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SOVEREIGN WEALTH FUNDS AS A PUBLIC – PRIVATE CHALLENGE FOR INSTITUTIONAL GOVERNANCE

I. INTRODUCTION

During the G20-meeting held in April 2009 it was agreed that all systemically important financial institutions, instruments, and markets should be subject to an appropriate degree of regulation and oversight. As systemically relevant investment vehicles, Sovereign Wealth Funds (SWFs) were not been mentioned expressly, contrary to hedge funds.¹ Indeed, the increasing significance of SWFs carries implications for worldwide financial stability, corporate governance, and national interests.

SWFs have become important financial market participants in terms of size and as a source of capital flowing from the periphery to the centre of the global economy. Economic studies assert that SWFs will continue to grow disproportionately for some time, and that they will increasingly attempt to diversify their holdings through cross-border investments. Their rise is closely linked to global macroeconomic imbalances.² During the 2007-2009 financial crisis, they have been welcome investments, incidentally acquiring large stakes and helping distressed banks in various cases. At the same time, their investments have triggered broad political controversy as well as closer government scrutiny and media coverage. As a source of governmental capital, SWFs raise concerns that they seek not financial, but instead political

* The views expressed in this paper are those of the author alone and do not necessarily represent those of the institution. Thanks to Lukas Gürtler, Peter Köfer and Mark Kyburz for their comments.

¹ G20, The Global Plan for Recovery and Reform, 2 April 2009.

² P. Hildebrand, "The challenge of sovereign wealth funds" (2007) Central Bank Articles and Speeches, BIS Review 150/2007, <http://www.bis.org/review/r071219d.pdf>, at 1.

and strategic leverage. Calls for protectionism against their influence are widespread. While it might be expected that the stakes taken by states in their own national banks will be gradually cut back, this might not be the case with SWFs.

This paper first situates SWFs and their regulatory framework, both at the national and international level. Three main issues are introduced: investment rationales, accountability versus independency, and financial stability and transnationalism. It then focuses on the Janus-like feature of the framework. First, its doubled-faced institutional governance structure is examined. From the side of donor countries as public actors, the potential of the regulatory regime for alleviating the concerns of recipient countries, for developing best practices, and thus for precluding an outcome where the activities of SWFs would trigger policy responses ultimately leading to financial protectionism is assessed.³ Discussion then considers recipient countries facing the option of initiating a national neo-protectionist backlash for their private economy. OECD investment policy principles and existing barriers in these countries, in particular Switzerland, are discussed. Finally, the regulatory regime applied to SWFs with regard to the public – private divide is assessed from both the point of view of donors and recipient countries. Overall, the paper argues that it is necessary to cooperate and establish ongoing dialogue between recipient and donor countries as well as with the international financial institutions in charge of financial stability. SWFs should adopt a responsive attitude and under all circumstances ensure adherence to the rules they have developed.

II. EMBEDDING OF SOVEREIGN WEALTH FUNDS

A. *Facts*

SWFs are not a new phenomenon. Coeuré has shown that France established a SWF already in 1816 with its Caisse des Dépôts et Consignations.⁴ While the Kuwait Investment Authority was established in 1953, most SWFs now in operation were established in the 1970s and from

³ *Ibid.* at 2.

⁴ B. Coeuré, “Faut-il avoir peur des fonds souverains?”, in B. Jacquillat (ed.), *Hedge Funds, Private Equity, Marchés financiers, Les frères ennemis?*, Cahier du Cercle des Economistes, December 2008, at 77; Hildebrand, *supra* note 2 at 1.

1996 on, as a means to invest surplus foreign exchange earnings of the official sector in overseas markets. Most SWFs are based in two regions: Middle East and Asian countries. Due to their opacity, there are currently significant gaps in the statistics regarding the assets they manage.⁵ Since figures are at best based on estimates, none are mentioned here.

For a long time, SWFs had a shadowy existence. Traditionally, they are investors holding highly rated fixed income assets. They moved into the spotlight in the course of the financial crisis when they began to intervene with a flurry of investment deals, boosting the liquidity and capital of the world's leading financial institutions. For example, the Government of Singapore Investment Corporation (GIC), one of the most prominent SWFs, committed itself to subscribing to a mandatory convertible bond issued by UBS, corresponding to a substantial capital injection.⁶ UBS shareholders approved the creation of conditional capital for the issuance of these mandatory convertible notes at an Extraordinary General Meeting on 27 February 2008. According to the terms of the agreement, and subject to the approval of UBS shareholders, the GIC will become a significant shareholder in UBS when the notes are converted into shares, at the latest on 9 December 2009. GIC's shareholding will then represent almost 9% of the share capital of UBS. GIC then declared:

GIC's preferred practice in respect of our public equity investments is to take relatively small stakes in companies for portfolio diversification. However, we made this significant investment in UBS because we have confidence in the long-term growth potential of the bank's businesses, particularly its global wealth management business.⁷

This capital raised in the aftermath of losses on large sub-prime mortgage positions offered UBS the opportunity to strengthen its balance sheet and maintain a substantial capital cushion. It also anticipated a further deterioration of the situation.

SWFs have made a number of similar transactions during the crisis. Their investment activities have led to the formation of large exposures, often in the financial sector. However,

⁵ R. Beck, M. Fidora, "The Impact of Sovereign Wealth Funds on Global Financial Markets", European Central Bank, Occasional Paper Series, No 91 (July 2008) at 6-18.

⁶ 13 billion Swiss francs through a GIC investment of 11 billion Swiss francs, and an investment of 2 billion Swiss francs made by an undisclosed Middle East investor. UBS Terms of the mandatory convertible notes.

⁷ Statement by T. Tan Keng Yam, Deputy Chairman and Executive Director, GIC (GIC Media Conference on 10 December 2007).

they are frequently confronted with allegations of non-transparency regarding their policies; besides, there is no uniform public disclosure.⁸ Moreover, the technical complexity of the funds enhances the challenge to understand them. Are they solely passive long-term investors? They could not strive for financial benefits and thus have to face the allegations of recipient countries for pursuing strategic and political interests in their transacted investments. Such interests may lead to a tendency to invest in distressed industries where they can counter political or public opposition as welcome investors. To this day however, it has remained almost unnoticed that SWFs have lost billions from their initial investments, mainly in the financial sector. In the future, they will most probably be seeking to invest increasingly in equity markets.⁹

B. Definition

On account of different underlying rationales, a range of definitions of SWFs exists.¹⁰ SWFs form a heterogeneous group of financial market participants representing countries with various political backgrounds and economies. They can be based on diverse institutional arrangements and pursue either multiple, overlapping or also purely individual objectives. Their practices and operations are not standardized and their investment policies as well as their risk management framework may differ.

The International Working Group of Sovereign Wealth Funds (IWG-SWF)¹¹ has provided the following definition:

SWFs are defined as special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial

⁸ Hildebrand, *supra* note 2 at 3; Beck, Fidora, *supra* note 5 at 14-23.

⁹ W. Miracky, B. Bortolotti, ed., *Weathering the Storm, Sovereign Wealth Funds in the Global Economic Crisis, of 2008*, Monitor, SWF Annual Report 2008 (April 2009) at 3-5; V. Fotak, B. Megginson, H. Li, *Sovereign Wealth Funds losses in listed firm stock investments*, *ibid.* at 53-58.

¹⁰ Several definitions are listed in a recent IMF-paper, *Sovereign Wealth Funds – A Work Agenda*, Prepared by the Monetary and Capital Markets and Policy Development and Review Departments, In collaboration with other departments, February 2008, at 37-38.

¹¹ The IWG was established at a meeting of countries with SWFs on April 30–May 1, 2008, in Washington, D.C. It comprises 26 IMF member countries with SWFs. IWG International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds, Generally Accepted Principles and Practices “Santiago Principles”* (October 2008) at 1.

objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.¹²

There is consensus that SWFs are government-owned investment companies and there is agreement about the following key criteria characterizing them:

- a. SWFs are owned by sovereign governments and are investment vehicles usually managed separately from central bank reserves.
- b. SWFs pursue diversified investments strategies including investments in foreign financial assets. Funds investing solely in domestic assets are not considered to be SWFs.
- c. SWFs are established by governments for macroeconomic purposes and pursue financial objectives, the maximization of their investments. They can be classified as conservative investors with a medium- to long-term timescale.
- d. SWFs are not hold inter alia for traditional balance of payments or monetary policy purposes, foreign currency reserve assets, operations of state-owned enterprises.¹³

SWFs have been categorized by the IMF according to the following five types based on their main objective: stabilization funds (1), savings funds for future generations (2), reserve investment companies (3), development funds (4), and contingent pension reserve funds (5).¹⁴

C. Regulatory framework

The regulatory framework of SWFs is characterized by two levels: national and international.

¹² *Ibid.* at 27. In this study, references to SWFs relate to this definition.

¹³ *Ibid.* at 27.

¹⁴ State-owned investment funds, IMF Intensifies Work on Sovereign Wealth Funds, IMF Survey Magazine: Policy, March 2008. Other authors, for instance, distinguish between: central bank funds, stabilization funds, public pension funds, government investment companies and state owned-enterprises. E. F. Greene & B. A. Yeager, "Sovereign wealth funds – a measured assessment", 2008, 3 Capital Markets Law Journal, at 247-274.

1. *National level*

At the national level, SWFs do not present a uniform picture. Their institutional basis and legal foundation vary depending on the conditions prevailing in a given country. Some are standalone solutions. They may have the typical structure of (private) companies or legal entities, and will, however, be only formally separated from the government and the central bank. Others are entities narrowly linked to either the central bank or part of it, or indeed belong to the treasury. Even others are state-managed asset pools. Usually, their constitutive legislation is made available.¹⁵

Indeed, SWFs are often designed so as to allow for a flexible interpretation of their regulatory framework.¹⁶ Equally, the role of the state is not always clearly delimited and understandable, hence prompting allegations of opacity.

2. *International level*

The international operations of SWFs raise concerns among recipient countries. The perception of a potential risk of political interference in their activities has led these countries to recognize that an international regulatory framework should be defined. Although no case involving the manipulation or (mis)use of an investment advantage to exercise strategic influence has become known to date, SWFs as a source of foreign governmental capital represent unwanted developments, such as privatization reversals and risks to financial stability. At the same time, the awareness of their market clout has been another rationale to call for regulation and oversight.

Working together with the IMF, the policy response of the IWG-SWF has been to adopt measures to increase the visibility of SWFs as large investors. It issued the Generally Accepted Principles and Practices¹⁷ in Autumn 2008 and established the International Forum of SWFs¹⁸ in April 2009.

¹⁵ For a broad discussion, see: E. M. Truman, "A Blueprint for Sovereign Wealth Fund Best Practices", Policy Brief 08-3, Peterson Institute for International Economics.

¹⁶ IWG International Working Group of Sovereign Funds, *supra* note 11 at 27.

¹⁷ GAPP or Santiago Principles of October 11, 2008 (Principles).

¹⁸ "Kuwait Declaration": Establishment of the International Forum of Sovereign Wealth Funds, International Working Group of Sovereign Wealth Funds, April 6, 2009 (Forum).

The Principles defined by the IWG members aim at promoting a clearer understanding of the institutional framework, governance, accountability arrangements, and investment practices followed by SWFs. They constitute a common set of voluntary principles and practices. They address three broad areas of concern:

- legal framework and relationship of SWFs with state policy and objectives, and coordination with their sovereign's macroeconomic policies,
- institutional framework and governance structure, and
- investment and risk management framework.¹⁹

While their publication has been welcomed, they correspond to a soft law approach and the absence of enforcement mechanism cannot be ignored. In this respect, complementary OECD efforts to develop a set of guidelines for inward investment regimes of recipient countries in order to impede discrimination against SWFs should be mentioned.²⁰

Formally, the Forum is constituted by the "Kuwait Declaration". It is formed by a standing group of SWFs. It is not a supranational authority and its work will not carry legal force. Forum members will be SWFs that participate in the IWG and that endorse the Principles. Its role is to support the SWFs activities and their guiding objectives. It offers a platform for ongoing communication and cooperation between SWFs, recipient countries and other bodies, thereby contributing to facilitating an understanding of the Principles and of SWF operations. It is committed to promoting global investment, rejecting protectionism, and underpinning prosperity. As a voluntary initiative, it represents a singular concept.

From an organizational point of view, the Forum conducts three sub-committees to work on: (1) experiences in the application of the Principles, (2) investment and risk management practices, and (3) international investment environment and recipient country relationships. It will meet at least once a year to exchange views on issues of common interest.²¹

¹⁹ *Supra* note 11 at 3-6; see also: E. M. Truman, "Sovereign Wealth Funds: The Need for Greater Transparency and Accountability", Policy Brief 07-6, Peterson Institute for International Economics.

²⁰ *Infra* point III.C.

²¹ "Kuwait Declaration" *supra* note 18.

D. Issues

The setting of a governance framework by SWFs has been largely initiated by external pressure. What, however, are the rationales for the unease with SWFs? The greatest concern today is uncertainty about how their substantial governmental investments might affect foreign economies and private companies. Hence, there is a sense that due to their size and future growth vigilance is required. The issues they raise can be classified into three groups. The first concerns their investment rationales and the geopolitical debate. The second refers to the call for SWF accountability versus their independency. The third relates to the challenge they pose to financial stability, not least due to their transnational activities.

1. Investment rationales: from commercial to strategic interests

Governments of recipient countries raise doubts about the underlying motives of SWF investments. Their transactions are perceived as a form of cross-border nationalization,²² representing a threat to the free market economy, as accentuated by the fact that the donor countries often are autocratic regimes. Thus, the challenge is to preclude an outcome that would lead to neo-protectionism. Two aspects – practice and geopolitics – are particularly prominent in this respect.

With regard to practice, the pursuit of possible strategic interests remains theoretical and hypothetical in nature.²³ For instance, the financial services sector in particular constitutes an important target for SWFs investments and it is regularly argued that investments in top financial institutions may be motivated not just by hopes of good investment returns, but by the desire to learn how those companies operate. To date, however, there has been no case of SWFs using their power for non-financial investment purposes, such as exercising their shareholder's rights in order to transfer financial engineering know-how to their own country.²⁴ Moreover, it should not be overlooked that the application of other, non-strategic rationales is not excluded either. In June 2006, for instance, the Norwegian SWF disinvested more than \$400 million of its Wal-Mart holdings, criticizing the company's treatment of its

²² A term coined by L. Summers, Davos Annual Meeting 2008.

²³ Statement by Finance Minister of Singapore on Principles – Release 08/07 October 2008.

²⁴ L. Summers, "Funds that shake capitalist logic" (July 29, 2007) Financial Times.

workforce.²⁵ Other cases are speculative. However, it cannot be ignored that they could occur. Summers has repeatedly pointed to potential grounds for concerns. For example, recipient countries could find themselves in awkward situations, such as company bailouts, much of whose debts are held by a SWF or an ally's central bank.²⁶

Conversely, one should note that SWFs – similar to other investors – have to account for the loss of a large part of their investments, mainly in the financial sector, due to the global economic crisis. Consequently, some have reevaluated their investment strategies, abandoning their long-term investment perspective. As the economic crisis unfurled, they retreated from distant markets, increasing domestic and regional investments, particularly in emerging markets. Other SWFs did not divest their investment with losses. Pursuing a long-term investment strategy, they did not liquidate these positions. However, adjustments of asset allocations may have taken place.²⁷ Still others, on the contrary, undertook substantial divestments to realize profits and it is worth noting that these divestments have been criticized on the grounds of creating insecurity for the companies or financial institutions concerned.²⁸

SWFs give rise to geopolitical and geo-economic issues in that they make investments largely in European and Northern American countries while many are based in Middle East and Asian countries. They are located in countries both politically and financially less open than OECD countries. These countries may still largely protect their own markets from foreign investments and have not gained experience as major players in international finance. It has therefore been suggested that the principle of reciprocity as a guiding principle for granting market access to SWFs in recipient countries should be applied. Reciprocity means that SWFs would only be allowed to invest in third-country companies if such investors were in turn free to invest in the SWF home country. The strict application of this principle would largely limit SWFs investments and it is unlikely that SWF home countries would swiftly change their attitude towards foreign investments in their countries.²⁹ Overall, the application of the

²⁵ S. Chesterman, “The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations – The Case of Norway's Sovereign Wealth Fund” (2008) 23 *Am. U. Int’L L. Rev.* at 577-615; A Closer Look at Sovereign Wealth Funds: Secretive, Powerful, Unregulated and Huge (December 12, 2007) Knowledge@Wharton.

²⁶ *Supra* note 23.

²⁷ P. Kunzel, Y. Lu, C. Mulder, J. Pihlman, Reserves Prove Their Usefulness as Global Economic Bites, *IMF Survey Magazine: In the News*, April 2009.

²⁸ J. Burton, “Temasek sells entire stake in BofA” (May 15, 2009) *Financial Times*; P. T. Larsen, K. Burgess, “Barclays falls 14% after IPIC sells its stake” (June 3, 2009) *Financial Times*.

²⁹ Hildebrand, *supra* note 2, at 5.

principle of reciprocity would be counterproductive and ultimately result in boosting protectionist attitudes.

2. *Accountability versus independency*

As mentioned, the unease with SWFs is also due to their perception as secretive as regards the role of their governments and the nature of their investment strategies. Their investment policies, risk management frameworks, and objectives are not sufficiently disclosed. Moreover, there is no comprehensive list of what they own, nor any mandatory reporting or disclosure of their investments policies. These may vary from traditional to more advanced, with risk objectives typically determined by the owner or governing body. Generally, constraints exist regarding investment classes, instruments, and established limits on stakes that SWFs can hold in companies. Norway, for instance, caps SWF stakes in foreign companies at 5%.³⁰ Indeed, a majority of SWFs have specific investment objectives, and about half of existing SWFs discloses these publicly. Truman has established various scoreboards to classify their behavior.³¹

Accordingly, enhancing transparency to appease concerns of recipient countries is a core point of the Principles. Disclosure rules have been introduced, encompassing the legal structure, policy purpose, source of funding, governance framework and objectives, investment policy, financial information, exercise of ownership rights, risk management framework, establishment of clear roles and responsibilities of management, and other relevant information on SWFs.³² These measures are trust-building, and serve to ensure that SWFs are not used by governments to pursue strategic interests by rendering them accountable to the broader public. They enhance transparency and corroborate the accountability of SWFs.

Although these measures undoubtedly represent a commendable effort and are intended to elicit positive reactions from recipient countries, they are unlikely to solve the issue of ensuring the independency of SWFs, thus counterbalancing accountability. Decision

³⁰ Folketrygdfondet, Regulations relating to the Management of the Government Bond Fund and Pension Fund – Norway, <http://www.ftf.no/regulations.html>.

³¹ Truman, *supra* note 15.

³² GAPP 1., 2., 4., 16.-19., 21.-22. Principles.

mechanisms as well as government responsibility remain unclarified. In order to pursue exclusively commercial goals, however, SWFs should only apply financial management principles and strategies. Their independency from their governments should not only be operational, as stated in the Principles, but also strategic. An all-embracing public commitment to independency would be needed, which in fact remains only casually mentioned in the Principles.³³ In this respect, Hildebrand advocates adopting a governance approach based on the institutional regime of the independency of central banks from governments. Similarly to central banks, SWFs are at risk of being hijacked by governments for political means at any time. Thus, the regime advocated is based on two elements. First, a clear mandate must be defined, so as to focus efforts on price stability for central banks and on commercial objectives for SWFs. Second, statutory independency from governments in the pursuit of the mandate as an appropriate form of governance should be guaranteed. In the case of central banks, this regime has proved its worth. It has become best practice, contributing to keeping politics out of monetary policy.³⁴ Applied to SWFs, accountability issues would effectively come to play through being in effect counterbalanced by independency.

3. *Financial stability and transnationalism: seeking relationships*

The cross-border investment activities of SWFs accentuate the trend towards globalization and the diversification of finance. Due to their clout and size, they pose a challenge to both financial stability and transnationalism.

One objective of the Principles and the Forum is to help maintain global financial stability and the free flow of capital. SWFs should act as responsible players and promote sound macroeconomic and investment policies. Their activities should contribute to ensuring growth, prosperity, and economic development in both donor and recipient countries. The Forum will support issues such as trends and developments pertaining to SWF activities, risk management, investment regimes, market and institutional conditions affecting investment operations, and interactions with the economic and financial stability framework.³⁵ Indeed, to be effective, the measures of the Forum will have to be consistent with other international initiatives and measures. It will be absolutely necessary to seek ways to coordinate efforts

³³ GAPP 6., 9., 16. Principles.

³⁴ Hildebrand, *supra* note 2 at 6.

³⁵ GAPP 3., 5., 17. Principles; “Kuwait Declaration” *supra* note 18.

with other bodies, such as the Financial Stability Board (FSB), where the Forum is not represented. A modus operandi to institutionalize relationships either in the form of ongoing dialogue or more formal cooperation will have to be engineered.

Under a regulatory point of view, the operations of SWFs are transnational. Their activities and interests transcend national borders. There is no linkage as such between the national regime applied to SWFs in their home country on the one hand, and the regimes applying to them in the recipient countries on the other hand. Subject to perspective they may apply either public or private rules. As such, they do not fit into standard categories. While the traditional concept of regulation or rather state regulation is linked to the notion of the nation-state and rests essentially upon territoriality, SWFs are not limited by their national boundaries. Their key feature is investment in foreign assets whereas the regulatory frameworks of donor and recipient countries abut. There is no specific international law regime applying to their activities, but two distinct regulatory frameworks. They design a unique constellation of interstate, transnational relationships. In these terms, it is worth noting that the sources of the concept of transnationalism³⁶ are rooted in the Cold War. Transnationalism designated the persistence of interstate cooperation despite political controversies. The relationships between actors were studied. Transnationalism has taken many forms since.³⁷ It is now used to indicate that it is essentially opposed to an international law regime. SWFs act amid different national regulatory regimes. Even though they have been designed by states, the Principles represent an autonomous transnational policy response regarding SWF activities rather than an international law solution. SWFs are not linked to the international regulatory regime, but reside beyond it or on its periphery. Thus, the key task remains to seek relationships.

III. A JANUS-FACED APPROACH TO GOVERNANCE AND REGULATION

Against the background of the above framework, this section concentrates on the implementation of the Principles and the role of the Forum. It discusses the various aspects of

³⁶ *The Oxford English Dictionary*, 2nd ed., Volume XVIII (Oxford: Clarendon Press, 1989) at 385 and 417 respectively; P. C. Jessup, *Transnational Law*, Storrs Lectures on Jurisprudence (New Haven: Yale University Press, 1956) at 2-3.

³⁷ H. J. Steiner, D. F. Vagts, H. Hongiu Koh, *Transnational Legal Problems*, 4th ed., Foundation Press, New York, 1994.

its governance potential and impact as a voluntary initiative serving to generate best practices. The overall challenge, however, remains to develop an institutional framework and governance regime able to ensure a climate of free flowing cross-border investment, a basic premise of open global capital markets. Similarly to the ancient god Janus, the guardian of doors and gates who presided over entrances, beginnings and ends, who designed everything in terms of two-way action, and who is therefore represented with a face on the front and another on the back of his head, any analytical approach to SWFs must be twofold in various respects: private or public, regulatory or non-regulatory, economical and financial or political, based on facts or on hypotheses, considering the effect of regulation on society or society on regulation, formal or informal, and vice versa – that is, taking into account the viewpoint of both the donor and recipient countries. Do investments of donor countries follow political rationales or are the responses of recipient countries politically motivated? Are private market participants or governments concerned, do they act autonomously or independently from each other while being interdependent at the same time?

Before exploring the role that norms and regulation will play in future governance and regulation from the point of view of either the donor or recipient countries, the governance structure of the regulatory regime is examined.

A. *Governance structure of the regime*

SWFs raise challenges for institutional governance. For donor countries, the organizational structure of the market is double-sided: they rely primarily on their existing regulatory framework and governmental boundaries at the national level. At the international level, they have joined forces to define the Principles and to create a Forum. Furthermore, the IWG governance regime has not been developed jointly with recipient country representatives. No consultation or other forms of cooperation have occurred between these two groups. The regulatory framework is the result of a unilateral initiative of donor countries with the support of the IMF. It marks a policy response to pressure from recipient countries concerning investment rationales.

Conceptually, as a cooperative regime (that is, from the point of view of the donor countries acting through the IWG), it relies on polyadic interactions. SWFs need to act together in order

to obtain an outcome that will benefit some or all of them. This type of collective behavior is oriented towards long-term interests and in such cases some may renounce reaping short-term personal profits. Such behavior typically applies to the management of public goods or the generation of benefits through collective action, for instance within the framework of voluntary or self-regulatory organizations representing an industry, as is the case with SWFs.³⁸ The efforts of the donor countries to define a regulatory framework are based on their realization that they should justify or in some way legitimate their activities as a collectivity towards recipient countries. Further incentives may have been to ensure their free choice of investments and the building and preservation of their reputation as reliable foreign investors by enhancing a better understanding of their activities. On its side, the IWG claims to have adopted an innovative, postmodern approach to global governance to arrive at the Principles.

Indeed, the governance potential of this voluntary regime must be appreciated in terms of the extent to which it will manage to assuage the concerns of recipient countries with regard to a risk of politically driven investments and (undesired) third-state involvement in their private markets. It is first determined by a sense of responsabilisation developed by SWFs, as demonstrated by defining the Principles and creating the Forum. These guidance measures represent a public response by SWFs and amount to a voluntary initiative. They had to contain governance prescriptions that ensure that investments are not driven by political objectives. At the same time, they should constitute a trust building measure. Thus, the governance potential first derives from a sense of responsabilisation and guidance.

A further criterion to assess the potential impact of the governance regime is compliance. SWF countries endorsing the Principles commit themselves to respecting them on a voluntary basis. To be recognized by recipient countries as a valuable regime, SWFs must effectively implement them. To this end, the Forum will conduct peer reviews and operate as a platform for guidance and dialogue. However, it will not have any enforcement capacities and, formally, no sanctions are foreseen.³⁹ In practice, sanctions may well exist, such as reputation impairment, SWF investment restrictions, and other protectionist measures.

³⁸ Unpublished paper on The Evolution of Cooperation and Trading, Tect – Eurocores, 2005, at 3-4, on file with author; P. J. Richerson, R. Boyd, *Not by Genes Alone, How Culture Transformed Human Evolution* (Chicago: The University of Chicago Press, 2005).

³⁹ A. Chayes, A. Handler Chayes, "Compliance Without Enforcement: State Behavior Under Regulatory Treaties" (January 1991) 7 *Negotiation Journal* 1 at 311-330; A. Chayes, A. Handler Chayes, *The New Sovereignty, Compliance with International Regulatory Agreements*, (Cambridge, London: Harvard

For recipient countries, SWFs as governmental investors differ markedly from their private market peers in their investment rationales, investment activities, behavior, preferences, and also accountability.⁴⁰ Various idiosyncrasies characterize their organization, and the performance of portfolio and risk management activities. Indeed, the initial position in recipient countries is completely opposite in that private market statutes apply. With SWFs, recipient countries face the challenge of dealing with foreign governmental investments and finding ways either to integrate or reject them. Their attitude is primarily reactive. Some states like the US and Germany have adapted their statutes individually. In the US, the Committee on Foreign Investment in the United States (CFIUS) reviews transactions that could result in a foreign national assuming control of a US business with regard to potential impact on national security; all transactions must be approved by the CFIUS.⁴¹ In Germany, a statute requiring interministerial approval of foreign investments, which could pose a threat to national interests, was passed in 2008. Acquisitions of stakes of more than 25% of voting shares in German companies by investors outside the European Union come under scrutiny.⁴²

As a result, we face a Janus-like governance structure. Two separate regimes pursuing different objectives collide. There is no system to deal with their mutual relationships. They add to the fragmentation⁴³ and polycentric character of regulation. They are not limited to a state regulatory regime, but apply transnationally and to circumstances abiding within a given society. Thus, there is a specialized, technical regime on the one hand, and individual national regimes of recipient countries on the other. Regulatory functions are not concentrated, but distributed among a range of bodies: SWFs, donor and recipient countries, private companies, private market participants, and citizens. The working of such a governance structure will be based largely on informal dialogue and on the appreciation of the measures adopted by either of the actors involved.

University Press, 1995) at 1-28, 109 et seqq.; P. S. Berman, "The Globalization of Jurisdiction" (December 2002) 151 U. Pa. L. Rev. 2 at 478 et seqq.

⁴⁰ For instance, SWFs face a four-fold accountability challenge: public internal accountability, private internal accountability, public external accountability, and private external accountability. For a discussion, see A. Gelpert, "A Sovereign Wealth Turn" (September 2008) Rutgers School of Law-Newark Research Papers No. 025, at 5-8.

⁴¹ Section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSAs) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.

⁴² H. Williamson, "Germans agree sovereign funds law", (April 10, 2008) Financial Times.

⁴³ M. Koskeniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, United Nations, A/CN.4/L.682, 13 April 2006, at 11-12.

B. Donor countries: public actors – private response

From the perspective of the public – private divide, SWFs are public actors, but ones undertaking activities in fields reserved to private market participants and private companies. They are as such subject to private statutes.

Given this situation, and as far as the definition of best practices is concerned, we should first ask whether existing international soft law standards and guidelines defined for private companies could apply and whether they could be considered sufficient to provide evidence for business conduct. Such standards and guidelines include, among others the OECD Corporate Governance Principles and OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact, UN Principles for Responsible Investment, and the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises. These rules first concern company operations and not specifically their investment policy or conduct of financial affairs while SWFs are financial vehicles. Furthermore, SWFs have had real incentives to define their own Principles and, in doing so, to address specific issues. They concretize peculiar interests of donor countries regarding their conduct in foreign private markets. Contrary to these international standards, the Principles have been neither defined nor validated by an international public authority.

The Principles constitute the core of the regime. In dogmatic terms, considering a hierarchy of norms where statutes are the ultimate form of state regulation, principles – similarly to standards – are a comprehensive concept. They not only embrace regulatory matters or matters with a potential to be regulated, but also refer more or less explicitly to some purpose, goal, entitlement, or value.⁴⁴ They represent the least binding form of rules and belong to the concept of soft law. They can be both public and private. However, their nature remains largely indeterminate. They are not mandatory and no notion of coercion exists as such. They reflect a general consent on a matter and can be established by authority or custom. The Principles considered here are the result of a voluntary IWG initiative, that is, the direct participation of the members concerned. They reflect the prevailing practices and governance

⁴⁴ H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Law Series, Oxford University Press, 1997) at 260; J. Braithwaite, P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 18-20.

rules in their own group. They are not compulsory for anyone and their observance relies on membership commitment to compliance. Since they are defined by an adept organization, they rest upon proven expertise, thereby providing an incentive to recognize and accept their validity.

The regulatory character of the Principles is twofold. Defined on a voluntary basis, they appear to be self-regulatory. But what does self-regulation mean? Self-regulation denotes regulation from within or automatically or also control, or indeed direction by or of oneself.⁴⁵ The OECD defines self-regulation as: “[t]he process by which an organized group regulates the behavior of its members.”⁴⁶ The basic idea of self-regulation is a process occurring of its own accord or governing itself from within a group or collectivity, that is, without state intervention. Those subject to the regulation have some say in its initiation. Consequently, self-regulation has been long considered to be an oxymoron. It stemmed from the traditional understanding of regulation as the representation of a state activity. Regulation signified that regulatory measures were imposed from outside, and thus defied self-regulation. Regulation was solely a form of state governance regarding citizen behavior or the private economy. In the meantime, this understanding of self-regulation has been superseded and has lost its oxymoronic character. In these terms, the regime discussed here is unparalleled as far as it is a form of regulation voluntarily defined by states, notably for the purpose of self-regulating themselves, that is, their activities unfolded in private markets. In a general context, the regime set by SWFs confirms the trend that the increasing fragmentation of regulation comes with a tendency to provide space for alternative regulatory resources, or indeed for alternative forms of regulation formulated and finalized by expert groups.⁴⁷

The Forum just created is also the result of a voluntary initiative of IWG members. Similar to other financial market bodies, such as the FSB, IOSCO, IAIS or BCBS, it has no international law statute. Formally, it has been constituted by a Declaration of IWG members. Prima facie, it is a public entity that represents states and whose policy measures will be made public.

⁴⁵ *The Oxford English Dictionary*, 2nd ed., Volume XIV (Oxford: Clarendon Press, 1991) at 929.

⁴⁶ OECD, Meeting on Alternatives to Traditional Regulation, OECD, Paris, 1994, at 7.

⁴⁷ J. L. Harrison, T. D. Morgan, P. R. Verkuil, *Regulation and Deregulation*, Cases and Materials, American Casebook Series, 2nd ed. (St.Paul: West Publishing Co., 2004) at 494 et seqq.; C. Scott, “Self-Regulation and the Meta-Regulatory State”, in: F. Cafaggi, ed., *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) at 133; National Intelligence Council, Global Trends 2025: A Transformed World, NIC 2008-003, November 2008, at x-xiii, 81-87.

Functionally, it could be regarded as a private entity insofar as its aim is to accompany and provide guidance to its members' role and their activities as private actors in foreign markets.

With regard to the implementation of the Principles, the Forum will contribute to the development and maintenance of an open and sound investment environment, supporting four guiding purposes underlying the Principles: to maintain a stable global financial system and free flow of capital and investment; to comply with all applicable regulatory and disclosure requirements in recipient countries; to ensure SWFs invest on the basis of economic and financial considerations; and to manage a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability. It will operate through its three sub-committees.⁴⁸ The governance framework is remarkable insofar as state entities have committed themselves to voluntarily adhering to the Principles based on peer review. The Forum will be in a position to determine whether a SWF complies with them. Formally, although it will not take action against members or SWFs that initially endorse the Principles and subsequently fail to comply with them, it will be decisive in determining which SWFs can enjoy full market access in recipient countries.

To clarify the role that these norms will play in governance and regulation, the governance potential of this particular regulatory regime is now being examined. However, the Principles and the Forum are new. There is no practical experience at the moment. Thus, to assess the regime, considerations remain theoretical and projective. Its governance potential, that is, its validity and impact are measured based on the following criteria: SWF investment behavior, their attitude towards their own citizens, their exercise of shareholder rights, and the trust-building capacity of the measures.

With regard to investment behavior, the crucial issue is how far SWFs will respect their commitment to pursuing commercial interests⁴⁹ rather than investing in strategic objectives? Will adherence to the Principles be a sufficient incentive? In this respect, ensuring for their independency from their government remains important.⁵⁰ To date, however, no case indicates that they may have abused their power for political matters. Similar to other investors, some SWFs have had to book losses facing a difficult investment environment. As observed, others have disinvested stakes in the short-term to realize large profits. The example

⁴⁸ *Supra* point II.C.2.

⁴⁹ GAPP 19. Principle.

⁵⁰ *Supra* point II.D.2.

of Barclays shows that SWFs may well act like private investors in the pursuit of profit maximization.⁵¹

Indeed, SWFs have the ability to take risks distinct from the global market benchmarks and to ride out cycles. However, they must answer to constituencies both in their own country and in the recipient country. In their country, their investment decisions may well have significant direct domestic implications and affect their own citizens. SWFs are accountable to their citizens as they are interested in the investment strategy applied by SWFs and may be in a position to influence it.⁵² Communicating losses to their own citizens is therefore a difficult task for SWFs. In such cases, a short-term focus on financial disclosure could be inconsistent with long-term strategies and might not shed light on the right areas. In this regard, the Principles appear to strike an appropriate balance in the level and type of public disclosure required.

In recipient countries, SWFs exercise their influence in their role as shareholders. However, they represent the interests of foreign governments, which differ from those of ordinary, private shareholders. Their investments lead to a resurgence of state ownership. Because they are so large, they place a lot of concentrated economic power under the control of a small number of people, often in autocratic countries. It is feared that they might engineer changes company behavior through exercising their shareholders' rights. Moreover, SWF behavior is not always predictable. While most declare to take a long-term approach to investing,⁵³ others may act more opportunistically. Thus, conflicts of interest have to be addressed. To resolve this issue, some authors argue that SWF voting rights should be suspended,⁵⁴ while others consider such a measure to lead to retaliation.⁵⁵ Moreover, Principle 21 declares that shareholder ownership rights are a fundamental element of the SWFs equity investments' value. It recommends that SWFs should publicly disclose their general approach to voting securities of listed entities, including the key factors guiding the exercise of ownership rights. Hence, SWFs appear to be firmly committed to exercising their role as active investors. Yet

⁵¹ *Supra* note 28.

⁵² Truman *supra* note 19.

⁵³ K. Halvorsen, Norwegian Finance Minister: "The fund is an extremely long-term investor. ... going to be shareholders forever. ... investment guidelines are discussed in parliament each year." Davos Annual Meeting 2008.

⁵⁴ Respectively: R. J. Gilson, C. J. Milhaupt, "Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism" (2008) Columbia University Law and Economics, Working Paper N. 328.

⁵⁵ Truman *supra* note 15.

another approach would be to define upper limits⁵⁶ applying to foreign investment in private companies, to hinder SWFs from taking majority stakes in strategic sectors companies, or to introduce restrictions on the type of instruments they could invest in.⁵⁷ These measures could be interpreted as discriminatory.

Finally, the trust-building capacity of the above measures is considered. This is where the Forum plays a central role. It provides a platform for the ongoing review of the Principles and will institute a dialogue with the recipient countries and other stakeholders. Not least due to its lacking any enforcement capacity will its governance potential primarily rely on its ability to influence membership behavior and, if necessary, to exercise pressure. Members should adopt a responsible investment behavior with regard to the Principles. Its ability to persuade recipient countries will be decisive.⁵⁸

C. Recipient countries: private actors – public response

Recipient countries have not been actively involved in shaping the SWF governance regime. Their challenge is to address the concerns SWFs raise adequately.

Cross-border investments are not a new phenomenon and most OECD countries welcome them as long as they pose no security risk. Unlike central banks, however, which tend to invest reserves in assets like U.S. Treasury bonds, SWFs invest in private companies. Besides any such investment resulting in a cross-border nationalization, even more concerns arise when the sectors or industries SWFs could invest in are strategically important interests of the recipient countries. Conceptually, it remains difficult to define what strategic or political investments are, just as specifying security issues poses challenges. Examples of sensitive areas are public services, public transport, telecommunications, energy, and infrastructure matters. In Switzerland, for instance, the banking sector is unquestionably of strategic importance for the economy. Political intervention would therefore be required in the event of internal or external threats. This situation will be different in another country. The concept of security also depends on a given environment and changes in the course of time. Practically,

⁵⁶ Hildebrand, *supra* note 2 at 6.

⁵⁷ Truman *supra* note 19.

⁵⁸ In that sense: C. Chinkin, „Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law“, in: J. Nijman, A. Nollkaemper, eds, *New Perspectives on the Divide Between National and International Law*, (Oxford University Press, 2007) at 147-148.

as shareholders, SWFs could exercise their influence to initiate technology transfer to their own country, displace workplaces, create competitive advantages for their national industries, or acquire stakes in national media.⁵⁹ Hence, recipient countries should maintain open investment policies in their private economy while safeguarding their security interests. Their attitude will also be motivated by their interest in preserving the good functioning, integrity, stability and efficiency of the financial markets in particular when investments are large and their allocation might affect the behavior of domestic and international investors with regard to specific companies or industries. While they may be tempted to impose veiled barriers on foreign investments, any measure they adopt potentially involves the risk of protectionism.⁶⁰ Thus, SWF ownership of private companies could adversely affect corporate governance.

The OECD works to counter investment protectionism. Its Code of Liberalisation of Capital Movements adopted in 1961 established the key principles of progressive liberalization, non-discrimination among parties, and transparency. With its comprehensive approach to investment policy and responsible business conduct within the “Freedom of Investment, National Security and ‘Strategic Industries’” process, it offers specific guidance on recipient country policies towards SWFs. It recommends vigilance, which can be exercised with effective policy frameworks – for example regarding beneficial ownership or infrastructure protection –, instead of discriminatory policies. It has defined guidelines relating to national security. They cover the following aspects: non-discrimination, transparency/predictability, regulatory proportionality, and accountability.⁶¹ With regard to practice, peer monitoring of developments, mandatory notification, examination procedures and oversight, as well as screening foreign direct investment should occur.

In the case of Switzerland, the right to own property and economic freedom are guaranteed.⁶² There is no systematic official control of foreign investments, unless dictated by special statutes, and SWFs are treated like other foreign investors. In addition, organizations responsible for infrastructure provision, such as energy and transport, are subject to statutory regulation, with statutes stipulating state control. In other words, they are protected from

⁵⁹ For various examples, see Summers *supra* note 24.

⁶⁰ Truman, *supra* note 19.

⁶¹ OECD Building Trust and Confidence in International Investment, Report by Countries Participating in the “Freedom of Investment” Process, March 2009; OECD Sovereign Wealth Funds and Recipient Country Policies, April and October 2008.

⁶² Article 26 Guarantee of ownership and article 27 Economic Freedom, *Federal Constitution of the Swiss Confederation of April 18, 1999*, SR 101.

takeovers by either private or foreign investors. For instance, the national railway company has been constituted as a special shareholding company. The statute regulating it states that it must be owned by the Swiss Confederation as its controlling shareholder. The Federal Council may decide to sell shares to third parties or allow third parties to purchase shares. However, the Confederation must at all times remain the majority shareholder, thereby retaining full rights over both capital and voting rights.⁶³ This will continue to be the case for a long time. Another case is the national transmission system operator for electricity. Legally, it has the form of a private shareholding company. It must own its transmission system. Its capital and voting rights must be controlled both directly and indirectly by the cantons and local authorities. These bodies have a preemptory shareholding right and initial public offerings or IPOs with subsequent listing on an exchange are prohibited.⁶⁴ Yet another group of cases concerns the concessions or conferral of an exploitation right on a public matter by municipalities, which decide on the structure of ownership of the concessionaire.

In the private sector, Swiss company statute applies. Private companies are responsible for their own organization and can protect themselves against undesirable national or foreign investors. One important instrument offered by the statute is the restricted transferability of voting rights and the curtailed exercise of these rights. The number of voting rights to be held by individual shareholders can be limited.⁶⁵ Of course, this cannot occur arbitrarily, but must be done for good reasons. In addition, the statute on securities exchanges stipulates duties of disclosure for large equity holdings in listed companies. These duties also apply to SWFs. However, these rules are not aimed at restricting shareholdings, but instead serve to ensure transparency. They render public the building of positions.⁶⁶

In regulated industries, such as the financial sector, special rules apply. Banking and securities market regulations are in place and require the disclosure of the beneficial ownership of financial institutions such as banks, securities dealers, or exchanges. These rules serve to protect financial institutions and markets from criminal, politically-motivated, and irresponsible actors. Owners of financial institutions must fulfill the requirement of ensuring irrefragable business conduct. Hence, the acquisition of large share or capital holdings, that is, in excess of 10% must be brought to the attention of the supervisory authority and

⁶³ Article 7 *Federal Act on the Swiss Railway Company of March 20, 1998*, SR 742.31.

⁶⁴ Article 18 *Federal Act on Electric Power Supply of March 23, 2007*, SR 734.7.

⁶⁵ Articles 685-685g *Swiss Code of Obligations of 30 March 1911*, SR 202.

⁶⁶ Articles 20-21 *Federal Act on Securities Exchanges and Securities Trading of March 24, 1995*, SR 954.1.

authorized in advance. This obligation also applies when a holding is increased or falls below the statutory thresholds. In addition, all financial institutions must inform the supervisory authority once a year of their shareholdings. In case of a new foreign shareholder assuming control, a supplementary license must be obtained and the institution would qualify as a foreign institution. Hence, the supervisory authority is unable to deny any shareholder the right to acquire shares based on arbitrary grounds. However, based on the rule of guarantee of irreproachable business conduct it is possible to argue that a potential shareholder would be unable to guarantee a positive impact on a prudent and solid business activity.⁶⁷

An analysis of practical experiences in the long run would show whether SWFs are treated in the same way as other shareholders. In this regard, it is worth noting that, following the financial crisis, they now adjoin to the shareholdings taken by states in their own national companies, in particular supervised financial institutions. While it can be reasonably expected that state shareholdings in national companies will fall off rapidly, this might not be the case with SWFs.

IV. EVALUATION

The SWFs regime presents a unique governance structure. There is no centralized institution, but a twofold, Janus-like institutional framework. Recently, donor countries voluntarily defined the institutional structure of a regime based on soft law. Recipient countries will either apply their existing statutes or develop new ones. Both sides are taking unilateral action although they agree that dialogue is a core issue. Institutionally, they consider cooperation to be very important. However, as stated by Oye:

At times, the absence of centralized international authority precludes attainment of common goals. Because as states, they cannot cede ultimate control over their conduct to a supranational sovereign, they cannot guarantee that they will adhere to their promises. The possibility of a

⁶⁷ Articles 3, 3bis and 3ter of the *Federal Act on Banking of November 8, 1934*. SwissBanking, “Sovereign Wealth Funds – A Position Paper by the Swiss Bankers Association” (May 2008) at 12-14.

breach of promise can impede cooperation even when cooperation would leave all better off.⁶⁸

The emerging regulatory framework must be subsumed both to non-state regulation and the traditional concept of state regulation. It forms a distinct, original regulatory regime and an ad hoc cooperative scheme of relationships should develop. There is also a structural bias in the relevant functional expertise.⁶⁹ Public and private aspects are largely imbricated and the transnational character of the overall regime even leads to an abandonment of the dichotomy between public and private.⁷⁰

A thorough analysis of the Principles shows that one important issue is not explicitly addressed: the independency of SWF from their government. Experience to date does not indicate that SWFs have been used for political agendas or rationales. Rather, it confirms that SWFs signing up to the Principles are demonstrating their firm commitment to ensuring proper arrangements. While economic considerations underpin their investment decisions, a clear mandate and separation of functions would be welcome.

Donor countries claim to pursue solely long-term commercial interests and no strategic ones. At the same time, precisely these interests might have resulted in disinvestments, which could have placed the companies concerned in a difficult financial situation.⁷¹ Thus, recipient countries are confronted with a double dilemma: they should maintain an open financial system to promote cross-border investments while reconciling this with security concerns in order to thwart the possible political misuse of the investments and while being confronted with the risk of managing the consequences of sudden, perhaps destabilizing disinvestments they cannot impede. In this regard, the 2007-2009 financial crisis has been a good indicator to gauging SWF behavior. The crisis has altered the investment climate, in particular since SWFs incurred huge losses. For instance, following losses, Temasek Holdings declared that it would revise its target for planned investments in developed economies and invest more in

⁶⁸ K. A. Oye, ed., *Cooperation under Anarchy*, (Princeton: Princeton University Press, 1986) at 1.

⁶⁹ M. Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, in: *The Modern Law Review*, Volume 70, No 1, January 2007, at 4.

⁷⁰ A. Fischer-Lescano, G. Teubner, „Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit“, in: M. Albert, R. Stichweh, eds, *Weltstaat – Weltstaatlichkeit: Politische Strukturbildung nach der Globalisierung* (Wiesbaden: VS Verlag, 2007) at 45-48; Chinkin, *supra* note 57 at 152-158.

⁷¹ *Supra* point II. Embedding of sovereign wealth funds, D. Issues, 1. Investment rationales: from commercial to strategic interests.

emerging markets.⁷² At the same time, there are concerns that asset allocation changes by SWFs will result in disorderly market price adjustments and may negatively influence financial stability. However, while it is impossible to rule out such effects, these risks do not apply solely to SWFs. The crisis has shown that, similar to any investor, SWFs pursue self-interests. Their economic transactions rely on the factual opportunities they offer. While SWFs may therefore act as global investors, they must safeguard own national interests. It will be the role of the Forum to facilitate knowledge sharing, promote the understanding of SWFs activities, and enhance their reliability. It conceptualizes complex and interactive relationships between official and unofficial forms or ordering.

V. CONCLUSION

The aim of the paper has been to provide a view on SWFs and the public – private challenge they present for institutional governance in the light of the regime just defined. Important economic considerations and issues of cooperation come into play. In addition, the measures adopted following the 2007-2009 financial crisis, together with the increasing globalization of trade and investment, will interlink economies even more. Thus, responsible behavior should be promoted. Although it presents weaknesses, the concept of dialogue and cooperation developed here should prove to be valuable.

From the perspective of Switzerland, the country has in absolute terms the sixth largest current account surplus in the world. Foreign investments by Swiss companies and by Swiss individuals regularly generate important net income receipt. Experience has revealed the benefits of cross-border investments. True to the metaphor of Janus, this also applies to its role as a recipient country.⁷³

⁷² Burton *supra* note 28.

⁷³ Hildebrand *supra* note 2 at 8.