THE GOVERNANCE OF SOVEREIGN WEALTH FUNDS

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I. INTRODUCTION

The increasing prominence of contemporary sovereign wealth funds (SWFs) with their recently acquired portfolio stake-holdings in North American and Western European corporations at distressed prices, attracted both fascination and flak in the global financial world. These SWFs, as the 'new kids on the block', along with other institutional investors such as hedge funds and insurance companies, are mostly from non-Western countries such as China, Russia, Singapore and United Arab Emirates. Governments of certain recipient countries such as the U.S., Italy and France, have raised the spectre of SWFs as smoking guns with investment strategies that threaten the nation's national security. Their rhetoric is ironically reminiscent of arguments advanced by developing countries against the 'free trade and market' and 'freedom of capital flows and investment' argument of developed countries. This reversal of roles corresponds with the change in the direction of capital flows from non-Western countries to Western markets. In an attempt to allay fears and obtain mutual understanding and broad consensus, two dominant interest groups, the SWFs as investors and the recipient countries have issued the Generally Agreed Principles and

Practices[1] (the 'Santiago Principles') embodying guidelines for SWFs' internal management and investment objectives, and the OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies[2] respectively.

This paper first introduces the issues that have emerged as a result of SWFs contemporary investments and observes how SWFs and recipient countries have reacted to these developments. It then proposes a model of SWF governance based on consultation, cooperation and coordination. This model draws on the experience of current deliberative fora such as the G20 summits and the IWG forum, the bilateral arrangements between countries and the laws and practices of some SWF countries, particularly Singapore. This paper further examines the oversight regimes to which Singapore SWFs are subject, and recommends the approach of the Singapore SWFs as a starting point for achieving an optimal balance between nationalism and global financial stability based on free capital and investment flows.

II. SWFS: BENIGN INVESTORS OR SMOKING GUNS?

A. The Rise of Contemporary SWFs

The term 'SWF' includes a diverse group of entities of different constitutive characteristics and investment objectives such as funds, pension schemes, state enterprises in home countries and investment vehicles constituted under foreign laws.[3] According to the Santiago Principles, SWFs are "special purpose investment funds or arrangements" created out of "balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports" and owned by the central government for "macroeconomic purposes".[4]

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[1] International Working Group of Sovereign Wealth Funds, International Monetary Fund, *Sovereign Wealth Funds Generally Accepted Principles and Practices* (Oct. 2008) at http://www.iwg-swf.org/pubs/santiagoprinciples.pdf.

[2] OECD Investment Committee (Oct.2008) at http://www.oecd.org/dataoecd/0/23/41456730.pdf.

[3] *See* IMF, *Sovereign Wealth Funds – A Work Agenda* (Feb. 29, 2008), Annex II at http://www.imf.org/external/np/pp/eng/2008/022908.pdf.

[4] Appendix 1 of Santiago Principles. *See* also, IMF, *Global Financial Stability Report*, Sep. 2007 at http://www.imf.org/External/Pubs/FT/GFSR/2007/02/pdf/text.pdf, particularly Chapter 1; Commonwealth Secretariat, "Sovereign Wealth Funds – Issue Note" Sep. 2008 at http://www.thecommonwealth.org/files/183308/FileName/FMM_08__INF_2.pdf; Sovereign Wealth Fund Institute Inc., at http://www.swfinstitute.org/swf.php.

Contemporary SWFs[5], particularly 'non-western' ones, are a recent phenomenon. They are rich sources of capital[6] with investment strategies beyond the purchase of foreign currencies and government bonds.[7] In the past, developed countries were the primary net exporters of capital. A reversal of economic fortunes and a change in the direction of capital flows has however occurred.[8] Since 2005, several 'non-Western' countries with economies ranging from advanced to developing, such as China, India, Kuwait, Russia, Saudi Arabia, Singapore and United Arab Emirates, have benefited from escalated oil prices and the exponential growth of emerging markets.[9] Their recent acquisitions of Western financial institutions such as Barclays, Citigroup, UBS and Merrill Lynch[10], during the U.S. sub-prime crisis have attracted significant flak and fascination from certain politicians and governments in recipient countries, notably, those from U.S., France and Italy. Indeed, the launch of the new China Investment Corporation, Ltd, with then US$200 billion of capital, was one of the first events that attracted Western interest in SWFs.[11]

Two key concerns about SWF investments, the lack of transparency and ominous investment strategy, have been raised by politicians in recipient countries such as the U.S:

> A lack of transparency that characterizes many sovereign wealth funds undermines the theory of efficient markets at the heart of our economic

[5] Kuwait Investment Authority is the first known SWF, created in 1953 to reduce the country's reliance on oil as it is a non-renewable resource.

[6] *See* Sovereign Wealth Funds Inc., *Largest Funds by Assets Under Management*, at http://www.swfinstitute.org/funds.php for an estimated total fund size of US$3,652.7 billion.

[7] *See e.g.*, Swaminathan S Anklesaria Aiyar, *Strange rise of Eastern neo-colonialism*, THE TIMES OF INDIA (Feb. 25, 2009) for an observation of the change in global financial power with the rise of non-Western SWFs and the corresponding increased flow of funds to Western countries.

[8] *See* UNCTAD, WORLD INVESTMENT REPORT 2008, at Table 1 – FDI flows, by region and selected countries, 1995-2007 and p.10, at http://www.unctad.org/en/docs/wir2008overview_en.pdf in relation to the inflows and outflows of foreign direct investments amongst developed economies and developing economies such as Asia. Foreign direct investment outflows from South, East and South-East Asia reached a new high amounting to US$150 billion reflecting the growing importance of developing countries as outward investors. Foreign direct investment outflows from West Asia increased for the fourth consecutive year to US$44 billion in 2007 – nearly six times its level in 2004.

[9] *See e.g.*, the estimates provided by McKinsey Global Institute, *The New Power Brokers: How Oil, Asia, Hedge Funds and Private Equity Are Shaping Global Capital Markets* (Oct. 2007), Exhibit 1.2 p.22.

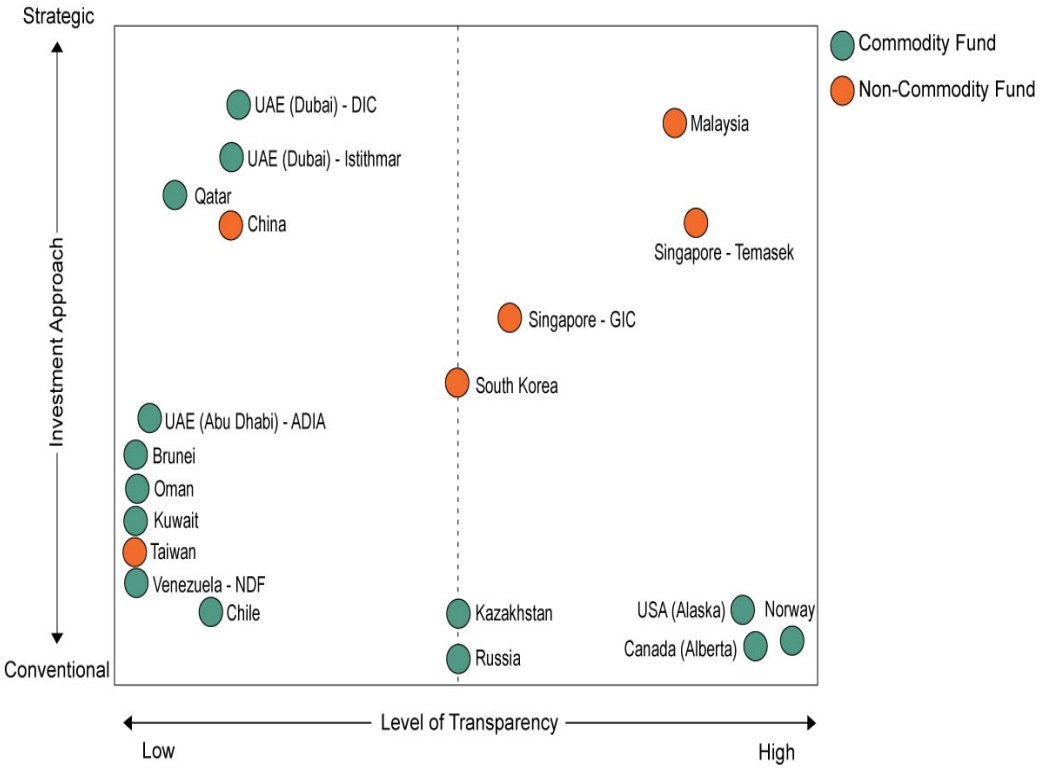
[10] *E.g.*, in 2007, China Investment Corporation acquired US$3 billion stake in Blackstone Group; Dubai's Istihmar wins the bid for Barneys New York; Mubadala Development Company owned by the Abu Dhabi government purchased 7.5% stake in Carlyle Group for US$1.35 billion; Dubai International Capital's purchase of a US$1.26 billion stake in hedge fund Och-Ziff Capital Management Group; Citic Securities, China's state-controlled investment bank, invested US$1 billion in Bear Stearns; Abu Dhabi Investment Authority purchased 4.9% stake in Citigroup for US$7.5 billion; Dubai International Capital, owned by the ruler of Dubai, acquired a minority stake in Sony; Singapore's GIC invested 11 billion Swiss francs in Swiss private bank UBS.

[11] *See* Michael F. Martin, China's Sovereign Wealth Fund (CRS Report RL 34337) as cited by Martin A. Weiss, SOVEREIGN WEALTH FUNDS: BACKGROUND AND POLICY ISSUES FOR CONGRESS (CRS Report for Congress) (RL34336) (Jan. 15, 2009).

system. In addition, unlike private investors, pension funds and mutual funds, government owned-entities may have interests that will take precedence over profit maximization. Just as the United States has geopolitical interests in addition to financial ones, so do other countries. Just as we value some things more than money, so do they. Why should we assume that other nations are driven purely by financial interests when we are not?[12]

Figure 1 below maps these concerns in relation to specific SWFs; the X axis and Y axis reflect the degree of transparency and the stated or perceived nature of the investment philosophy. SWFs that fall within the upper-left quadrant attract heightened concern from recipient countries.[13]

Figure 1: Ranking of SWFs by Investment Approach and Transparency



Source: Standard Chartered and Oxford Analytica[14]

[12] Senate Banking, *Housing and Urban Affairs Committee Hearing on Foreign Government Investment in the United States* (Nov. 14, 2007). See also, *Joint Economic Committee Congress of the U.S., Do Sovereign Wealth Funds Make the U.S. Economy Stronger or Pose National Security Risks?* (Feb. 13, 2008) (S. HRG. 110-499).

[13] Martin A. Weiss, SOVEREIGN WEALTH FUNDS: BACKGROUND AND POLICY ISSUES FOR CONGRESS (CRS Report for Congress) (Jan. 15, 2009) (RL34336) at p8, http://assets.opencrs.com/rpts/RL34336_20090115.pdf.

[14] As cited by Gerard Lyons, *Prepared Statement* in The Rise of Sovereign Wealth Funds: Impacts on U.S. Foreign Policy and Economic Interests (Hearing before the Committee on Foreign Affairs House

Although some cautioned against unwarranted nationalistic and protectionist reactions against SWFs, others called for a defense of national interests against a perceived loss of sovereignty and economic espionage.[15] A primary concern is that a recipient country's national security and economic interests would be compromised if SWFs which are controlled by the respective foreign governments, invest in corporations within defense, key infrastructure and technologies industries.[16] SWFs as foreign government entities, are often viewed as investors with deep pockets who distort capital markets by competing from an unfair position and who are driven by interests that differ from purportedly safer interests of non-government investors. Several further assert that SWFs, though similar to hedge funds without long term investment objectives, are less transparent than hedge funds and therefore more ominous.[17] Such opinions unjustifiably gloss over the levels of secrecy and accountability enjoyed by so-called private investors such as private equity funds, hedge funds and investment banks.[18] There has been no evidence of national security violations or economic espionage thus far; the jury is still out.

B. Reactions of Recipient Countries

While most concerned States may not call for an outright ban on the inflows and outflows of capital *per se*, they have sought greater restrictions on investment inflows to sectors with potential national security implications or financial market systems vulnerable to being reshaped by foreign government intervention.[19] These restrictions differ from existing securities disclosure laws that apply to both domestic and foreign investors, such as Section 16 of the U.S. Securities Exchange Act of 1934[20] requires any person that

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of Representatives, U.S., May 21, 2008) (No. 110-190) at p. 13. Save for China, Malaysia, Singapore – Temasek, Singapore – GIC, South Korea and Taiwan, the rest are commodity funds.

[15] *See e.g.*, Helene Fouquet and James G Neuger, *Sarkozy Calls for EU Funds to Buy Cut-Price Shares*, BLOOMBERG.COM (Oct. 21, 2008); and Ben Hall, *Sarkozy puts €20bn barrier around industry*, FINANCIAL TIMES (Nov. 20, 2008).

[16] *See e.g.*, Christopher Cox, *The Rise of Sovereign Business*, SEC Speech (Dec. 5, 2007).

[17] *See e.g.*, Edwin M Truman, *Four Myths About Sovereign Wealth Funds*, VOXEU.ORG (Aug. 14, 2008) at http://www.voxeu.org/index.php?q=node/1539.

[18] *See e.g.*, David Cho, *Hedge Funds Mystify Markets, Regulators - Deeply Powerful, Largely Unchecked*, WASHINGTON POST, (Jul. 4, 2007): the largely unregulated and understood hedge funds which are responsible for more than one third of stock trades and control more than US$2 trillion worth of assets. See also, Kavaljit Singh, *SWFs mark structural shift in world financial order*, THE ECONOMIC TIMES (INDIA TIMES), (Nov. 11, 2008).

[19] *See e.g.*, Kathryn C. Lavelle, *The Business of Governments: Nationalism in the Context of Sovereign Wealth Funds and State-Owned Enterprises* 62 JOURNAL OF INTERNATIONAL AFFAIRS 131-147 (2008).

[20] 15 U.S.C. § 78a et seq.

directly or indirectly owns more than 10% of any U.S. registered class of equity securities, to disclose its interest and any change thereof within two business days.

One form of *ex ante* protective measures implemented by recipient countries is the blanket prohibition of foreign stake-holdings in domestic companies above a specified threshold percentage. SWFs, are for example, prohibited from buying more than 5% of individual Italian companies.[21] This blanket threshold threatens the freedom of investments and curtails the exchange of capital without any contextualized examination of possible risks posed by each specific potential SWF investment.

Another form of ex ante protective measures is the review of foreign investment.[22] Typically, these reviews are conducted when foreign investments exceed a specified stake-holding percentage or draws national security concerns. For example, the Investment Canada Act of 1985 requires the review of significant foreign investment, such as investments comprising more than fifty percent of the total value of the investee's assets, to ensure that such investment "contributes to economic growth and employment opportunities" of Canada.[23] In France, acquisitions irrespective of size or the nationality, involving "sensitive" sectors such as private security services, production of chemical or biological antidotes, defense and military services are subject to prior approval by the Finance Minister.[24] Foreign investments in the U.S. are subject to review by the Committee on Foreign Investments (CFIUS) pursuant to the U.S Foreign Investment and National Security Act of 2007[25] which amended the Section 721 of the Defense Production Act of 1950[26]. CFIUS is generally required to review acquisitions by foreign persons of control[27] of U.S entity – broadly majority ownership or dominant minority of total voting interests or board representation, or special contractual arrangements, to ensure that such acquisitions do not threaten "national security". Currently, the U.S.

[21] See *e.g.*, Guy Dinmore, *Italy set to curb sovereign wealth funds*, THE FINANCIAL TIMES (Oct. 21, 2008).
[22] *See e.g.*, *Laws and Policies Regulating Foreign Investment in 10 Countries*, FOREIGN INVESTMENT GAO-08-320 (Feb. 2008) at http://www.gao.gov/new.items/d08320.pdf.
[23] Chapter I-21.8, R.S., 1985, c. 28 (1st Supp.) at http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00071.html, see Ss 2 and 14.
[24] Decree 2005-1739 of Dec. 30, 2005.
[25] Pub. L. No. 110-049, 121 Stat. 248 (2007). The Act implemented in 2007 significantly amended the 1988 Exon-Florio Amendment (Pub. L. No. 102-99, 150 Stat. 487 (1988) (50 U.S.C. App. 2170) to the 1950 Defense Production Act.
[26] 50 U.S.C. App. 2170.
[27] Current CFIUS regulations define "control" functionally, in terms of the ability of the acquirer to make certain important decisions affecting the acquired entity. *See* 31 C.F.R. § 800.204(a).

regulations exempt from CFIUS review passive investments and establish a "safe harbour" for acquisitions of 10 percent or less of an U.S. company's voting securities.[28]

These forms of ex ante protective measures arguably violate relevant provisions in bilateral agreements that protect foreign investments in recipient countries under 'national treatment' and 'most-favored-nation treatment' principles.[29] Unlike the usual laws that limit foreign ownership in sensitive sectors such as aviation, banking, telecommunications, media and military industries in numerous states, percentage restrictions are pre-emptive and apply to all sectors.

C. Responses of SWF Countries

In response to mounting criticisms and calls by the International Monetary and Financial Committee (IMFC)[30], twenty two countries established an International Working Group of Sovereign Wealth Funds (IWG)[31] and issued twenty four voluntary principles concerning SWFs' governance, accountability and investment conduct, in October, 2008.[32] The guiding purpose of the Santiago Principles is "to have in place a transparent and sound governance structure that provides for adequate operational controls, risk management and accountability; ensure compliance with applicable regulatory and disclosure requirements in the countries in which SWFs invest; ensure SWFs invest on the basis of economic and financial risk and return-related considerations; and. help maintain a stable global financial system and free flow of capital and investment".[33] The composition of IWG is broadly representative of a wide range of countries and interests. Its members comprise mostly countries with SWFs which investments have caused some

[28] 31 C.F.R. § 800.302(d)(1). Recent passive SWF investments were purportedly not subject to CFIUS review on this basis, for example, Abu Dhabi Investment Authority's purchase of 4.9% of Citigroup and Singapore's Temasek Holdings' purchase of 9.4% of Merrill Lynch.

[29] See, *e.g.*, in relation to financial investments, the Free Trade Agreement between the U.S. and Singapore, at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf: Specifically, Articles 10.2 (National Treatment) and 10.3 (Most-Favored-Nation Treatment) where each party shall accord to investors of the other party treatment no less favorable than that it accords to its own investors in respect of *inter alia* investments in its own financial institutions.

[30] See IMFC, Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund (Oct. 20, 2007) and (Apr. 12, 2008) at http://www.imf.org/external/np/cm/2007/102007a.htm and http://www.imf.org/external/np/cm/2008/041208.htm respectively.

[31] IWG, International Working Group of Sovereign Wealth Funds is Established to Facilitate Work on Volutary Principles (Press Release No. 08/01) (May 1, 2008) at http://www.iwg-swf.org/pr/swfpr0801.htm.

[32] http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf

[33] See IWG, International Working Group of Sovereign Wealth Funds Presents the "Santiago Principles" to the International Monetary and Financial Committee (Press Release No. 08/06) Oct. 11, 2008 at http://www.iwg-swf.org/pr/swfpr0806.htm.

concerns among recipient countries and countries with SWFs but have been recipients of such investments such as Australia and the U.S.[34] The inclusion of the OECD and the World Bank, together with Oman, Saudi Arabia and Vietnam as permanent observers, and the current involvement of David Murray, Chairman of Australia's Future Fund Board of Guardians, as the chair; and Jin Liqun, Chairman of the Board of Supervisors, China Investment Corporation and Bader Mohammad Al-Sa'ad, Managing Director, Kuwait Investment Authority, as the deputy chairs, collectively boost the legitimacy of IWG's objectives.

The Santiago Principles have been welcomed in principle by the recipient countries. For example, as discussed in the section below, the OECD which had given its input to the making of the Santiago Principles reaffirmed the content of such principles in its Declaration on Sovereign Wealth Funds and Recipient Country Policies, General Investment Policy, Guidelines for Recipient Country Investment Policies relating to National Security and Freedom of Investment Process: Preserving the Foundations of Global Prosperity and Development (collectively, the 'OECD's Recipient Country Policies').[35]

Independent evaluations of SWFs such as the scoreboard drawn up by Truman[36] have motivated certain governments to boost existing levels of accountability and transparency for their SWFs' operations and investments. For example, in response to the then low ranking of Singapore SWFs by Truman, the Singapore Government assured the parliamentarians that it was engaged "in talks with the US authorities" and that Truman had sought its "inputs".[37] The continued economic crisis and the consequent depressed values of Singapore SWF investments and significant losses, particularly U.S. portfolios such as Barclays[38], Citigroup, Inc.[39] and Merrill Lynch (recently, taken over by Bank of

[34] The members are Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Iran, Ireland, Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, The United Arab Emirates, The United States.
[35] OECD Investment Committee (Oct.2008) at http://www.oecd.org/dataoecd/0/23/41456730.pdf.
[36] *See* Edwin M. Truman, in *A Scoreboard for Sovereign Wealth Funds*, (Oct. 19, 2007) at http://www.iie.com/publications/papers/truman1007swf.pdf; and Edwin M. Truman, *A Blueprint for Sovereign Wealth Fund Best Practices*, POLICY BRIEF 08-3 (Apr. 2008) at http://www.petersoninstitute.org/publications/pb/pb08-3.pdf.
[37] *See* speech by Second Minister of Finance, Lim Hwee Hua in SINGAPORE PARLIAMENTARY DEBATES (Mar. 3, 2008).
[38] *See e.g., Alvin Foo, Temasek's Barclays stake 'sold'*, THE STRAITS TIMES (SINGAPORE) (Jun. 5, 2009).
[39] *See e.g.*, Grace Ng, *GIC Pumps $9.8b into Troubled Citigroup*, THE STRAITS TIMES (SINGAPORE) (Jan. 15, 2008).

America)[40], have led to repeated calls for a substantive review of their global and regional investment strategies.[41]

As the global economy further deteriorated in the third quarter of 2008 and first half of 2009, many of the recipient countries abandoned the rhetoric of national security and sovereignty, and renewed their courtship of SWF investments.[42] SWFs are however re-assessing their investment holdings and strategies. Financial analysts estimate that the SWF assets under management have dropped from some US$3,600 billion (end of 2007) to US$3,000 billion at the end of the first quarter of 2009.[43] The SWFs' varied responses to the current economic crisis comprise the postponement of investments, sale of investments with materially diminished expected returns, and new focus in emerging markets or non-financial industries which afford higher dividend returns.[44]

III. A MODEL OF GOVERNANCE: CONSULTATION, COOPERATION, COORDINATION

A. Between Nationalism & Globalization

Contemporary SWF investments accentuate the difficulties in balancing the differing national interests of the SWF and recipient countries. One country's debit on the foreign reserves balance sheet is after all another country's credit on its balance sheet. While few deny the mutual benefit of free trade and investment and flow of capital, perceptions of undue gain or unfair discrimination at the expense of domestic interests of recipient and SWF countries respectively continue to surround SF investments. Compliance with the investment, securities and disclosure laws and regulations of recipient countries does not necessarily 'immunize' SWF investments from threats of nationalistic sentiments.

For example, in January 2006, Temasek together with a group of Thai investors, purchased an initial of 49.6 per cent stake in Shin Corp, Thailand's telecommunications listed company for US$1.9 billion, from then popularly elected Thai Prime Minister

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[40] *See e.g.*, Saskia Scholtes and Greg Farrell, *Singapore state fund counts Merrill losses*, FINANCIAL TIMES: "The state agency's unrealised losses could amount to more than US$2 billion, excluding any hedges". Temasek's stakeholding has recently been sold due to its investment focus shift from developed countries to emerging markets*: see* SINGAPORE PARLIAMENTARY DEBATES, *Temasek Holdings (Sale of Bank of America Shares)*, vol. 86 (May 28, 2009).

[41] *See e.g.*, SINGAPORE PARLIAMENTARY DEBATES, *Debate on Annual Budget*, vol. 85 (Feb. 10, 2009) where it was observed that the collective losses incurred by GIC and Temasek were estimated to be S$50 billion.

[42] Cite

[43] David Oakley, *Sovereign wealth funds suffer sharp falls*, THE FINANCIAL TIMES (20 Jul., 2009).

[44] *See e.g.*, *Qatar fund puts off investments*, GULF DAILY NEWS (Mar. 13, 2009).

Thaksin and his family.[45] The purchase triggered a mandatory offer for the remaining stake resulting in a total stake-holding of 96% by the Temasek-led consortium for US$3.8 billion. The change in the telecommunication laws governing the foreign ownership cap[46] shortly before Temasek's initial purchase in Jan. 2006 triggered fears of political interference in Thailand's domestic laws and practices..[47] Charges of corruption and market manipulation were made against Thaksin[48] resulting in nationalistic sentiments against a sell-out of vital national assets.[49] A military coup occurred and Thaksin was toppled as prime minister in September, 2006. Subsequently, Temasek diluted its stake in Shin Corp; its stake-holding is now reflected as 42%.[50]

A second example is the sale of P&O Ports North America to AIG Global Investment Group by Dubai Ports World (DPW), a state owned company in United Arab Emirates, in March 2007. These ports had already been foreign-owned by Peninsular and Oriental Steam Navigation Company, a British firm taken over by DPW in March 2006.[51] Although the takeover had been approved by the executive branch of the U.S. government, the bipartisan opposition in U.S. Congress was unrelenting in light of fears that the takeover would compromise U.S. port security.[52] Another example of a foreign direct investment in U.S. that attracted adverse political reaction particularly within the U.S. Congress is China National Offshore Oil Company Ltd's (CNOOC) acquisition offer

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[45] Bryan Lee, *Temasek partners complete Shin Corp takeover*, THE STRAIT TIMES (SINGAPORE), March 15, 2006.

[46] On January 23, 2006, the Thai TELECOMMUNICATION ACT (2006) became effective, raising the limit on foreign holdings in telecom companies to 49%. The Act replaced the Telecom Business Law which took effect in November 2001, and put the foreign investment cap at 25%. Angela Tan, *Temasek'sStake in Thai Bank Under Scrutiny*, BUSINESS TIMES (SINGAPORE), Apr. 6, 2006; *Kularb Kaew Has 1 Year to Cut Non-Thai Shareholding*, NATION (THAILAND), Jan. 10, 2007.

[47] *See, e.g.*, Bidhya Bowornwathana, *Thaksin's model of government reform: Prime Ministerialisation through "a country is my company" approach*, 12 ASIAN J. OF POL. SCIENCE 135 (2004).

[48] *See, e.g., Shin Corp losses hit Temasek after coup*, FIN. TIMES, Sep. 22, 2006.; *Singapore may see worst fallout from Thai coup*, FIN. TIMES, Sep. 20, 2006. *See also*, *Temasek 'may have overstepped ownership laws' in Shin Deal*, THE STRAITS TIMES (SINGAPORE), Oct. 3, 2006; *Thai probe turns up heat on Temasek's Shin deal*, THE STRAITS TIMES (SINGAPORE), Oct. 2, 2006.

[49] Leslie Lopez, *Shin Corp deal fallout spooks foreign investors in Thailand*, STRAIT TIMES (Singapore), Nov. 8, 2006.

[50] *See* ANNUAL TEMASEK REVIEW 2008, http://www.temasekholdings.com.sg/media_centre_temasek_review.htm.

[51] DP World Press Release, DP World US Asset Sale Complete (Mar. 16, 2007) at http://portal.pohub.com/pls/pogprtl/docs/PAGE/DP_WORLD_WEBSITE/DP_WORLD_MEDIA_CENTRE/MEDIA_CENTRE_NEWS_RELEASES/NEWS_RELEASES_2007/US%20ASSET%20SALE%20MAR%2016.PDF DP WORLD US ASSET SALE COMPLETE (Mar. 16, 2007).

[52] See *e.g.*, David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, NY TIMES (Mar. 10, 2006).

for Unocal Oil Company. According to a CNOOC spokesperson, "political pressure" was one of the major reasons for the company to withdraw the offer.[53]

A recent example is the collapse of a proposed acquisition US$19.5 billion stake in the Australian-British mining giant Rio Tinto Group by China's state-owned Aluminium Corporation of China[54].[55] The board of Rio Tinto Group announced that it would issue new stock and form a joint venture with its long time rival, the Australian mining giant BHP Billiton, instead. While the deal collapse can be justified on commercial grounds[56], the deal, which would have been the Chinese government's largest investment in a Western corporation, incited intense political opposition in Australia.[57]

Any proposal for the governance or regulation of SWF investments must tackle the issues underlying the absence of an international regime of oversight of international financial markets.[58] The question whether there is any meaningful potential in the regulation of international financial relations and global capital markets at the level of public international law remains uncertain.[59] First, there is no one unified body that represents a wide range of countries and diverse interests. There is instead a somewhat complex and overlapping matrix of actors – standard-setting bodies such as the Basel Committee, International Organization of Securities Commissions, and Financial Action Task Force; international economic organizations such as the IMF, International Bank for Reconstruction and Development and World Trade Organization; regional organizations such as the African Union, European Union, Organization of American States, Arab League, and Association of Southeast Asian Nations, South Asian Association for Regional Cooperation. Second, the jurisdiction and rules of each actor vary such that the

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[53] See *CNOOC Withdraws Unocal Bid*, XINHUA NEWS AGENCY (Aug. 3, 2005) at http://www.china.org.cn/english/2005/Aug/137165.htm.

[54] http://www.chalco.com.cn/zl/web/chinalco_en_show.jsp?ColumnID=122

[55] *See e.g.*, Jamil Anderlini and Sundeep Tucker, *Outmanoeuvred*, FINANCIAL TIMES (Jun. 11, 2009).

[56] See *e.g.*, *Australian Treasurer: Chinese investment is welcome*, XINHUA NEWS (Jun. 6, 2009) at http://news.xinhuanet.com/english/2009-06/06/content_11499364.htm. "Rio's made their decision and Chinalco's made theirs completely independent of government."; *Chinese ambassador: Chinalco deal "win-win" for Australia-China*, XINHUA NEWS (May 26, 2009) at http://news.xinhuanet.com/english/2009-05/26/content_11437131.htm : China provided reassurances that it was not trying to take control of Australia's resources industry through Chinalco's bid for Rio Tinto.

[57] The political campaigns against the deal coincided with a Senate inquiry into foreign investments by state-owned entities. On 18 March 2009, the Senate referred the following matters to the Senate Standing Committee on Economics for inquiry and report by 17 July 2009: http://www.aph.gov.au/Senate/committee/economics_ctte/firb_09/index.htm.

[58] *See e.g.*, Peter Behrens, *The International Architecture of Global Financial Markets* 6(3) MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 271-88 (1999).

[59] See generally, RAINER GROTE AND THILO MARAUHN *eds*, THE REGULATION OF INTERNATIONAL FINANCIAL MARKETS (Cambridge, UK: Cambridge University Press, 2006).

rule-setting and enforcement mechanisms of such actors depend on the agreement and submission of its members which are typically, States. Indeed, the area of international investment law is littered by a series of unsuccessful or marginalized attempts to create multilateral treaties by international organizations. States are unable to agree on the rules governing foreign investment.[60] Consequently, regulatory power exercised at the level of the nation-state being economically, politically and legally endowed with sovereignty, constitutes the primary standard setting and enforcement agency. It is therefore unlikely for any coherent overarching economic, institutional or legal framework regulating financial markets particularly involving SWF investments, to emerge in the near future.[61]

The current global economic crisis triggered by the collapse of the U.S. financial markets formerly celebrated for their free market ideology has rendered the philosophy of neo-liberalism embodying free markets, competition, privatization and minimal regulation unfashionable and untenable.[62] The new phenomenon of "state capitalism as opposed to market capitalism" discards the Western conception of the trade and foreign investment liberalization, and the minimal role of governments in the economy, specifically, the Washington Consensus.[63] It affirms instead the more regulatory approach taken by the governments of 'non-Western' SWFs towards their own domestic economies.[64] While increased governmental oversight and regulation is necessary to correct the abuses of domestic financial markets,[65] national and regional regulators seeking to prevent outflows of capital in the current crisis may wield excessive prudential

[60] In particular, the failed attempt by OECD to put forward a Multilateral Agreement on Investment in the 1990s: see *e.g.*, M. Sornarajah, *Multilateral instruments on foreign investment* in THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (United Kingdom: Cambridge University Press, 2004). In contrast, North American Free Trade Agreement (NAFTA), a regional treaty, contains strong provisions on foreign investment, provides for a strong investor-state dispute resolution mechanism.
[61] *See* Rolf H. Weber and Douglas W. Arner, *Toward A New Design For International Financial Regulation*, 29 U.PA.J. INT'L. L. 391 (2007) at p. 427.
[62] For a policy perspective, see Peter Nunnenkamp, *Liberalisation and Regulation of International Capital Flows: Where the Opposites Meet* in Grote and Marauhn, *supra* note 59.
Cf., FT Reporters, *Bush comes out fighting for free markets*, FINANCIAL TIMES (Nov. 13, 2008). *See Testimony of Alan Greenspan*, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (Oct. 23, 2008) at http://oversight.house.gov/documents/20081023100438.pdf; and *Greenspan Concedes to 'Flaw' in His Market Ideology*, BLOOMBERG (Oct. 23, 2008).
[63] An initial neo-liberal development policy framework constructed by powerful financial institutions such as the World Bank, the IMF and US Treasury. Its main components are fiscal discipline, tax reform, liberalization of interest rates, trade and foreign investments, a comprehensive exchange rate and deregulation. *See* BEHROOZ MORVARIDI, SOCIAL JUSTICE AND DEVELOPMENT (Palgrave Macmillan 2008) at pp.72-106; and NARCIS SERRA AND JOSEPH E. STIGLITZ, THE WASHINGTON CONSENSUS RECONSIDERED (United Kingdom: Oxford University Press, 2008).
[64] *See e.g.*, Peter S. Goodman & Louise Story, *Overseas Investors Buying U.S. Holdings at Record Pace*, NY TIMES (Jan. 20, 2008) at A1 (quoting Prof. Jeffrey E. Garten, Yale School of Management), as cited by Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345 (2008).
[65] For an example of arguably lax regulatory oversight, see *e.g.*, Joanna Chung, *SEC flaws exposed by Madoff scandal*, FINANCIAL TIMES (Feb. 13, 2009).

regulatory powers. Governments desperate to stem financial losses have adopted different approaches contrary to the coordinated global response espoused at the G20 Washington summit of 2008. Towards the end of 2008, several Western governments approved various bailout plans in an attempt to salvage their respective faltering domestic economies.[66] As the economic crisis deepens, the repeated intervention of Western governments continues[67], with similar bailout plans implemented by Asian[68] and Middle Eastern[69] countries.

The fact that WTO recently discarded plans to seek a Doha breakthrough for a new trade deal severely underscores the faltering political will to avoid protectionist measures narrowly tailored to rescue domestic economies.[70] Groups such as the G-7[71], G-20[72] and ASEAN[73] have however provided assurances that they would not engage in protectionism. Still, there is no consensus concerning the nature and type of acts that amount to harmful protectionism. Indeed, the differing terms of bailouts granted by each government to struggling industries further accentuate the existence of protectionism.[74] Since protectionism endangers global trade and capital flows that are essential to the

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[66] *See e.g.*, Deborah Solomon and David Enrich, *Devil Is In Bailout's Details Government's $250 Billion Cash Injection Sparks Welter of Issues*, WALL STREET JOURNAL (Oct. 15, 2008); *French parliament approves massive bank rescue package* AFP (Oct. 15, 2008): 360-billlion-euro bank rescue package; *Rescue plan for UK banks unveiled*, BBC (Oct. 8, 2008) - US$692 billion; *German Government Sets Conditions for Bank Bailout*, DEUTSCHE WELLE (Oct. 20, 2008) - 480 billion Euros.

[67] *See e.g.*, Nikki Tait, *Brussels proposes €200bn stimulus*, FINANCIAL TIMES (Nov. 26, 2008); John Murray Brown, *Cautious welcome for Irish recapitalization*, FINANCIAL TIMES Dec. 22, 2008) for a brief comparison of the terms of the Irish government's €5.5bn (£5.1 billion) recapitalization, with the terms of bailout of banks by the UK government (more £50 billion). *See* also Daniel Dombey and Edward Luce, *US stimulus clears Congress*, FINANCIAL TIMES (Feb. 13, 2009): economic stimulus of US$787 billion; and U.S. Treasury Department Office of Financial Stability report, at http://www.financialstability.gov/docs/transaction-reports/transactions-report-060509.pdf - the net total treasury capital purchase amount was US$197,530,948,000 as of Jun. 3, 2009.

[68] *See e.g.*, *China unveils massive stimulus plan amid global crisis; Premier calls for confidence*, XINHUA NEWS (Mar. 6, 2009); Aditya Suharmoko, *Stimulus package approved, raised*, JAKARTA POST (Feb. 25, 2009): Robin Harding, *Aso launches $154bn Japan stimulus*, FINANCIAL TIMES (Apr. 10, 2009); Tom Mitchell, *Hong Kong to launch additional stimulus*, FINANCIAL TIMES (May 26, 2009); Soraya Permatasari and Ranjeetha Pakiam, *Malaysia Unveils $16 Billion Stimulus Amid Slowdown (Update1*), BLOOMBERG (Mar. 10, 2009); *Singapore announces $13.6B stimulus*, CNN (Jan. 22, 2009).

[69] *See e.g.*, *Dubai Gets $10 Billion Bailout to Ease Debt*, WALL STREET JOUNRAL (Feb. 23, 2009); *Saudi stimulus plan to boost demand, output*, ARAB NEWS (Apr. 27, 2009); Diana Elias, *Kuwait Seeks Quick Action on Stimulus*, ARAB NEWS (Mar. 25, 2009).

[70] *See e.g.*, *WTO won't seek Doha breakthrough this year*, INTERNATIONAL HERALD TRIBUNE (Dec. 12, 2008).

[71] *See e.g.*, Guy Dinmore, *G7 pledges to avoid protectionism*, FINANCIAL TIMES (Feb. 14, 2009).

[72] *See e.g.*, George Parker, et. al, *G20 leaders hail crisis fightback*, FINANCIAL TIMES (Apr. 2, 2009).

[73] *See* however, Tim Johnston, *Asean split on protectionism*, FINANCIAL TIMES (Feb 28. 2009). However, no real consensus on the balance to be struck between sustaining open markets and promoting economic activity at home was obtained.

[74] *See e.g.*, Krishna Guha, *Difficult promise of co-ordinated response*, FINANCIAL TIMES (Nov. 14, 2008). *See* also Stephen Castle and Dan Bilefsky, E.U. President Calls U.S. Stimulus the 'Way to Hell', NY TIMES (Mar. 26, 2009): European countries, including Germany, have resisted calls to increase the scale of their fiscal stimulus arguing, that the G-20 should concentrate on tightening financial regulation.

recovery of the global economy, it is critical that governments not only harmonize and incorporate[75] international standards in their respective domestic laws and policies by mutual consultation, cooperation and coordination.

B. The Scope of Customary International Law & Bilateral Agreements As 'Gap-Fillers'

In general, the right of a State to control the entry and operation of foreign and domestic investments that flows from sovereignty is unlimited. A State can therefore significantly affect foreign interests subject only to customary international law, and specific provisions of bilateral, regional or multilateral treaties assuming both SWF and recipient countries are contracting parties.

1. The absence of international law norms

There is no customary international law governing the entry and operation of foreign investments *per se* given the absence of two essential components, practice and opinion juris[76]. This lack of a common ground concerning specific far-reaching standards of foreign investment protection is underscored by the failure to complete the negotiations relating to the Multilateral Agreement on Investment (MAI) which were launched by the OECD governments in 1995.[77] Presently, customary international law only prohibits certain expropriation by host States such as discriminatory takings or takings without compensation.[78] Foreign assets and use thereof may be subject to taxation or trade restrictions. Such measures are not unlawful in the absence of special facts.[79] Non-discriminatory measures relating to anti-trust, consumer protection, environmental protection, land planning and national security which are essential to the efficient functioning of the State, are typically non-compensable takings.[80]

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[75] *See e.g.*, Reuven S Avi-Jonah, *National Regulation of multinational Enterprises – An essay on comity extraterritoriality and harmonization*, 42(1) COLUMBIA JOURNAL OF TRANSNATIONAL LAW 5-34 (2003).

[76] *See e.g.*, Oppenheim's International Law at 27 and *Columbia v. Peru*, ICJ Rep (1950) at 267-277 for the meaning of customary international law.

[77] *See* OECD, *Multilateral Agreement on Investments*, at http://www.oecd.org/daf/mai/intro.htm. The MAI was intended to be a "free standing international treaty, open to all OECD Members and the European Communities, and to accession by non-OECD Member Countries" and to "provide a broad multilateral framework to for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures". Negotiation ceased in 1998 due to the lack of consensus among the OECD countries.

[78] Takings for a public purpose as provided by law and with compensation are permitted. *See* generally, M. Sornarajah, *Controls by the host state* in THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (United Kingdom: Cambridge University Press, 2004).

[79] Ian Brownlie, PUBLIC INTERNATIONAL LAW, (United Kingdom: Oxford University Press, 2003) at 509

[80] *See e.g.*, OECD, *Indirect Expropriation" and the "Right To Regulate* in INTERNATIONAL INVESTMENT LAW (No. 2004/4) pp 3-5, 16 at http://www.oecd.org/dataoecd/22/54/33776546.pdf.

Multilateral treaties such as the General Agreement on Trade and Tariffs (GATT), General Agreement on Trade and Services (GATS) and Agreement on Trade-Related Investment Measures (TRIMS)[81] which relate to trade in goods, services and investment measures involving trade in goods respectively, do not directly address the issues posed by SWF investments. For example, unless the recipient country acts in a manner that adversely affects the trading in goods or services a corporation owned by an SWF, these multilateral treaties do not protect SWFs or their direct and portfolio investments from unfair or nationalistic intervention by governments of recipient countries.

2. The potential application of bilateral investment treaties

Bilateral investment treaties (BITs) such as free trade treaties potentially afford some protection for SWFs and their investments by conferring the most favored nation status, national treatment and fair and equitable treatment.[82] Most BITs adopt an expansive, open-ended interpretation of the term 'investment', thereby encompassing numerous types of investment forms and assets. For example, according to the 2004 US Model BIT:

> ""investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) intellectual property rights;
>
> (g) licenses, authorizations,

[81] For the full texts, see World Trade Organization, http://www.wto.org/english/docs_e/legal_e/legal_e.htm#agreements.

[82] *See e.g.*, Locknie Hsu, SWFs, *Recent US Legislative Changes, and Treaty Obligations*, 43(3) JOURNAL OF WORLD TRADE 451 [2009] at 458-469.

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."[83]

While most if not all BITs include corporate entities under the term "investor", the term has varying parameters. Other terms subject to differing interpretations are the place of incorporation and the concept of "control", as may be applied to an entity with numerous investment and management centers and an entity with indirect or informal means of "control" respectively. Any dispute concerning a SWF investment is likely to fall within the scope of one or more BITs. Taking Singapore SWFs as an example, although SWF investments are not specifically mentioned in the US - Singapore Free Trade Agreement (USSFTA)[84], the similarly worded definitions of "investment"[85] and "investor"[86] are broad enough to encompass their direct and portfolio investments.

Although most BITs provide some assurance against direct and indirect expropriation, there are critical exceptions or qualifications.[87] Pursuant to the relevant provisions of BITs or domestic law, host or recipient countries may carve out restrictions or limitations falling within "legitimate public welfare objectives" such as "public health, safety and the environment" from the provisions relating to "indirect expropriation" of rights in investments.[88] Many BITs contain an overriding exception that allows a recipient country to implement "measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[89] Moreover, there are specific exceptions that apply to investments in the financial services industry. For example, Article 10.10(1) of USSFTA provides, *inter alia*, that the recipient or host State can adopt measures for "prudential reasons" including "the maintenance of the safety,

[83] Article 1, US 2004 Model BIT at http://www.state.gov/documents/organization/117601.pdf. For a similar and arguably broader definition, see the German model treaty at http://www.fes-globalization.org/dog_publications/Appendix%201%20German%20Model%20Treaty.pdf.
[84] Office of the United States Trade Representative, final text (2003) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.
[85] Article 15.1: "investment means every asset owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives …"
[86] Article 17: "investor of a Party means a Party or national or an enterprise of a Party that is seeking to make, is making, or has made an investment in the territory of the other Party; provided, however that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality …".
[87] *See e.g.*, OECD, *supra* note 80 at pp. 16-21 for observations on bilateral investment treaties' provisions and state practice.
[88] *See e.g.*, the 2004 Model BIT issued by the U.S. Department of State, Annex B, paragraph 4(b) at http://www.state.gov/documents/organization/38710.pdf, as reflected in one BIT, *Exchange of Letters on Expropriation* (6 Jul., 2003) in relation to U.S. - Singapore Free Trade Agreement.
[89] *E.g.*, Article 18 of the US Model BIT and Article 21.2, USSFTA

soundness, integrity or financial responsibility of individual financial institutions or cross-border financial service suppliers" and "the protection of investors, depositors, policy holders", or "to ensure the integrity and stability of the financial system".

Terms such as "national security" in FINSA and "essential security interests" specified in BITs, GATT and GTS are subject to varying interpretations. Questions such as whether the terms are similar, whether an objective or subjective ("self-judging") test applies, and whether the terms ought to include fiscal crises beyond military or defense related threats have been raised. For example, concepts of "public order" and "essential security interests" embodied in Article XI, the U.S. Argentina Bilateral Investment Treaty[90] have been subject to a string of International Centre for Settlement of Investment Disputes (ICSID) rulings endorsing different views and interpretations as to whether the magnitude of Argentina's financial crisis allowed it to derogate from its legal obligations to foreign investors.[91] In the *Continental Casualty v. Argentina* arbitration, the tribunal viewed Article XI and customary international law defence of necessity as separate defences open to Argentina, and rejected the earlier approach in *Sempra Energy International v. Argentina Republic*[92] which construed Article XI exceptions in accordance with the more stringent tests prescribed under customary international law. The tribunal ruled that either exception could encompass situations arising from a severe economic crisis, and endorsed a "significant margin of appreciation" when it came to applying measures: "a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight".[93] It however rejected Argentina's argument that Article XI should be viewed as "self-judging" by the state.[94]

Regulators in recipient countries are also likely to require SWFs to undertake not to acquire rights of control or management, or any role in governance, in the relevant corporations, contrary to allegations that there is "little accountability to regulators".[95] Specific undertakings relating to the suspension of voting or participation rights may be

[90] The U.S. Trade Compliance Center, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp

[91]. For an analysis of ICSID decisions relating to Argentina such as *CMS Case Transmission Company v. the Argentina Republic*, ICSID Case ARB/01/08 (2003), *Sempra Energy Internationa v. the Argentine Republic*, ICSID Case ARB/02/16 (2007), *Enron Corporation and Ponderosa Assets, L.P. v the Argentine Republic*, ICSID Case ARB/01/03 (2007), *LG&E Corp., LG&E Capital Corp. and LG&E International Inc. v. the Argentine Republic*, ICSID Case ARB/02/1 (2007) and *Continental Casualty Co. v Argentina*, ICSID Case ARB/03/9 (2008), *see e.g.*, Locknie Hsu, SWFs, *Recent US Legislative Changes, and Treaty Obligations*, 43(3) JOURNAL OF WORLD TRADE 451 [2009] 462-472.

[92] *Sempra Energy Internationa v. the Argentine Republic*, ICSID Case ARB/02/16 (2007).

[93] *Continental Casualty Co. v Argentina*, ICSID Case ARB/03/9 (2008) at para. 181.

[94] *Ibid.*, at paras. 182-188.

[95] *The invasion of the sovereign-wealth funds*, ECONOMIST (Jan. 17, 2008).

required under the recipient countries' securities laws or laws governing foreign investments.[96]

Furthermore, regulators sometimes deviate from corporate standards of control stipulated in current laws and regulations by pursuing a more malleable concept whereby they exercise jurisdiction to review and take action in transactions where the foreign investor acquires less than a majority of the domestic corporation's voting securities. For example, the CFIUS reviewed the proposed acquisition of 3Com Corporation by Bain Capital Investors, LLC, a private equity fund, and Huawei Technologies Co., a Chinese company known for its strong ties with the government of China.[97] The 'national security' concern stemmed from 3com's defense technology and TippingPoint, a security software firm, used by the U.S. The parties abandoned the deal because they failed to reach a "mitigation" agreement typically involving safeguards and pledges with CFIUS.[98] SWFs are likely to encounter similar treatment. Faced with the prospect of a lengthy or unpredictable review, SWFs are likely to withdraw from their investment plans. The delay and undue publicity place SWFs at a disadvantage compared to other institutional buyers such as hedge funds and insurance companies.

It may be possible to challenge the legality of CFIUS' review of SWF, assuming the SWF and recipient country are contracting parties to an agreement similar to the US Model BIT.[99] Articles 11(4) and 11(5) of the US Model BIT stipulates that each party shall ensure that its administrative proceedings are carried out in a "consistent, impartial and reasonable manner", and "shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions". It has been observed that draconian powers such as the retrospective review of existing transactions[100], the exemption from public disclosure of information filed with the President or his designee[101], the exclusion

[96] For example, Singapore SWF, Temasek Holdings', which invested in Merrill Lynch, had no rights of control. See Merrill Lynch & Co., Inc, *Merrill Lynch Enhances Its Capital Position by Raising Up to $6.2 Billion From Investors, Temasek Holdings and Davis Selected Advisors* (Dec. 24, 2008) at http://www.ml.com/index.asp?id=7695_7696_8149_74412_86378_87784; and Merrill Lynch & Co., Inc, TERM SHEET (Dec. 24, 2008) at http://www.ml.com/media/92240.pdf.

[97] See Steven R Weisman, *Block China's 3Com Deal*, NY TIMES (Feb. 21, 2008).

[98] 3Com, *3Com and Bain Capital Partners Announce Mutual Withdrawal of CFIUS Application*, PRESS RELEASE (Feb. 20, 2008) at http://www.3com.com/corpinfo/en_US/pressbox/press_release.jsp?INFO_ID=281478

[99] The US Government, http://www.state.gov/documents/organization/117601.pdf

[100] See Section 721(a)(3) of the Defense Production Act of 1950 (50 U.S.C. App. 2170) - 'covered transaction' means any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.

[101] See Section 721(c) of the Defense Production Act of 1950 (50 U.S.C. App. 2170) - Confidentiality of information.—Any information or documentary material filed with the President or the President's

of judicial review of the President's actions and findings[102], exercisable pursuant to FINSA, contravene BIT provisions similar to the aforementioned Articles 11(4) and 11(5). [103]Nevertheless, if one accepts that concepts of "national security" and "essential security interests" encompass economic crises albeit some controversy concerning the severity of the crisis, the overriding carve-outs in BITs, GATT and GTS would whitewash a review or action implemented pursuant to FINSA.

C. The Domestic SWF Rule of Law

In general, SWFs as government entities, are subject to wealth management benchmarks[104] and the corporate rule of law – procedural norms of accountability, transparency and disclosure. These are enforced pursuant to a mix of public and private laws and practices in their home countries[105]. These procedural norms are broadly consistent with the Santiago Principles, particularly, the following:-

> **GAPP 4. Principle**: There should be clear and publicly disclosed policies, rules, procedures, or arrangements in relation to the SWF's general approach to funding, withdrawal, and spending operations.
>
> GAPP 4.1 Sub-principle The source of SWF funding should be publicly disclosed.
>
> GAPP 4.2 Sub-principle The general approach to withdrawals from the SWF and spending on behalf of the government should be publicly disclosed.
>
> **GAPP 10. Principle**: The accountability framework for the SWF's operations should be clearly defined in the relevant legislation, charter, other constitutive documents, or management agreement.
>
> **GAPP 11. Principle**: An annual report and accompanying financial statements on the SWF's operations and performance should be prepared in a timely fashion and in accordance with recognized international or national accounting standards in a consistent manner.

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designee pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.

[102] See Section 721(e) of the Defense Production Act of 1950 (50 U.S.C. App. 2170).

[103] *See e.g.*, Locknie Hsu, SWFs, *Recent US Legislative Changes, and Treaty Obligations*, 43(3) JOURNAL OF WORLD TRADE 451 [2009] at 462, 469-472.

[104] For an overview of the challenges of managing sovereign wealth, *see* generally, JENNIFER JOHNSON-CALARI AND MALAN RIETVELD *eds.*, SOVEREIGN WEALTH MANAGEMENT (Central Banking Publications, 2007).

[105] *See e.g.*, Anna Gelpern, *Sovereign Wealth Turn*, RUTGERS SCHOOL OF LAW-NEWARK RESEARCH PAPERS No. 025 (Sep. 22, 2008) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272395.

GAPP 12. Principle: The SWF's operations and financial statements should be audited annually in accordance with recognized international or national auditing standards in a consistent manner.

GAPP 15. Principle: SWF operations and activities in host countries should be conducted in compliance with all applicable regulatory and disclosure requirements of the countries in which they operate.

GAPP 18. Principle: The SWF's investment policy should be clear and consistent with its defined objectives, risk tolerance, and investment strategy, as set by the owner or the governing body(ies), and be based on sound portfolio management principles.

GAPP 18.1 Sub-principle: The investment policy should guide the SWF's financial risk exposures and the possible use of leverage.

GAPP 18.2 Sub-principle: The investment policy should address the extent to which internal and/or external investment managers are used, the range of their activities and authority, and the process by which they are selected and their performance monitored.

GAPP 18.3 Sub-principle: A description of the investment policy of the SWF should be publicly disclosed.

GAPP 19. Principle: The SWF's investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy, and based on economic and financial grounds.

GAPP 19.1 Sub-principle: If investment decisions are subject to other than economic and financial considerations, these should be clearly set out in the investment policy and be publicly disclosed.

GAPP 19.2 Sub-principle: The management of an SWF's assets should be consistent with what is generally accepted as sound asset management principles.[106]

It has been observed that SWFs with the active involvement of political leaders are more sensitive to the social needs of the nation, and consequently are more willing to accept investments which have high social returns but low private returns.[107] The application of the rule of law however varies for each SWF, regardless of the nature of its constitution – whether as a publicly constituted arm of the government at one end or a private corporate entity wholly or substantially owned by the government. For example, the SWFs of Norway and Saudi Arabia, the Government Pension Fund and SAMA

[106] http://www.iwg-swf.org/pubs/gapplist.htm

[107] *See* Bernstein, Lerner and Schoar, *The Investment Strategies of Sovereign Wealth Funds*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER NO. 14861 (Apr. 2009).

Foreign Holdings respectively, are funds established by the respective Ministries of Finance. However, their governing corporate rule of law significantly differs, pursuant to divergent public laws and political structure of each government. As shown in Figure 2 below, in contrast to Norway's Government Pension Fund, SAMA Foreign Holdings' ranking on various research sources' scale of accountability, independence and transparency remains low notwithstanding its collective issuance of the Santiago Principles.

Figure 2: the Linaburg-Maduell Transparency Index

Country – SWF	**Ranking**	**Country – SWF**	**Ranking**
Singapore – Temasek	10	China – NCSSF	5
Ireland – NPRF	10	Vietnam	4
USA – Alaska	10	UAE – ICD	4
Norway – GPF	10	Malaysia	4
New Zealand	10	China – CADfund	4
Chile	9	Botswana	3
USA – New Mexico	9	Saudi Arabia – SAMA	3
South Korea – KIC	9	UAE – RAK	3
Canada – APFC	9	UAE – ADIA	3
Azerbaijan	9	Saudi Arabia – PIF	3
Australian Future Fund	9	UAE - EIA	2
USA – Wyoming	9	Libya – LIA	2
UAE – Mubadala	7	Kazakhstan	2
Bahrain	7	China – SAFE	2
Hong Kong – HKMA	7	Venezuela – FIEM	1
China – CIC	6	Oman	1
USA – Alabama	6	Nigeria	1
Timor-Leste	6	Mauritania	1
Singapore - GIC	6	Kiribati	1
Kuwait – KIA	6	Iran	1
Trinidad & Tobago	5	Brunei	1
Russia	5	Algeria	1
Qatar – QIA	5		

Point	**Principles of the Linaburg-Maduell Transparency Index**
+1	Fund provides history including reason for creation, origins of wealth, and government

	ownership structure
+1	Fund provides up-to-date independently audited annual reports
+1	Fund provides ownership percentage of company holdings, and geographic locations of holdings
+1	Fund provides total portfolio market value, returns, and management compensation
+1	Fund provides guidelines in reference to ethical standards, investment policies, and enforcer of guidelines
+1	Fund provides clear strategies and objectives
+1	If applicable, the fund clearly identifies subsidiaries and contact information
+1	If applicable, the fund identifies external managers
+1	Fund manages its own web site
+1	Fund provides main office location address and contact information such as telephone and fax

Source: Adapted from The Linaburg-Maduell Transparency Index (1st Quarter 2009)[108]

Several examples of SWFs constituted under private laws but owned by governments or their public arms, are China's China Investment Corporation (CIC)[109] and SAFE Investment Company (SAFE)[110], Singapore's The Government of Singapore Investment Corporation Pte Ltd (GIC)[111] and Temasek Holdings Pte Ltd (Temasek)[112], and United Arab Emirates' SWFs, Abu Dhabi Investment Company (ADIC)[113], Dubai International Capital LLC[114], and Mubadala Development Company (Mubadala)[115]. Most of the directors of all such SWFs hold concurrent positions in the executive branch of

[108] Developed by Carl Linaburg and Michael Maduell available at http://www.swfinstitute.org/research/transparencyindex.php.
[109] http://www.china-inv.cn/cicen/ China Investment Corporation (CIC) is an investment institution established as a wholly state-owned company under the Company Law of the People's Republic of China
[110] http://www.safe.gov.cn The SAFE Investment Company is organized as a privately held firm
[111] GIC was incorporated under the Companies Act (Cap. 50) of Singapore in 1981. It is wholly owned by the Government of Singapore and manages the foreign reserves of Singapore. Its website is http://www.gic.com.sg.
[112] Temasek was incorporated under the Companies Act (Cap. 50) of Singapore in 1974. It is wholly owned by the Government of Singapore and acts as an investment house for the Ministry of Finance. Its website is http://www.temasekholdings.com.sg.
[113] Founded in 1977, ADIC is a joint stock company that is jointly owned by the Abu Dhabi Investment Authority and the National Bank of Abu Dhabi and specializes in providing investment and corporate finance in addition to advisory services: http://www.adia.ae/.
[114] Dubai International Capital LLC is a Dubai-based international investment company with a primary focus on private and public equity. It was established in 2004 as a wholly owned subsidiary of Dubai Holding with the mandate to build an international portfolio of diverse business assets: http://www.dubaiic.com/en/company/about-dic.html.
[115] Mubadala is a Public Joint Stock Company established in 2002, wholly owned by the Government of the Emirate of Abu Dhabi. Its focus is on developing and managing an extensive and economically diverse portfolio of commercial initiatives: http://www.mubadala.com/.

government and other publicly owned corporations. SWFs such as CIC[116] and GIC[117] have independent advisory bodies. The degree of accountability and transparency of the government of each SWF country generally corresponds with the degree of involvement of external managers and committees, and foreign board directors or senior management officers.

In addition to the 'bottom-lines', such as income and capital gains benchmarks, certain SWFs are required by their respective domestic laws and internal regulations to ensure their investments comply with environmental and human rights laws. For example, Norway's SWF, Government Pension Fund-Global must ensure that its investments comply with ethical guidelines.[118] The business activities, operations and management of investee corporations are closely monitored by a council of ethics. Any breach of the ethical guidelines is likely to result in a divestment.[119]

D. A New Approach: Deliberative Fora & Good Practices

1. The decline of a central regulator & the rise of the deliberative fora

Given the fluidity of the financial markets and diverse interests, it would not be feasible for the oversight of a regime of international governance for SWFs and their investments to be entrusted to any particular international or regional institution or group. Regional bodies represent the interests of their members and may be weighted in favor of some countries. For example, most of the 30 members of OECD[120] are 'Western' countries who are the recipients of SWF investments. International organizations such as the IMF have structural flaws such as unequal quotas and voices in favour of countries with large economies.[121] This is likely to change in light of the increasing shift of

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[116] International Advisory Council http://www.china-inv.cn/cicen/governance/management_international.html

[117] Investment Committee http://www.gic.com.sg/aboutus_mgtteam_comm.htm; Risk Committee http://www.gic.com.sg/aboutus_mgtteam_riskcomm.htm

[118] See NBIM's website at http://www.norges-bank.no/templates/article____41206.aspx. For a detailed discussion on ethical divestment of NBIM, see Simon Chesterman, *The Turn to Ethics: Divestment from Multinational Corporations for Human Rights violations – The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577 (2008).

[119] *See e.g.*, Terry Macalister, *Ethical business: Norway ejects mining giant Rio from its pension portfolio*, GUARDIAN (Sep. 9, 2008), Mark Lander, *Norway Keeps Nest Egg From Some U.S. Companies*, NY TIMES (May 4, 2007): Norway added Wal-Mart Stores to its blacklist, alleging that the retailer was guilty of tolerating child-labor violations by its suppliers in the developing world and obstructing unions at home. The fund sold off more than $400 million worth of Wal-Mart shares. See also, Norway's Government Pension Fund Manager, NBIM, Investor Expectations on Children's Rights, (Nov. 2008) at http://www.norges-bank.no/templates/article____73703.aspx.

[120] Organization for Economic Cooperation and Development, at http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html.

[121] *See e.g.*, Nancy Birdsall, *Why it matters who runs the IMF and the World Bank*, in

economic power to non-Western countries such as China and India[122], and the broad consensus obtained at the G20 London summit of 2009 to implement the package of the IMF quota and voice reforms by 2011.[123]

In recent months, global fora such as the G20 meetings have been utilized as platforms to forge common values for both 'old' and 'new' economic powers.[124] It is noteworthy that G20 and not the 'old' economic powers such as G7 ('Western' powers with Japan) or G8 (G7 plus Russia) is being used as a forum to redress the current economic problems.[125] The global financial and trade frameworks are clearly evolving with the rise of new economic powers – Brazil, Russia, India and China (BRIC)[126], and the reversal of capital flow and economic power primarily from the geo-political 'West' to the 'East'.[127]

2. An alternative approach: SWF Principles as the 'good practices' catalyst

An alternative approach has been pursued through the establishment of 'soft' codes and 'good practices' such as the Santiago Principles and OECD Declaration on Recipient Countries' Policies (collectively, the SWF Principles). This approach relies on existing foreign investment laws and practices which already ensures the avoidance of the worst case scenarios concerning rogue SWFs. It avoids the dichotomy between 'hard' and 'soft' law that "marginalizes strategies not framed in the soft v. hard law language".[128] It also builds on existing bilateral investment agreements and cooperative platforms such as the G20, and bilateral and regional structures such as the U.S. Trade and Investment Framework Agreements provide strategic frameworks and principles for dialogue on

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GLOBALIZATION AND THE NATION STATE: THE IMPACT OF THE IMF AND THE WORLD BANK, Gustav Ranis, James Raymond Vreeland and Stephen Kosack, *eds.* (Oxon, UK: Routledge, 2006).

[122] *China wants more say in global financial bodies*, IHT (Oct. 29, 2008).

[123] G20 Communiqué from the London Summit, *The Global Plan for Recovery and Reform* (Apr. 2, 2009) para. 20 at http://www.g20.org/Documents/final-communique.pdf

[124] The G20 gathers the seven major industrialized countries (Britain, Canada, France, Italy, Japan, Germany and the United States) and Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey and the European Union. See http://www.g20.org/.

[125] Quentin Peel, *A wider order comes into view*, FINANCIAL TIMES (Apr. 5, 2009).

[126] An acronym first coined by Jim O'Neill in *Building Better Global Economic BRICs* (Goldman Sachs: Global Economics Paper 66, 2001). The BRIC first summit was held in June 2009: see *e.g.*, Isabel Gorst, *Medvedev urges 'fairer global order'*, FINANCIAL TIMES (Jun. 16, 2009).

[127] *See* generally, Jack Boorman, *Sixty Years After Bretton Woods: Developing a Vision for the Future*, Michael Buchanan, *The BRIC Dream: An Update*, Gordon de Brouwer, *Institutions to Promote Financial Stability: Reflections on East Asia and an Asian Monetary Fund* in THE INTERNATIONAL MONETARY SYSTEM, THE IMF AND THE G-20 - A GREAT TRANSFORMATION IN THE MAKING? Richard Samans, Marc Uzan and Augusto Lopez-Claros, eds. (World Economic Forum, The Reinventing Bretton Woods Committee) (New York USA: Palgrave MacMillan, 2007).

[128] Anna Di Robilant, *Genealogies of Soft Law*, 54 THE AMERICAN JOURNAL OF COMPARATIVE LAW 499 (2006) at p.544.

trade and investment issues between the United States and the other parties such as ASEAN and certain SWF countries, Kuwait, Qatar, Saudi Arabia and United Arab Emirates.[129]

Notwithstanding the remarkable speed at which the SWF Principles was formulated, they may however be criticized on several grounds. First, they are "illusory" due to their non-binding nature, akin to international agreements which are not legally binding. This criticism is however premised upon a particular Austinian conception of international law and its functions, and unjustifiably discounts the growing influence of "non-law" on the laws, policies and practices of States. It discounts the commercial feasibility in adhering to such "non-law" given the benefits and risks for both SWF and recipient countries.

Second, the SWF Principles suffer from vague concepts. In relation to the Santiago Principles, some examples are "sound" and "effective operation" (GAPP 1), "best interests of the SWFs" (GAPP 8), option to choose from either "recognized international or national auditing standards" (GAPP 12), "relevant financial information regarding the SWF should be publicly disclosed" (GAPP 17) and broad carve-outs such that each principle is "subject to home country laws, regulations, requirements and obligations",[130] an equivocal commitment to "explore the establishment of a standing group" for the facilitation of the understanding and implementation of the principles,[131] and an absence of a central regulator and enforcer.

In relation to the OECD Declaration on Recipient Countries' Policies, examples of policies containing contested concepts such as "protectionist", "discriminate" and "legitimate national security concerns" are: Recipient countries "should not erect protectionist barriers to foreign investment" and "discriminate among investors in like circumstances", "additional investment restrictions in recipient countries should only be considered when policies of general application to both foreign and domestic investors are inadequate to address legitimate national security concerns", .and where "such national security concerns do arise, investment safeguards by recipient countries should be transparent and predictable, proportional to clearly-identified national security risks, and subject to accountability in their application."

SWF and recipient countries appear to be *ad idem* concerning several broad principles and common values such as fiscal norms of propriety, profits and prudence,

[129] The Office of the U.S. Trade Representatives at http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements.
[130] Santiago Principles, *supra* note1 at 7.
[131] Santiago Principles, *supra* note 1 at 6.

corporate governance processes boosting accountability and transparency and macroeconomic objectives of growth and development and financial stability. Specific shared elements between the two 'interest' groups may be observed in the recently issued the SWF Principles. Both groups maintain their support for market liberalization, specifically, the freedom of investment and benefits of free flows of capital. They also advocate an adherence to the principles of accountability, independence and transparency; protectionism. Rogue investment strategies are also distinguished from real national security concerns and fair commercial competition. A new 'thin' SWF rule of law has emerged.

Notwithstanding the SWF Principles' non-binding nature and elusive concepts, its potential for SWF and recipient countries to reach a common understanding and practice should not be under-estimated. The SWF Principles, as a product of comity and cooperation between SWF and recipient countries, can form the integrative premise for specific agreements and arrangement in future.[132] These countries are free to adopt specific aspects of 'good practices' and 'harden' relevant national laws, policies and practices. 'Good practices' may be likened to a financial form of *lex mercatoria* which is an 'organic' set of self-creating and self-enforceable norms, that can be 'adopted' by international or domestic law and practice.[133]

Specifically, States may pursue their respective policy goals by entering into bilateral or regional arrangements that establish normative standards in line with the SWF Principles that incorporate access to arbitration venues such as ICSID without restraining their freedom to modify their laws or practices in pursuit of their national interests. Several examples of provisions that apply to SWF investments are: First, the relevant SWF country and its SWF covenant not to hold any position of control or management in specified 'sensitive' industries without the prior approval of the recipient country. Second, SWF and recipient countries agree to negotiate a mutually acceptable set of disclosure and transparency rules concerning the SWF's strategy and management in relation to the relevant investment. Third, the meaning of "national security" or "essential security interests" includes severe financial crises, particularly defined as, for example, a continued and drastic contraction of the economy over several financial quarters.

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[132] *See e.g.*, Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW 296 (1977) at 304.
[133] *See* Robilant, *supra* note 128 at 519-520 and 544; and Celia Wasserstein Fassberg, *The Empirical and Theoretical Underpinnings of the Law Merchant: Lex Mercatoria--Hoist with Its Own Petard?*, 5 CHI. J. INT'L L. 67 (2004).

Indeed, the broad framework of the SWF Principles has facilitated overall discourse, participation and creation of 'good principles, policies and practices' amongst recipient and home countries, and existing international and regional financial institutions and bodies. Within six months of the Santiago Principles' publication, the IWG established the International Forum of Sovereign Wealth Funds.[134] Although the forum is stipulated not to be a "formal supranational authority" and "its work shall not carry any legal force", it facilitates the continued exhange of views and study of SWF activites among the SWF and recipient countries, international organizations and market functionaries. The forum serves as a foundational step towards the synchronization of differing domestic laws and practices and the eventual adoption of uniform norms for SWF investments by each State.

The effectiveness of SWF Principles in relation to certain 'non-Western' SWFs is already evident. For example, shortly after the IWG was formed to create the Santiago Principles, the Singapore SWF, GIC issued a report on its investment strategies and policies.[135] Although the GIC report has not attained the same standards of accountability, disclosure and transparency as those relating to Western SWFs such as Norway, further changes are likely.[136] The other Singapore SWF, Temasek Holdings recently adopted a more transparent stance as evident from its press releases.[137] It currently ranks first on The Linaburg-Maduell Transparency Index (Figure 2) ahead of Government Pension Fund-Global of Norway, compared to its tenth position out of 47 SWFs in the second quarter of 2008[138]. In another development, Mubadala, an Abu Dhabi SWF, released its annual report showing losses of Dh11.8 billion (US$3.2 billion),[139] in a "first of its kind move" towards greater transparency by a Gulf state investment entity.[140]

IV. SINGAPORE SWFS AS AN OPTIMAL MODEL

This section examines the laws of Singapore and the practices of its SWFs, in light of the concerns articulated by both SWF and recipient countries. It observes that GIC and

[134] The "Kuwait Declaration" (Apr. 6, 2009) at http://www.iwg-swf.org/mis/kuwaitdec.htm.
[135] http://www.gic.com.sg/PDF/GICreport0708_Full.pdf.
[136] Lim, *supra* note 37.
[137] http://www.temasekholdings.com.sg/media_centre.htm.
[138] http://www.swfinstitute.org/news/augeight.php.
[139] http://www.mubadala.ae/en/category/investor-relations-12/annual-report-1/.
[140] Andrew England, *Gulf fund reveals $3.2bn loss as it releases first report*, FINANCIAL TIMES (Apr. 24, 2009).

Temasek are subject to private and public regimes of governance in Singapore.[141] It explores the possibility of extending certain provisions of Singapore's free trade agreements to its SWF investments. It then recommends Singapore SWFs as the model starting point for achieving an optimal balance between nationalism and global financial stability based on free capital and investment flows.

A. GIC and Temasek As Singapore's SWFs[142]

The Government of Singapore Investment Corporation Pte Ltd (hereinafter, 'GIC') and Temasek Holdings Pte Ltd (hereinafter, 'Temasek') are, respectively, the investment management and holding arms of the Singapore Government.[143] GIC and Temasek are private companies incorporated under Singapore's Companies Act (Cap. 50)[144] in 1981 and 1974 respectively, and are wholly owned by the Singapore Government. While GIC does not own assets and only manages assets and foreign reserves on behalf of the Singapore Government, Temasek owns and manages investments and assets previously owned by the Singapore Government during the first decade post independence in 1965.

Officially, as of Mar. 31, 2008,[145] GIC managed wealth of over US$100 billion[146] with an average annual rate of return of 4.5% above inflation in real terms, and Temasek owned a net portfolio value that has grown from an initial S$354 million transferred from the Singapore Government, to S$185 billion (US$134 billion)[147] with a total shareholder

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[141] *See, e.g.*, Kala Anandarajah, *Corporate Governance Reforms in Singapore—Economic Realities, Political Institutions, and Regulatory Frameworks* in REFORMING CORPORATE GOVERNANCE IN SOUTHEAST ASIA- ECONOMICS, POLITICS AND REGULATIONS (ISEAS Publications 2005) at 266 (detailed discussion on the role of Singapore Government and the independence of the companies linked or owned by it [similar to the concept of 'state owned enterprises' in North America]); Yvonne C.L. Lee, *The Corporate Rule of Law: Singapore's Securities Regulators*, 3 CORP. GOVERNANCE L. REV. 225 (2007); Joseph Y.S. Lim, Ruth S.K. Tan & S.Y. Ow, ANALYSTS' PERCEPTION AND PERFORMANCE OF GOVERNMENT LINKED COMPANIES (National University of Singapore 2008); Andrea Goldstein & Pavida Pananond, *Singapore Inc. Goes Shopping Abroad: Profits and Pitfalls*, 38 J. OF CONTEMP. ASIA (2008) 417.

[142] This article treats Temasek as one of Singapore's two SWFs, notwithstanding Temasek's perception of itself as an "atypical" SWF. *See* S. Dhanabalan, Chairman of Temasek, *Role of Sovereign Funds in Today's Globalization, Speech at The Indus Entrepreneurs Event* (Aug. 21, 2008), http://www.temasekholdings.com.sg/media_centre_news_speeches_210808.htm; *see also* the earlier discussion on the characteristics of SWFs, in Section II.

[143] *See generally* the websites of GIC and Temasek at http://www.gic.com.sg and http://www.temasekholdings.com.sg, respectively; *see also* Santiago Principles, *supra* note 1, at 44-47.

[144] COMPANIES ACT, Singapore (Cap. 50 Rev. Ed. 2006).

[145] However, the respective fund values have significantly depreciated since Mar. 31, 2008. *See, e.g.*, Lim Hwee Hua, *Temasek, GIC Losses Won't Drain Reserves*, THE STRAITS TIMES (Singapore), Feb. 15, 2009 (where Senior Minister of State for Finance Lim Hwee Hua assured parliamentarians that Singapore's reserves would not be depleted by the losses of Temasek and GIC).

[146] US$100–330. *See* Edwin M. Truman, Peterson Institute for International Economics, A Scoreboard for Sovereign Wealth Funds (2007), *available at* http://www.iie.com/publications/papers/truman1007swf.pdf.

[147] Temasek's portfolio is currently estimated at a reduced US$85 billion. Sovereign Wealth Fund Institute, *Sovereign Wealth Fund Rankings*, http://www.swfinstitute.org/funds.php.

return by market value and shareholder funds of over 18% since inception. Their geographical distribution of asset portfolios then comprised:

GIC[148]	Temasek[149]
40% (Americas: U.S. (34%), others (6%))	23% (OECD Economies excluding Korea)
35% (Europe)	
23% (Asia)	33% (Singapore) 22% (North Asia : China, Taiwan, Korea) 12% (ASEAN excluding Singapore), 7% (South Asia: India, Pakistan)
2% (Australasia)	3% (Others)

B. Private Law Oversight

The activities and holdings of GIC and Temasek are transparent to some extent under private laws. GIC, as a manager, is not required by law to disclose information about its clients' assets and reserves. Assets owned by its group of subsidiaries are not subject to statutory disclosures because these subsidiaries are exempt private companies.[150] The heightened scrutiny of its SWF activities has increased pressure on GIC to be more transparent. It has thus recently issued a report to clarify its investment processes, long-term performance and strategies, albeit without details as to assets, income and liabilities.[151] Temasek, as an exempt private company, is not legally obligated to make statutory disclosures of its accounts. It has however voluntarily issued the annual Temasek Review since 2004, which provides an overview of investment strategy and governance framework, in addition to group financials and investment details.[152] While observers applaud the release of Temasek Review, its shortcomings have been noted.[153]

[148] GIC, Report on the Management of the Government's Portfolio for the Year 2007/08, *available at* http://www.gic.com.sg/PDF/GICreport0708_Full.pdf.
[149] Temasek, *Our Portfolio By Geography*, http://www.temasekholdings.com.sg/our_portfolio_portfolio_highlights_geography.htm (as of Feb. 25, 2009).
[150] *See* COMPANIES (EXEMPT PRIVATE COMPANIES) (CONSOLIDATION) NOTIFICATION (Cap. 50), Singapore, *http://www.acra.gov.sg/Legislation/Companies_Act.htm*
[151] GIC, REPORT ON THE MANAGEMENT OF THE GOVERNMENT'S PORTFOLIO FOR THE YEAR 2007/08 http://www.gic.com.sg/PDF/GICreport0708_Full.pdf
[152] ANNUAL TEMASEK REVIEW: 2008, http://www.temasekholdings.com.sg/media_centre_temasek_review.htm
[153] The Temasek Review 2008 was audited using the standard of SSA 800. *See* THE INDEPENDENT AUDITOR'S REPORT ON SPECIAL PURPOSE AUDIT ENGAGEMENTS, http://www.icpas.org.sg/article_det.asp?articleid=1870&ps=7 (follow "Independent Auditor's Report" link). Generally, the Temasek Reviews are brief in detail, without the specific key accounting policies, pay and incentive schemes, and paint only a "broad-brush" picture of its balance sheet, income

Furthermore, although GIC and Temasek are owned by the Singapore Government, their respective boards of directors are formally separate and independent from one another. Each is managed by separate and independent professional officers. This independence has been reiterated by the Singapore Government and the two companies.[154] However, while some Temasek directors are associated with private companies such as ExxonMobil Asia Pacific, Skandinaviska Enskilda Banken (SEB), SAAB AB and AB Electrolux and L M Ericsson, most GIC directors have portfolios as ministers or are associated with government owned companies.[155] Furthermore, there are familial connections between the GIC and Temasek boards, and the Singapore Government. For example, the chairman of GIC is Minister Mentor Lee Kuan Yew, who was the former Prime Minister of Singapore. His son, Prime Minister Lee Hsien Long is a GIC director and was concurrently a Minister for Finance from 2001 to 2007[156]. Prime Minister Lee's wife, Ho Ching, is the current CEO and director of Temasek.[157]

As mentioned in the earlier section, the SWF Principles have positively influenced Singapore SWFs' governance behaviour as evidenced by GIC's issuance of its first annual report and Temasek's top ranking on The Linaburg-Maduell Transparency Index[158] ahead of Government Pension Fund-Global of Norway, compared to its tenth position out of 47 SWFs in the second quarter of 2008[159].

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statement and cash flow. In response, Temasek has provided some clarification. *See* http://www.temasekholdings.com.sg/pdf/TR2007%20FAQs.pdf.

[154] *See, e.g.*, Tharman Shanmugaratnam, Minister of Finance, SINGAPORE PARLIAMENTARY DEBATES, vol. 84 (Jan. 21, 2008); Eunice Elizabeth Olsen, Nominated Member, and Lim Hwee Hua, Second Minister for Finance, SINGAPORE PARLIAMENTARY DEBATES, vol. 82 (Mar. 2, 2007), where the Government emphasized that it neither influences nor second-guesses any Temasek's investment decisions, and Temasek is accountable to it as shareholder for delivering a good rate of return on its overall investment portfolio, and not any investment in isolation; and statements of Temasek and GIC at their respective websites.

[155] *See Temasek Board of Directors: About Us*, http://www.temasekholdings.com.sg/about_us_board_of_directors.htm.

[156] *Cabinet Appointments: Lee Hsien Loong*, http://www.cabinet.gov.sg/CabinetAppointments/Mr%2BLee%2BHsien%2BLoong.htm (last visited May 11, 2009).

[157] It was recently announced that Ho Ching would be stepping down as CEO to allow for her successor, an American, Charles W. Goodyear who was the former CEO of BHP Billiton. Temasek's chairman, S Danabalan cited the availability of the highly qualified successor as the reason for the change, and dismissed rumours that losses incurred by Temasek were the reasons for Ho Ching's departure. *See, e.g., Temasek Holdings Appoints Charles W. Goodyear as Member of the Board and CEO-Designate* (Temasek News Release), Feb. 6, 2009. However, in a surprising turn of events, Temasek Holdings announced that Goodyear would not take over as chief executive of the Singapore state investment company as planned, following strategic "differences". See John Burton, Temasek says Goodyear will not be chief, THE FINANCIAL TIMES (Jul. 21, 2009).

[158] http://www.swfinstitute.org/research/transparencyindex.php. The *Linaburg-Maduell* transparency index is a method of rating transparency of SWFs.

[159] http://www.swfinstitute.org/news/augeight.php .

C. Public Law Oversight

A fair degree of public accountability in the form of presidential and parliamentary oversights exists under current law. Both come under the purview of the elected President of Singapore in two key areas: the appointment and/or removal of members of the Board of Directors require(s) the assent of the President; the financial statements and proposed budgets must be submitted to the President for his approval. The President is constitutionally entitled to any information concerning GIC and Temasek. However, the President is not involved in the daily monitoring and supervision of their activities. These powers are reactionary, in that the President does not initiate his own fiscal policies and proposals, and exercises these powers only when the government needs his concurrence to proceed.[160] Constitutional amendments necessary to strengthen or amend the President's oversight powers will be subject to parliamentary debates and must be approved by a two-third majority.[161]

The public or parties dealing with GIC or Temasek may be able to apply to Singapore courts for judicial review of investment decisions. This is based on a possible extension of the administrative law principle that entities which have public law functions or whose actions have public law consequences are amenable to judicial review.[162] This shifts the focus away from the nature of the body to the impact or consequences of such bodies' decisions. The functions of such bodies are quasi-judicial[163] in nature, which attract the duty to act judicially.[164] Courts have therefore required such decision-makers to adhere to common law principles of fair procedure and rationality.[165]

The Malaysia Court of Appeal recently created three categories of private companies: first, limited companies (whether public or private) which perform no public function and are vested with no statutory powers (*e.g.*, Malaysia Airlines), for which there

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[160] For further evaluation and comments on the role and powers of the president, see Thio Li-ann, *Singapore: (S)electing the president – diluting democracy?* 5 INT'L J. OF CONST. L. 526 (2007); Yvonne C L Lee, *Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian*, SINGAPORE J. OF LEGAL ST. 290 (2007); MANAGING POLITICAL CHANGE: THE ELECTED PRESIDENCY OF SINGAPORE (Kevin Y.L. Tan and Lam Peng E eds. Routledge 1997).

[161] The Singapore Constitution is however rigid only in form. The two-third majority approval is easily obtained since the ruling party occupies 80 out of 82 seats in Parliament. Forty constitutional amendment bills have been passed since Singapore's independence in 1965. For detailed analysis of the supremacy of the Singapore Constitution, *see* Jaclyn Neo Ling Chien and Yvonne C L Lee, *Constitutional supremacy: Still a little dicey*, *in* EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION (Thio Li-ann & Kevin Y. L. Tan eds, Routledge-Cavendish, 2009).

[162] *See, e.g., Regina v. Panel on Takeovers and Mergers, Ex part Datafin PLC*, [1987] Q.B. 815 (the nature of power test applied).

[163] *E.g.*, the determination of rights and obligations, and the imposition of sanctions.

[164] *Ridge v. Baldwin*, A.C. 40 (1964).

[165] *See, e.g., Datafin, supra* note 162 (the Panel on Takeovers and Mergers, an unincorporated association without statutory prerogative or common law powers was subject to judicial review).

is no judicial review; second, hybrid companies which are former public owned service providers that have been corporatized under a privatization scheme and are owned by many different persons including the government and perform public functions regulated by statute (*e.g.*, Malaysian Telekom), for which there can be judicial review if the company does something or omits to do something that is *ultra vires* the powers conferred on it by statute; third, companies of which the government is the sole shareholder, are funded entirely with public money and have either statutory powers or duties conferred upon them (*e.g.*, Pengurusan Danaharta Nasional Berhad) for which there is judicial review of such public functions.[166] By this reasoning, GIC and Temasek fall within the third category and may therefore be subject to judicial review. However, Singapore courts which are not bound by foreign case-law, are likely to treat their investment decisions as involving 'intricate balancing of various competing policy considerations" and refuse to view the merits of such decisions because judges are "ill-equipped to adjudicate" given "their limited training experience and access to materials."[167] Hence, an application for judicial review may be denied.

Since 2007, the Singapore government has been addressing issues of the accountability, transparency (disclosure) and independence of its SWFs to a greater extent. According to Truman's 2007 scoreboard for SWFs, GIC and Temasek were awarded the 30th and 11th positions out of 32 positions, with scores of 2.25 and 13.5 out of a total score of 25.[168] A revised 2008 scoreboard recorded some improvement with GIC and Temasek receiving scores of 41% and 45% respectively.[169] In regard to queries on the SWF debate and the financial position of Singapore's reserves and investments, the Singapore Government reiterated that GIC and Temasek "operate independently of each other and of the Government" with the "single objective of maximizing the long-term returns on the portfolios, without any political agenda whatsoever".[170] In particular, the Singapore Government has repeatedly affirmed its general oversight as a shareholder who does not "influence" or "coordinate" their investments, but "does look at the risks in

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[166] *Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd* [2006] 5 M.L.J. 60 (Malyasia Court of Appeal), o*verruled on other grounds byPengurusan Danaharta Nasional Bhd v Tang Kwor Ham* [2007] 5 M.L.J. 125 (the existence of a statutory ouster clause).

[167] *See Lee Hsien Loong v. Review Publishing Co. Ltd and Another and Another Suit* [2007] SGHC 24 at para. 98 (Singapore).

[168] Truman, *supra* note 36, at 1. Truman conceded that SWFs exist in different forms with varied objectives and government structures. Nevertheless, he puts forward a "core set" of 4 elements" being structure, governance, transparency and accountability, and behavior, that are "substantially relevant for all such entities whether the objective is short-term macro-economic stabilization, wealth transfer across generations, or a combination of objectives".

[169] Truman, *A Blueprint for Sovereign Wealth Fund Best Practices*, *supra* note 36.

[170] Lim Hwee Hua, Second Minister for Finance, SINGAPORE PARLIAMENTARY DEBATES (Mar. 3, 2008).

totality to ensure that firstly, they are within its overall risk threshold and that, secondly, GIC and Temasek are likely to be able to provide Government with good long-term returns on their overall portfolios."[171]

The recent sharp fall in the Singapore SWFs' portfolio value has been subject to scrutiny during the parliamentary debates. Consistent with the Santiago Principles such as Principles 15, 18 and 19, the Singapore government has provided public explanations concerning the extent of losses of GIC and Temasek and their current investment strategies.[172] Of particular public interest was Temasek's sale of its stake-holding in Bank of America (as converted from its Merrill Lynch stake-holding). The Singapore government justified the divestment based on Temasek's reassessment of the risk-return environment. The government further clarified that Temasek, as a long-term investor, would regularly reassess the risks and potential returns on its investments, and rebalance its holdings when it considers necessary to enhance the long term value of its portfolio.[173]

IV. CONCLUSION

Contemporary SWF investments have attracted fears of 'national security' and economic espionage. While there has been no evidence confirming the fears of recipient countries, the effect of SWFs acting as large stakeholders that buy and sell based on their margins of risk and returns on domestic markets remains unclear. Any attempt to regulate SWF investments on an international level is completely unrealistic, given the complex and overlapping interests of various States and non-State actors such as corporations, investors and market intermediaries. Any viable regulatory or governance response therefore requires striking a a careful balance between the need for foreign capital and the danger of foreign governments interfering in sensitive sectors of the economy. Unfortunately, a global economic recession is hardly an appropriate time for the development of a rational regulatory response.[174] Instead, a synergistic approach towards SWF investments should be embraced. This entails forging an equilibrium between market liberalism and nationalism. Recent developments reflecting this idea are reflected in the constitution of a consultative forum pursuant to the Santiago Principles (2009

[171] *Id*.
[172] See *e.g.*, SINGAPORE PARLIAMENTARY DEBATES (Jan. 19, 2009), and the reply by Senior Minister of State for Finance, Lim Hwee Hua, SINGAPORE PARLIAMENTARY DEBATES, vol. 85 (Apr. 02, 2009): "The Government's mandate for GIC is to achieve a reasonable rate of return above global inflation, over a long-term horizon. In the last 20 years to March 2008, the average annual rate of return of the portfolio was 5.8% in Singapore dollar terms. This was 4.5% above global inflation."
[173] Speech by the Minister for Finance, Tharman Shanmugaratnam, SINGAPORE PARLIAMENTARY DEBATES, vol. 86 (May 28, 2009).
[174] See *e.g.*, Veljko Fotak and William Megginson, *Are SWFs Welcome Now?* COLUMBIA FDI PERSPECTIVES, No. 9, Jul. 21, 2009.

Kuwait Declaration), and the voluntary adoption of accountability and transparency practices by SWF countries such as Singapore. This demonstrates that SWF Principles constitute a credible starting point of consultation, cooperation and coordination.