009, at <http://www.ifswf.org/pr/pr2.htm>.

corporate codes of conduct produced by the private sector to regulate itself,²⁶¹ and principles jointly produced by public and private actors to regulate private conduct (for example, the Equator Principles, a collaboration between private banks and the International Finance Corporation). GAPP is unusual because the principles are produced by and for public entities, yet they purport to regulate market activity.²⁶² “Governments as market actors”²⁶³ favor self-regulation.

IFSWF combines features of a macroeconomic policy coordination body (the G-7) and a producer’s cartel (OPEC). It is more like the latter in the sense that group members appear to be SWFs themselves, not their sponsoring governments²⁶⁴—and to the extent there is daylight between general government interests and those of the SWFs, the latter but rarely the former are represented in regular meetings. But the IFSWF’s regulatory and self-regulatory aspirations also evoke the rise of the Financial Stability Board (FSB), a group of public and private regulators and standard setters formed in the wake of the Asian Financial Crisis of the late 1990s, which was re-launched and given a prominent role in the regulatory reform proposals coming out of the current crisis.²⁶⁵ Neither has legal personality or much of an infrastructure; yet both have charter-like mandates, norm-generating authority, and enough of an organizational chart to fit somewhere in between bureaucratic networks²⁶⁶ and full-fledged international institutions on the Bretton Woods model.²⁶⁷ Time will tell which analogy fits best, if any. However, the IWG’s decision to stick around and morph into IFSWF is further evidence of the surplus countries’ taking ownership of what started in their view as a made-up category, and using it as a vehicle

²⁶¹ E.g., John M. CONLEY & Cynthia A. WILLIAMS, *Engage, Embed, and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement*, 31 JOURNAL OF CORPORATE LAW 1 (2005).

²⁶² Compare INSTITUTE OF INT’L FINANCE, INC., PRINCIPLES FOR STABLE CAPITAL FLOWS AND FAIR DEBT RESTRUCTURING IN EMERGING MARKETS (2005), available at <http://www.iif.com/download.php?id=4fyB5BGIKzU>.

²⁶³ See *supra* note 100.

²⁶⁴ INT’L SOVEREIGN WEALTH FUNDS, <http://www.ifswf.org> (last visited 26 June 2010); INT’L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, <http://www.iwg-wf.org> (last visited 26 June 2010); Int’l Working Grp. of Sovereign Wealth Funds, *supra* note 263.

²⁶⁵ FINANCIAL STABILITY BOARD, <http://www.financialstabilityboard.org> (last visited 26 June 2010); see also G-20, *Communiqué*, Declaration Summit on Financial Markets and the World Economy, (15 Nov. 2008), available at http://www.g20.org/Documents/g20_summit_declaration.pdf; G-20, *Communiqué*, Declaration on Strengthening the Financial System, (2 Apr. 2009), available at http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf.

²⁶⁶ See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) for a description of the network model.

²⁶⁷ See *supra* IIIA.

not just to allay deficit country fears, but more importantly, to advance their own interests and participate in the governance of international finance.

VI. Conclusion: SWF Governance as an Experiment and a Lens

This Article has described how an apparently artificial grouping of investors, made salient by the particular historical and political circumstances of their host states in the mid-2000s, became a vehicle for addressing some of the hardest policy problems of the past century and a site for innovation in international law-making and institution-building. I have argued that the funds' common quality—their hybrid public-private and transnational character—makes them hard to define and govern, but also makes them exceptionally apt reflections of contemporary global finance and its multiple constituents. I have sought to capture this quality in the four-part accountability matrix elaborated in Part IV. From this perspective, the task of governing SWFs, just like the task of governing global finance, is about negotiating among public, private, internal and external demands for accountability in the absence of a clear normative hierarchy among them, and with no prospect for the emergence of such a hierarchy. The goal is to establish a dynamic governance process, capable of winning legitimacy simultaneously in radically different political, economic and cultural settings.

This governance project might draw on, and contribute to, several fields of law scholarship that have struggled with some of its constituent challenges. *First*, writing on legal pluralism and, more recently, on global legal pluralism, has worked with cultural difference, the simultaneous application of diverse legal regimes to a single subject, and conflicting accountability demands on administrative actors.²⁶⁸ However, legal pluralism and to a lesser extent its global counterpart, often come rooted in colonial hierarchies, and in a sharp distinction between state and non-state law. SWFs offer an example of state-made law dislodged from its privileged position, embracing informality as a core part of their identity as regulators and regulated

²⁶⁸ See Ralf MICHAELS, *Global Legal Pluralism*, 5 ANNUAL REVIEW OF LAW & SOCIAL SCIENCE 243 (2009) (a literature overview discussing the interaction of legal pluralism and legal globalization); see also Paul Schiff BERMAN, *Global Legal Pluralism*, 80 SOUTHERN CALIFORNIA LAW REVIEW 1155 (2007); Sally Engle MERRY, *Legal Pluralism*, 22 LAW & SOCIETY REVIEW 869, 870 (1988) (defining legal pluralism as multiple legal systems within a single society); Nico KRISCH, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT. LAW 247 (2006).

subjects. *Second*, the GAPP and IFSWF projects evoke elements of the large literature on New Governance, described in the financial regulatory setting as a regime “that uses innovative, pragmatic, information-based, iterative, and dialogic mechanisms to gather, distill, and leverage industry learning in the service of ... more effective and less burdensome ... public regulatory mandate.”²⁶⁹ The absence of a stable hierarchy, the iterative and information-channeling functions of IFSWF, the incorporation of private knowledge, methods and artifacts in GAPP, and SWFs’ simultaneous struggle for legitimacy in multiple diverse settings, make the comparison fruitful. Here too SWFs enrich the cast of law-making characters, usually conceived of as a dynamic combination of public and private players learning from one another, less often as one set of players “performing” the other (sovereigns as market actors). *Third*, the resurgent literature on soft law, particularly soft law in international finance,²⁷⁰ responds to persistent criticisms of the Santiago Principles as nonbinding.²⁷¹ This scholarship implies that such criticism can be misleading in light of the weak compliance machinery in the most formally “binding” international legal arrangements, and the impressive compliance pull of embedded market discipline, competition, and process institutionalization. SWFs, which compete vigorously in the market but also increasingly co-finance with one another,²⁷² exemplify all three features. Moreover, political scientists writing about soft law have praised its unique capacity to deal with uncertainty and diversity of interests, values and power.²⁷³ The alternative to soft law in this view is not hard law, but no law at all. Whether no law is better depends on the behavior

²⁶⁹ Cristie L. FORD, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 BUS. L. J. 1, 5 (2008). See Charles F. SABEL & William H. SIMON, *Epilogue: Accountability without Sovereignty*, in GRAINNE DE BURCA & JOANNE SCOTT, EDs., *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (2006), 395-411; Julia BLACK, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, REGULATION & GOVERNANCE (2008) 2, 137-164 (broader theoretical treatments of the accountability challenge in New Governance, particularly in transnational regulation).

²⁷⁰ Chris BRUMMER, *How International Financial Law Works (and How It Doesn't)*, GEO. L. J. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542829 (arguing that market discipline and competition among financial regulators makes apparently soft financial law harder than it seems); Douglas W. ARNER & Michael TAYLOR, *The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?*, 32 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 488 (2009) (advocating a more institutionalized soft law, including more formal and binding dispute resolution); Claire KELLY & Roberta S. KARMEL, *The Hardening of Soft Law in Securities Regulation*, 34 BROOKLYN JOURNAL OF INTERNATIONAL LAW 883 (2009); Gregory SHAFFER & Mark A. POLLACK, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINNESOTA LAW REVIEW 706 (2010).

²⁷¹ See, e.g., *Cash in Hand*, *The Economist*, 19 June 2010, at 68 (citing Ashby MONK on the role of SWF co-financing in managing demands for SWFs’ accountability).

²⁷² *Id.*

²⁷³ Kenneth W. ABBOTT & Duncan SNIDAL, *Hard and Soft Law in International Governance*, 54 INT’L ORG. W 421 (Summer 2000).

of SWFs going forward and the eventual success of GAPP and IFSWF, as measured by their domestic and external legitimacy.

A fuller examination of SWFs in relation to these theories and others is beyond the scope of this Article. Rather, the list suggests that much more work remains to be done by legal scholars to exploit the theoretical potential of SWFs, and to contribute to their governance. Much of the early U.S. law literature on SWFs hewed closely to the policy problem as framed by domestic legislative debates. It took the host perspective and argued either the national security or the open investment brief.²⁷⁴ Backer²⁷⁵ and Pistor²⁷⁶ were among the first to reject this framing and explore the broader governance import of SWFs—but scholars have not yet exhausted the category's potential.

Meanwhile, from the policy perspective, it is tempting to see the Santiago Principles as an exercise in technocratic legitimation—a set of light and general rules to help Chinese, Russian and Arab money look friendlier to its U.S. and European hosts, while maintaining the mandate to invest from the masses at home.²⁷⁷ This undersells the achievement even with the limited implementation record to date. At a minimum, the negotiation process revealed a new role for the IMF in financial diplomacy: a shift from the hard power of conditionality in the 20th century to the soft power of persuasion and expertise in the 21st. In the world of soft power, brokering an investment compromise is a step up from technical assistance. The financial crisis has reinforced the IMF's role as a source of balance-of-payments support, and has more than doubled its resources. On the other hand, the rise of the FSB—a soft institution without the IMF's baggage, charter and funding constraints, but with a huge mandate from the G-20—brought real competition to governing finance. The interactions between the IMF and the IFSWF may reveal new modes of cooperation between formal and informal governance arrangements. More ambitiously, the Santiago experiment may yet launch a durable policy coordination regime among key actors who had trouble coming on stage in the 20th century institutional framework. Ad-hoc, interest-based groupings such as the IFSWF, horizontally linked with established

²⁷⁴ See, e.g., GILSON & MILHAUPT, *supra* note 108; EPSTEIN & ROSE, *supra* note 215.

²⁷⁵ BACKER, *Regulatory Chameleons*, *supra* note 10.

²⁷⁶ PISTOR, *supra* note 206.

²⁷⁷ COHEN & DeLONG, *supra* note 15; cf. MONK, *supra* note 38, at 4-6.

institutions such as the IMF, may offer a new model to complement the G-20 and further displace the old G-7 order.

Just as easily, the Santiago Principles could fail. They may turn out to be too vague or too stingy to reassure the hosts, too restrictive to bind a set of very diverse and very rich actors whose interests often conflict, or too radical to coexist with tightly controlled domestic political regimes. More likely, if the principles succeed at fostering model corporate governance and transparency, the (still-hypothetical) threats that prompted GAPP's creation may assume different form – shifting out of SWFs into reserve pools, state-owned enterprises, or new vehicles as yet unknown. The GAPP model would still be out there, but it would apply to an unimportant fringe of sovereign finance.

Whatever the outcome, the Santiago Principles implicate substantive issues that have been at the core of governing global finance for over half a century, and have launched legal and institutional experiments with implications far beyond their SWF signatories. Meanwhile, SWFs have gone from a seemingly incongruous fiction fueled by worried Western politicians to catalysts for negotiating the terms of integration and governance among different political, social and economic systems—Saudi Arabia, Brazil, China and Norway, and their hosts in the United States, Europe and Africa. This alone is an impressive achievement that merits further study.