SOVEREIGN WEALTH FUNDS, CAPACITY BUILDING, DEVELOPMENT, AND GOVERNANCE

Larry Catá Backer[*]

INTRODUCTION

A peaceable kingdom:[1] once upon a time, and not so long ago, there existed the Empire that is (or was) Globalization, one made up of many kingdoms woven together into a single transnational order. While there was order, there was little peace and the Empire was constantly on the defense against monsters spawned from out of itself, and thus spawned, such monsters might be set free to terrorize the inhabitants of those many kingdoms that together constituted this transnational order. With the rise of each monster, all would seem lost, or at least diminished. But for every beast whose ravings threaten the good order of the global system, the great defenders of the transnational order could wield regulatory reform, like music in William Congreve's play, *The Mourning Bride*, with "[c]harms to sooth a savage B[r]east, To soften Rocks, or bend a knotted Oak."[2] But could all beasts be so domesticated by the sonorous melodies of reform that preserved the good order of the system itself?

Enter the beast: When the state is itself the beast that seeks both the protection of Globalization and its undoing, the protection of the good order of the transnational system becomes more complicated, against which the tonics may have little effect. Enter sovereign wealth funds ("SWFs"); though operating in some form or another for over half a century,[3] SWFs did not become an object of

* W. Richard and Mary Eshelman Faculty Scholar Professor of Law and International Affairs, Pennsylvania State University. My thanks my research assistant Angelo Mancini (Penn State Law J.D. 2017 expected) for his usual excellent work.

1. Edward Hicks, *Peaceable Kingdom* (oil on canvas) National Gallery of Art, Washington, D.C. (1834) https://www.nga.gov/content/ngaweb/Collection/art-object-page.59908.html (last visited Sept. 12, 2017).

2. WILLIAM CONGREVE, THE MOURNING BRIDE act I, sc. 1, 9 (Glasgow: 1751) (1697).

3. *See* Simon Johnson, *The Rise of Sovereign Wealth Funds*, FIN. & DEV., Sept. 2007, at 56, http://www.imf.org/external/pubs/ft/fandd/2007/09/pdf/straight.pdf (explaining the history of SWFs); *see also* Joseph J. Norton, *The "Santiago Principles" and the International Forum of Sovereign Wealth Funds: Evolving Components of the New Bretton Woods II Post-Global Financial Crisis*

general attention until the early part of the twenty-first century when a combination of the need for developed states for investment and the growing acceptability of state investment in private markets abroad made them both threatening and desirable.[4] This was the beast set loose on the kingdoms, especially those realms grown fat on the profits of global production, but that now found themselves at the mercy of a monster whose potential appetite could reduce these cash starved realms to the sort of penury they could not contemplate—at least not contemplate if they meant to keep their kingdoms stable and their heads on their shoulders. SWF money could prop up failing markets in the West,[5] but it could also be used to control Western apex corporations,[6] and thus indirectly threaten the authority of Western states—that was the essence of the fear at the time of the Great Recession of 2008.[7]

And how to soothe this beast?: The approach embraced was centered on the crafting of a narrative that would both provide food to the beast and put the monster to work for the preservation of the realms which it might otherwise have threatened. That master narrative[8] both framed a rational understanding of the sovereign wealth fund, and embedded model or idealized SWFs within emerging global financial systems.[9] A SWF was conceived in a form that served the needs of the host states into which investment was injected, as well as the home state that sought to make money from

Architecture and Another Example of Ad Hoc Global Administrative Networking and Related "Soft" Rulemaking?, 29 REV. BANKING & FIN. L. 465, 472–78 (2010).

4. *See* Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3, 24 (2010).

5. Eric Langland, *Misplaced Fears Put to Rest: Financial Crisis Reveals the True Motives of Sovereign Wealth Funds*, 18 TUL. J. INT'L & COMP. L. 263, 264 (2009).

6. *Id.*

7. *See id.*; *see also* Larry Catá Backer, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 GEO. J. INT'L L. 425, 474–82 (2010); Luca Schicho, *Pride and Prejudice: How the Financial Crisis Made Us Reconsider SWFs*, 2 GOETTINGEN J. INT'L L. 63, 69 (2010); Robert Rich, *The Great Recession*, FEDERAL RESERVE HISTORY, https://www.federalreservehistory.org/essays/great_recession_of_200709 (last visited Sept. 26, 2017).

8. JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION 3 (Manchester Univ. Press 1984) (1979), https://www.marxists.org/reference/subject/philosophy/works/fr/lyotard.htm (explaining a master narrative is a theory of postmodernism that posits a societies storytelling in a historical sense, which centers or focuses on that societies' particular point of view).

9. For a discussion of the SWF master narrative, see Larry Catá Backer, *SWFs in Five Continents and Three Narratives: Similarities and Differences*, *in* RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 57, 57–98 (Fabio Bassan ed., 2015).

these investments.[10] With a focus on money, the political threat of the SWF could be diffused.[11] No longer a threat, the beast became an ox, and its masters were now welcomed into the club of those who ate well—and they have, eaten well that is.[12] And its story—of its apparent threat and the manner of the breaking of the beast—shearing its monstrosity for the stoic utility of the ox, became one fit for retelling as an important marker of the scope and triumph of the global financial master narrative and the domesticated SWF's role within it.[13]

Thus, the beast that was the rogue SWF served two purposes. The first purpose was its contribution to the productivity of capital and investment across global markets, enriching those societies in which it might graze—as long as it played by the rules. The second purpose was its contribution to the mechanics and language of narrative and its articulation of the mechanisms of the regulatory order (in soft and hard national and international rules) that served the domesticated beasts as yoke and plough. The kingdom that is Globalization also generates stories of triumph over threats to the good order of the global political-economic and social systems.[14] These are the stories elites like to tell themselves over what passes for the campfires of community bonding—academic conferences, meetings of eminent persons at national and international organizations.[15] These are also the stories that help mask the sausage making that is regulatory governance in this age[16]—an age that might itself be coming to an end[17]—of global regulatory

10. Róbert Csoma, *Appreciation of the Role of Sovereign Wealth Funds in the Global Economy*, PUB. FIN. Q. no. 2, 2015, at 270, 275, https://asz.hu/storage/files/files/public-finance-quarterly-articles/2015/a_csomar_2015_2.pdf.

11. *Id.* at 285.

12. Mathias Okwe, *Sovereign Wealth Fund Records N5.17b Profit*, THE GUARDIAN (Sept. 8, 2015), https://guardian.ng/news/sovereign-wealth-fund-records-n5-17b-profit/ (discussing SWFs located in Nigeria); *see also Norway's Sovereign Wealth Fund Books $30 Bln Profit in Third Quarter*, REUTERS (Oct. 7, 2016), www.reuters.com/article/us-norway-swf-idUSKCN1270O2.

13. *See* Csoma, *supra* note 10, at 270–87.

14. Larry Catá Backer*, Economic Globalization Ascendant: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17 LA RAZA L.J. 141, 145 (2006).

15. *Cf.* Neil Gross and Crystal Fleming, *Academic Conferences and the Making of Philosophical Knowledge, in* SOCIAL KNOWLEDGE IN THE MAKING 151 (Charles Camic et al., eds., U. Chicago Press 2011).

16. ORG. FOR ECON. CO-OPERATION & DEV. INV. DIV., SOVEREIGN WEALTH FUNDS AND RECIPIENT COUNTRIES—WORKING TOGETHER TO MAINTAIN AND EXPAND FREEDOM OF INVESTMENT (2008), http://www.oecd.org/daf/inv/investment-policy/41456730.pdf.

17. *See* Larry Catá Backer, *The 45th Presidency and Multilateral Treaties—Fear, Loathing and a Repudiation of 20th Century Americanism*, L. END DAY (Feb. 2, 2017, 10:53 PM), http://lcbackerblog.blogspot.com/2017/02/the-45th-presidency-and-multilateral.html#more.

networks that provide the basis of good order for transnational economic activity.[18]

The nature, features, and character of this master narrative that reframed discourse and activity were developed around two primary premises. The first created a strong case of classification that made the SWF, so defined, amenable to management that would reduce its potential threats to good order. This classification system distinguished between the beast—which might forage and feed upon the financial instruments of foreign states—and other financial instrument livestock stomping around global financial and operational markets.[19] SWFs were to be encased in a precise and narrow definition,[20] which excluded both State Owned Enterprises ("SOEs")—whose taming and use would be dealt with through a different regulatory narrative—and other forms of investment vehicles that feel outside the definition.[21]

The second encompassed the even larger project of socialization muted for what the political community constituted the most dangerous aspects of SWFs. The principles that emerged as the bars of the cage that made the SWF palatable had a single object—to de-nature the public element of the mechanism and to produce the illusion—and perhaps sometimes the reality—that these instruments would operate on the same basis as their non-state analogues.[22] That provided some advantages to the host states—the power to regulate the activities of these instruments in their home territories like other private enterprises, and the right to develop systems that might allow them to void such investments as they deemed threatening.[23] These usually were meant to protect sensitive industries, but could also be used to protect national development schemes.[24] There were some odds and ends to be sure. The issue of sovereign immunity required some action. The issue of state subsidies and of the need for a wall between the political and investment arms of the state also had to be considered.[25]

18. *See, e.g.*, ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Thierry de Montbrial, *For a New World Economic Order*, FOREIGN AFF. (Oct. 1, 1975), https://www.foreignaffairs.com/articles/1975-10-01/new-world-economic-order; Anne Marie Slaughter, *The Real New World Order*, FOREIGN AFF. (Oct. 1997), https://www.foreignaffairs.com/articles/1997-09-01/real-new-world-order.

19. Veljko Fotak, Xuechen Gao & William Megginson, *A Financial Force to Be Reckoned With? An Overview of Sovereign Wealth Funds* 4 (Eur. Corp. Governance Inst., Working Paper No. 476/2016, 2016), http://ecgi.global/working-paper/financial-force-be-reckoned-overview-sovereign-wealth-funds.

20. *Id.* at 8.

21. *See id.* at 8.

22. *See id.* at 9.

23. *See id.*

24. *See id.* at 7.

25. *See id.* at 9.

What was then required was a simple and straightforward application of well-worn hard and soft law regimes to tame the SWF, or at least to create a more or less fungible investment vehicle that could be regulated and evaluated much like any other private investment fund.[26] All of this was nicely framed within the general principles developed at the height of that epoch, now sometimes called the Great Recession, when the lust of western states for investment inflows into their capital markets exceeded their fear of rapidly developing and cash flush states now seeking to project their financial power into the capital markets abroad.[27] This was undertaken by a collective allegiance to the principle that such states would forego the use of their financial power for political ends by projecting investment as an enhanced weapon of international relations.[28]

The result was the compromised settlement that are the Santiago Principles.[29] These twenty-four principles were affirmed by the International Working Group of SWFs ("IWG") and welcomed by the International Monetary Fund's ("IMF") International Monetary Financial Committee in 2008.[30] The IWG's successor organization, the International Forum of Sovereign Wealth Funds (IFSWF), formed in 2009.[31]

To some extent, the Santiago Principles have proved useful.[32] Among the Santiago Principles' more important uses has been as a global centering element around which rational discussion could be organized.[33] The Santiago Principles produced—or better, they reflected—an ideology of sorts, one which was framed around a core set of principles:

> To help maintain a stable global financial system and free flow of capital and investment; To comply with all applicable regulatory and disclosure requirements in the countries in

26. *See* Larry Catá Backer, *"The Future of Sovereign Wealth Funds": Notes From the Symposium Sponsored by the Wake Forest Law Review*, LAW AT THE END OF THE DAY (Mar. 24, 2017, 10:06 AM), http://lcbackerblog.blogspot.com /2017/03/the-future-of-sovereign-wealth-funds.html.

27. *Id.*

28. *Id.*

29. INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO PRINCIPLES" (Oct. 2008) [hereinafter SANTIAGO PRINCIPLES].

30. *Id.* at 1–2, 7–9.

31. *See Kuwait Declaration*, INT'L F. OF SOVEREIGN WEALTH FUNDS (Apr. 6, 2009), http://www.ifswf.org/santiago-principles-landing/kuwait-declaration (establishing the IFSWF).

32. *See* INT'L FORUM OF SOVEREIGN WEALTH FUNDS, IMPLEMENTING THE SANTIAGO PRINCIPLES: 12 CASE STUDIES 15, 19, 23, 37, 49 (Nov. 2016), www.ifswf.org/sites/default/files/IFSWF_CaseStudies_Nov2016_0.pdf (analyzing the positive values of the Santiago Principles).

33. *Id.* at 5, 23.

> which SWFs invest; To ensure that SWFs invest on the basis of economic and financial risk and return-related considerations; and To ensure that SWFs have in place a transparent and sound governance structure that provides adequate operational controls, risk management, and accountability.[34]

That ideology has been furthered through the tireless work of its own quasi-governance apparatus.[35] The Secretariat that was created to support the project of the Santiago Principles has become an important source of useful storytelling and examples of appropriate conduct.[36]

Assured by the narrative framework that was encapsulated in the Santiago Principles, most states could view SWFs as useful limited-purpose sovereign investment vehicles.[37] As such the privileged sovereign investment fund ("SIF") was meant to be constrained within the borders of the now precisely defined SWF. As Allie Bagnall and Edwin Truman suggested in 2011, the Santiago Principles represented an "admirable but flawed transparency."[38] The flaws, of course, provided states, civil society, and academics much food for thought.[39] Transparency flaws

34. SANTIAGO PRINCIPLES, *supra* note 29, at 4.

35. *See Who We Are*, INT'L F. SOVEREIGN WEALTH FUNDS, http://www.ifswf.org/who-we-are (last visited Sept. 12, 2017) (explaining the IFSWF has its own small secretariat through which it produces knowledge that elaborates the fundamental ideology of the Santiago Principles themselves).

36. *See* SANTIAGO PRINCIPLES, *supra* note 29, at 4; *see also* INT'L FORUM OF SOVEREIGN WEALTH FUNDS, SANTIAGO PRINCIPLES: 15 CASE STUDIES 66 (Nov. 2014), http://www.ifswf.org/sites/default/files/SantiagoP15CaseStudies1_0.pdf.

37. Allie E. Bagnall & Edwin M. Truman, *IFSWF Report on Compliance with the Santiago Principles: Admirable But Flawed Transparency*, PETERSON INST. FOR INT'L ECON. (Aug. 2011), https://173.242.152.27/publications/pb/pb11-14.pdf.

38. *See id.*

39. *See* SVEN BEHRENDT, CARNEGIE ENDOWMENT FOR INT'L PEACE, POLICY OUTLOOK: GULF ARAB SWFS—MANAGING WEALTH IN TURBULENT TIMES 2–4 (2009), http://dafg.eu/fileadmin/dafg/Downloads/S_Behrendt_update_Q4_2008.pdf; RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW (Fabio Bassan ed., 2015); Larry Catá Backer, *Regulating Financial Markets: What We Might Learn From Sovereign Wealth Funds*, *in* RESHAPING MARKETS: ECONOMIC GOVERNANCE, THE GLOBAL FINANCIAL CRISIS AND LIBERAL UTOPIA (Bertram Lomfield et al. eds., 2016); Jason Buhi, *Negocio de China: Building Upon the Santiago Principles to Form an Effective International Approach to Sovereign Wealth Fund Regulation*, 39 H.K. L.J. 197, 202–03 (2009); Anna Gelpern, *Sovereignty, Accountability, and the Wealth Fund Governance Conundrum*, 1 ASIAN J. INT'L L. 289, pin? (2011); Ashby Monk, *Recasting the Sovereign Wealth Fund Debate: Trust, Legitimacy, and Governance*, 14 NEW POL. ECON. 451, 452 (2009); Joseph J. Norton, *The 'Santiago Principles' for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes*, 13 J. INT'L ECON. L. 645, 649–50 (2010); Paul Rose, *Sovereign Wealth Fund Investment in the Shadow of Regulation and Politics*, 40 GEO. J. INT'L L. 1207, 1208 (2009); Schicho, *supra* note 7, at 69–70;

might also prove useful as metrics for gauging the performance of SWFs as a class.[40]

Yet, over the last decade or so, SWFs appear to have developed the potential to become an important instrument in good governance and development, especially for resource-rich and capacity-poor developing states. Following the lead of Chile, and with the patronage of International Financial Institutions ("IFIs"), these SWFs have begun to serve objectives as and with development banks both within and beyond their home state.[41] They are also viewed not merely as a vehicle for training in fiscal discipline, but also as a means through which anti-corruption strategies can be realized.[42] They also appear to be useful as the means through which state-to-state development ventures may be undertaken.[43] Taken together, these movements appear to move SWFs back into its more general SIF form.

This Article considers the capacity of SWFs to serve ends beyond a strict economic role to maximize fund value, which describes the core ideology that is envisioned in Santiago Principle 19 envisions.[44] The Article then considers the continuing relevance of the Santiago Principles as a basis for ordering and supporting legitimacy structures for state SIFs. To that end it, examines the principal emerging alternative or supplemental ends for which SWFs are created (and the ideologies underlying them). These include the following: (1) the value of SWFs as a means of enhancing governance capacity in weaker states; (2) SWF utility in enhancing development objectives; (3) the emerging landscape of joint ventures among SWFs for investment, development, and enhancing economic political objectives abroad along with the intersection of these objectives with emerging roles of infrastructure and development banks; and (4) the importance of SWFs in enhancing the operationalization of emerging international business and human rights standards not only within their own organizations but through their investment activities. Section I considers the emerging realities on the ground. Particular attention will be paid

---

Edwin M. Truman, *Sovereign Wealth Funds: Is Asia Different?* (Peterson Inst. for Int'l Econ., Working Paper No. 11-12, 2011), http://dx.doi.org/10.2139/ssrn.1898787.

40. Bagnall & Truman, *supra* note 37.

41. *See* IMPLEMENTING THE SANTIAGO PRINCIPLES: 12 CASE STUDIES, *supra* note 32, at 19.

42. Thomas Holt, Jr., *To Be or Not To Be: Sovereign Wealth Funds Face Increasingly Complex Legal Challenges*, FLETCHER NETWORK FOR SOVEREIGN WEALTH & GLOBAL CAP., http://fletcher.tufts.edu/SovereigNet/About/letterholt (last visited Sept. 12, 2017).

43. *See* SANTIAGO PRINCIPLES, *supra* note 29, at 4.

44. Santiago Principles GAPP 19 should be read in conjunction with GAPP 18 that states that investment policy ought to be based on sound portfolio management principles.

to SWFs as means of projecting state policy through its investment decisions and as an active shareholder, SWFs as development funds, SWF joint venturing in projects with other SWFs, SWFs as owners or controlling shareholders of SOEs, and SWFs as a means for strengthening governance in weak governance zones. Section III then considers the compatibility of these changes within the normative framework of the Santiago Principles and some emerging regulatory issues—from transparency initiatives in hard law, to national extraterritoriality projects, to the emerging business and Human Rights frameworks in operations and financial transactions. A brief assessment of these trends ends the Article.

I. THE EMERGING REALITIES ON THE GROUND.

The traditional SWF has generally sought to engage in its investment activities to the same ends as private funds.[45] Certainly, most funds are organized for the purpose of making money, or better put, of augmenting the interests of the fund,[46] and they embrace the principle of fair competition with private funds.[47] Yet, even here, there are some differences with the ordinary course private funds. Private funds have hungry investors who enjoy the bounty of returns paid often.[48] The time horizon of such funds tends toward the shorter term.[49] SWFs have the luxury of a longer time horizon, perhaps even as long as the anticipated life span of the state whose assets are thus aggregated for projection abroad.[50] That difference in time horizon, of course, opens a very large door through which the political, macro-economic, and legal regulatory agendas of states might creep into decision making in a variety of ways.

For traditionally constituted SWFs, those longer-term time horizons affect not merely approaches to returns, but also the principles around which SWFs manage their investments and the management of the investment universe within which the SWF will

45. For a discussion of early SWFs, especially those of the Middle East, see, for example, SARA BAZOOBANDI, THE POLITICAL ECONOMY OF THE GULF SOVEREIGN WEALTH FUNDS: A CASE STUDY OF IRAN, KUWAIT, SAUDI ARABIA AND THE UNITED ARAB EMIRATES 2–3 (2013).

46. *See* SANTIAGO PRINCIPLES, *supra* note 29, at 8.

47. *Id.* at 9 ("This principle promotes the fair competition of SWFs with private entities. For example, SWFs should not seek advantages such as those arising from privileged access to market sensitive information.").

48. Omri Marian, *The Other Eighty Percent: Private Investment Funds, International Tax Avoidance, and Tax-Exempt Investors*, 2016 BYU L. REV. 1715, 1738–39 (2016).

49. *Id.* at 1722–23 (discussing the time investment horizons for private funds).

50. *See Investment Strategy*, NORGES BANK INV. MGMT., https://www.nbim.no/en/investments/investment-strategy/ (last visited Sept. 12, 2017) (arguing SWFs tend to make this explicit in the description of their investment policies).

choose securities.[51] But, they also have appeared to open the door for a more instrumental use of SWFs that are meant to achieve short- and medium-term purposes far removed from economic return. This "door opening" appears to have been undertaken on the promise, sometimes quite tenuous, that in the long term the SWF will indeed generate the economic rewards understood in Principle 19[52] through the exercise of securities ownership compatible with Principle 21.[53] This Section considers the emerging broad range of uses of SWFs that have emerged since 2008.

A. SWFs as means of projecting state policy through its investment decisions and as an active shareholder

This might be considered the first deviation from the ideal of the Santiago Principles. But it is also one that the Santiago Principles recognizes. Principle 19 articulates the general principle that SWFs ought to be operated to make money;[54] yet there is an exception. Principle 19.1 provides "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."[55] But this principle, that appears open-ended, is itself constrained by sub-Principle 19.2: "The management of an SWF's assets should be consistent with what is generally accepted as sound asset management principles."[56] The same principles apply to the exercise of active ownership regulated by Principle 21.[57]

To some extent, all SWFs tend to exhibit some tendency to use SWF investment strategies in the service of public policy, as the states that direct them might determine. Where this approach is the most limited are those instances in which the SWF is itself managed by professional managers—usually residing outside the territory of the home state, and where the SWF is offered a substantial measure of autonomy.[58] But even in these cases, the

51. *Id.*

52. SANTIAGO PRINCIPLES, *supra* note 29, at 8 (Principle 19 provides: "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.").

53. *Id.* at 9 (Principle 21 provides: "SWFs view shareholder ownership rights as a fundamental element of their equity investments' value. If an SWF chooses to exercise its ownership rights, it should do so in a manner that is consistent with its investment policy and protects the financial value of its investments. The SWF should publicly disclose its general approach to voting securities of listed entities, including the key factors guiding its exercise of ownership rights.").

54. *Id.* at 8.

55. *Id.*

56. *Id.*

57. *Id.* at 9.

58. *See generally id.* at 15 (discussing the various SWF frameworks and governance structures that influence investment decisions).

decision to free the SWF from direct political objectives represents an initial political choice that it is the state's interest to use SWFs primarily for conventionally understood economic purposes to the state's desired ends.[59] The autonomy that follows a decision to permit the SWF to operate as an instrument of long-term economic policy rather than as a short-term political instrument, of course, is subject to limits. And those limits usually correspond to public expectations of SWF use or objectives, broadly understood.[60]

But there are those SWFs that quite consciously push the envelope for perfectly good public policy reasons. The first are those SWFs whose objectives aim to make money but only consistently with the implementation of international standards, at least as transposed into national law.[61] The Norwegian Pension Fund Global is the usual example. Its complex structures, Ethical Guidelines, Parliamentary objectives, and development of review and examination procedures through an Ethics Council and the decision making authority of Norges Bank,[62] is the epitome of the use of a SWF to make money, but to do so in the long term in a way that advances the project of internationalizing Norwegian conceptions of international law and norms.[63] To that end, companies are examined and either excluded from the investment universe or put under observation through a complex and sometimes serendipitous process.[64] Sometimes these exclusions or observations are imposed by statute—for example, the divestment of coal-using enterprises.[65] Most of the time, the Ethics Guidelines provide the normative framework, exercised through discretionary decision-making at the Ethics Council and Norges Bank.[66]

The other broad category includes those funds that are also managed to make money in the long term, but the discretionary

59. The Singaporean fund, GIC Private Limited (formerly the Government of Singapore Investment Corporation) provides a good example of this approach. "Investment returns from GIC, along with MAS and Temasek, help strengthen Singapore's R&D, education, social security nets and physical environment. This is done through the Net Investment Returns Contributions (NIRC) which allows the government to take up to 50% of the net investment returns of the net assets managed by MAS, GIC and Temasek to supplement the annual government budget." *Shaping Singapore*, GIC, http://www.gic.com.sg/shaping-singapore (last visited Sept. 12, 2017).

60. *See generally id.* at 17 (discussing limits to SWF operational independence).

61. *See id.* at 11.

62. *See id.* at 41–42.

63. *Id.*

64. *Id.*

65. *See, e.g.*, Larry Catá Backer, *A Coal Free Investment Universe: Third Tranche of Coal Exclusions from the Government Pension Fund Global*, L. END DAY (Mar. 20, 2017, 10:02 PM), http://lcbackerblog.blogspot.com/2017/03/a-coal-free-investment-universe-third.html.

66. SANTIAGO PRINCIPLES, *supra* note 29, at 41–42.

investment decisions are substantially constrained by a requirement to conform to state macro-economic policy for internal development and for the protection of its supply chains abroad. Chinese SWFs may be fair examples of this type of operation.[67] In this context, the SWF is viewed as another application of socialist modernization principles that require that the development of productive forces must be directed by both state and Party to advance economic and societal development under contemporary conditions.[68] Thus, for example, the One Belt One Road policy might tilt Chinese SWF investing toward infrastructure enterprises.[69] The importance of protecting China's material supply sources might be given substantial weight in decisions about SWF investment to shift investment into companies that operate in the extractive and petroleum sectors or otherwise aid Chinese overseas investment objectives.[70] On the other hand, some of the more traditional funds may invest infrastructure principally out of economic interest—though the decision to invest in some infrastructure projects and avoid others may also have political overtones.[71] For example, Middle Eastern funds from Muslim majority states may advance national or regional political agendas through decisions about investment in Israeli firms or firms that are seen as having very close ties to Israel.[72] But irrespective of the forms of its engagement, it is becoming clearer that SWFs project political power

67. For an early criticism along those lines that reflect the then emerging SWF master narrative, see BECKY CHIU, AND MERVYN K. LEWIS, REFORMING CHINA'S STATE-OWNED ENTERPRISES AND BANKS 1–2 (Cheltenham: Edward Elgar, 2006).

68. *See id.* at 36–37.

69. For a discussion, see, for example, *Our Bulldozers, Our Rules*, THE ECONOMIST (July 2, 2016), http://www.economist.com/news/china/21701505-chinas-foreign-policy-could-reshape-good-part-world-economy-our-bulldozers-our-rules ("China's sovereign wealth fund backed a new Silk Road Fund worth $40 billion and the government set up the AIIB with $100 billion of initial capital."). *See also* Sara Hsu, *China's Sovereign Wealth Fund Seeking Alpha in Silk Road*, THE DIPLOMAT (Aug. 4, 2015) http://thediplomat.com/2015/08/chinas-sovereign-wealth-fund-seeking-alpha-in-silk-road/ (describing a report that "CIC Capital, CIC's overseas direct investment branch started in 2015, may have received $100 billion from a Ministry of Finance (MOF) bond issue in part for [OBOR investment]. CIC is seeking to profit from OBOR projects in line with its aim of maintaining a direct investment in a number of countries.")

70. *See Our Bulldozers, Our Rules*, *supra* note 69.

71. In this context, the recent infrastructure-related activities of the Singaporean and Malaysian funds are examples of this political activity. *See, e.g.*, Georg Inderst, *More Private Capital for Infrastructure Investment in Asia?*, OECD INSIGHTS (Feb. 3, 2017), http://oecdinsights.org/2017/02/03/more-private-capital-for-infrastructure-investment-in-asia/.

72. For a discussion, see, for example, Ashby Monk, *An Intriguing Joint Venture*, OXFORD SWF PROJECT (Aug. 19, 2010), https://oxfordswf.wordpress.com/2010/08/19/an-intriguing-joint-venture/.

outward.[73] The issue, then, is not in seeking a principle that forbids this inevitable effect, but in figuring out what sorts of political projections are benign enough to be tolerated, and which are not.

B. SWFs as development funds and "Reverse SWFs"

Over the last half decade, it has become quite fashionable to deploy SWFs as development funds. This is especially the case for developing states. Developing states' SWFs can be more effective when they switch from the conventional passive investment vehicle to a role as strategic investors operating coherently with national development policies.[74] IFIs have encouraged this cooperation as a means of ensuring fiscal discipline, and as we will see in discussion below, as a tool of capacity building in weak governance zones.[75]

The Palestinian Fund ("PIF") might be a special case—yet it represents the potential use of SWFs as funnels for inbound as well as outbound investment. "PIF's mission is to promote a strong, sustainable and independent Palestinian economy that will be a cornerstone of the independent Palestinian State with Jerusalem as its capital."[76] Its vision is to promote sustainable growth in Palestine through in-country investment.[77] The focus of its activities is investment within Palestine. "The firm prefers to invest in Palestine region with a focus on Jerusalem, Jordan Valley, and Dead Sea. It also manages portfolios for its clients. The firm invests in the public equity and fixed income across the globe. It can take both direct majority and minority stakes in its portfolio companies."[78] The object is to provide a structure in PIF as a pass-through entity through which money received can be devoted to a core set of development missions.[79] In a sense, PIF begins to acquire the characteristics of a vehicle for the disbursement of foreign aid rather than as a means of channeling sovereign wealth. The context may make this inevitable in this time in Palestinian history. But in a sense, the PIF is most interesting for the possibilities it offers as a means of serving as a reverse SWF.

Outside of developing states, some of the larger petroleum-rich states have also sought to use their SWFs as development funds with a twist. The Korean Fund was used as an investment vehicle for the purpose of wealth enhancement and strategic development of

73. *See, e.g.*, Backer, *supra* note 26.

74. *See id.*

75. *See, e.g.*, PALESTINE INVESTMENT FUND, ANNUAL REPORT 2012 9 (2012), http://www.pif.ps/files/annual_report/EnglishAnnualReport.pdf [hereinafter PIF].

76. *Id.*

77. *See id.*

78. *Company Overview of Palestine Investment Fund PLC*, BLOOMBERG, http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId =62147909 (last visited Sept. 12, 2017).

79. *Id.*

key sectors.[80] It is, in a sense, a future fund operated for the purpose of enhancing the aggregate economic potential of Korea. The mission of the Korea Investment Corporation ("KIC") is focused on the financial sector itself while increasing national wealth. "As our purpose is not only to manage Korea's sovereign wealth, but also to support the development of the domestic finance industry, we are taking steps to contribute locally. We will increase the scale of entrustments to domestic managers this year in order to support their global development, and improve opportunities for domestic institutional investors to jointly invest abroad."[81]

The Russian Direct Investment Fund ("RDIF") is structured as an international development fund.[82] The operations of the RDIF are overseen by a supervisory board, an International Advisory Board, and an International Auditor; an Investment Committee approves transactions; and the Chief Executive Officer and Executive Board oversees the day-to-day activities of the RDIF.[83] What makes the RDIF distinctive is that it operates as a set of managed and overlapping joint ventures with other development oriented SWFs, international financial organizations, and private finance entities.[84] Indeed, its CEO has noted, "today the Fund is an effective and functional tool for co-investment on a global scale, and a reliable partner for international investors in Russia."[85] This practice is made official with the structuring of the RDIF that has

80. *See Overview of Korean Fund Inc.*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=KF (last visited Sept. 12, 2017). At the same time, KIC increasingly serves as a source of infrastructure financing. "In particular, we will work with domestic engineering, procurement and construction companies (EPC) expanding. . . Through doing so, we will be able to support domestic companies expanding overseas while also providing domestic financial institutions and investors with profitable opportunities to increase returns." SOVEREIGN WEALTH FUND OF KOREA, 2016 ANNUAL REPORT 46 (2016), http://www.kic.kr/_custom/kic/_common/board/download.jsp?attach_no=32945.

81. Sung-Soo Eun, *Message From the CEO*, SOVEREIGN WEALTH FUND OF KOREA, 2016 ANNUAL REPORT, *supra* note 81, at 13.

82. *See About Us*, RUSSIAN DIRECT INVESTMENT FUND, https://rdif.ru/Eng_About/ (last visited Oct. 3, 2017) ("RDIF was created in 2011 under the leadership of the President and Prime Minister of Russia to co-invest alongside top global investors, acting as a catalyst for direct investment in Russia").

83. *See Three Levels of Governance*, RUSSIAN DIRECT INVESTMENT FUND, https://rdif.ru/Eng_Management/ (last visited Oct. 3, 2017).

84. *See Partnerships,* RUSSIAN DIRECT INVESTMENT FUND https://rdif.ru/Eng_Partnership/ (last visited Oct. 3, 2017).

85. *See Message From the CEO,* RUSSIAN DIRECT INVESTMENT FUND https://rdif.ru/Eng_message-CEO/ (last visited Oct. 3, 2017) ("We set ourselves the task of helping foreign partners to actively share their successful experiences in Russia. Our joint investments already cover more than 95% of the country's regions. Therefore, it is important for us to ensure regional development through quality investment projects.").

already become part of the functional operation of other funds, especially the Russian National Welfare Fund ("RNWF").[86]

The Italian SWF represents a curious throwback. While it may be operated in sovereign wealth form, and even adopt the long-term shareholder language of SWF master narratives, it remains, at its core, a means of providing strategic resources to enterprises that the state would like to favor.[87] But it is presented in new form. As a strategic development fund, it funnels money from the Italian state to the Italian private sector.[88] And it hopes, like a bank, to make money in the process.[89] But it is a very different organization from SWFs, with the aim to project its economic power abroad directly through fund investment.[90]

C. SWF joint venturing in projects with other SWFs.

As discussed above with respect to the Russian Fund, SWF-to-SWF investment, in the form of joint investments or jointly sponsored projects, has also become more visible.[91] These types of investments are not confined to developing states or even to state on the financial markets periphery, like Russia. For example, the RDIF and KIC have signed a memorandum to form the Russian-Korean Investment Platform. The signing ceremony took place in the presence of Russian President, Vladimir Putin, and Korean President, Park Geun-hye, in Seoul. The investment platform will focus on cross-border investments which fulfill Russian-Korean strategic interests. The parties intend to invest in companies and projects that facilitate trade and encourage investment cooperation between the two countries.[92] SWFs have also sought to pool funds

86. *See National Wealth Fund*, MINISTRY FIN. RUSSIAN FED'N, http://old.minfin.ru/en/nationalwealthfund/ (last visited Sept. 26, 2017).

87. *See* Larry Catá Backer, *Part 11: Italy Strategic Fund—Reimaging the State in the Global Sphere: An Inventory of Sovereign Wealth Funds as Regulator and Participant in Global Markets*, L. END DAY (Feb. 15, 2014, 3:48 PM), http://lcbackerblog.blogspot.com/2014/02/part-11-italy-strategic-fund-reimaging.html.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See, e.g.*, RUSSIAN DIRECT INVESTMENT FUND, *supra* note 84.

92. Press Release, Russian Direct Inv. Fund, RDIF and KIC Launch Russian-Korean Investment Platform (Nov. 13, 2013), https://rdif.ru/Eng_fullNews/822/. KIC has entered into joint venture Memoranda of understanding with eighteen SWFs, including those of China, Australia, Kuwait, and Italy. SOVEREIGN WEALTH FUND OF KOREA, 2016 ANNUAL REPORT, *supra* note 80, at 43. KIC is a member of the Co-Investment Roundtable of Sovereign and Pension Funds, "established in 2014 as a practical platform for participants to identify, build trust, and successfully collaborate and co-invest with limited partners, general partners, investment banks, and corporations." *SOFAZ Hosts CROSAPF Annual Summit 2016*, TREND NEWS AGENCY (Sept. 11, 2016), https://en.trend.az/azerbaijan/business/2662761.html. KIC founded CROSAPF and co-hosted with Ithmar Capital its annual meeting in 2017. *See*

for joint investment, but not necessarily for development aims.[93] One such joint investment fund partnered the Qatar Investment Authority ("QIA") and KIC.[94] SWFs have also begun to develop a capacity to act as venture funds.[95]

D. SWFs as a Development Vehicle: As Owners or Controlling Shareholders of SOEs, Real Estate and other Enterprises.

SWFs as development funds and vehicles to further strategic policies including, but sometimes beyond, mere macro-economic policies have become a more prominent feature of some SWFs in recent years. The conflation of SWFs and SOEs can have some spillover effects, especially with respect to the principles of SOE investment abroad.[96] Things have become even more complicated as SWFs become the owners and operators of national SOEs. In the recent action by Turkey to transfer several of its SOEs into its SWF,[97] the SWF itself has been transformed into an internal investment vehicle for the provision of funds among its SOEs and an external investment vehicle for leveraging its SOE assets in the service of Turkish transnational economic policy,[98] as well as politico-religious aims.[99]

Co-Investment Roundtable of Sovereign and Pension Funds, MOROCCO WORLD NEWS (March 30, 2017), https://www.moroccoworldnews.com/tag/co-investment-roundtable-of-sovereign-and-pension-funds/. "Co-investment with the private sector such as foreign partners and including pension funds is often a most cost effective way forward. In that light I welcomed the decision by the Korea Development Bank and Korea Investment Corporation to create a pool of funds estimated at US$2 billion for infrastructure investment in Asia, including Australia." Warren Truss, Keynote Address at the Sovereign and Pension Funds Annual Summit 2015 Co-investment Roundtable (Nov. 3, 2015), http://minister.infrastructure.gov.au/wt/speeches/2015/wts025_2015.aspx,

93. *See* Carlo Festa, *The Newly Created "Fund of Sovereign Funds" Will Support "Made in Italy" Businesses,* ITALY 24 (Dec. 27, 2016), http://www.italy24.ilsole24ore.com/art/business-and-economy/2017-07-04/the-newly-created—fund-of-sovereign-funds-will-support-made-italy-businesses—122639.php?uuid=AEnwgArB.

94. *See Korea, Qatar to Create Investment Fund worth US$2 Billion*, Business Korea (Nov. 6, 2014), http://www.businesskorea.co.kr/english/news/politics/7150-joint-fund-qatar-korea-qatar-create-investment-fund-worth-us2-billion; *see also* Investment, *Global Network*, KOREA INVESTMENT CORPORATION, http://www.kic.kr/en/02/06/01.jsp (last visited Oct. 3, 2017).

95. *See* Diego Lopez, *The Rise of Sovereign Venture Funds*, in THE SKY DID NOT FALL: SOVEREIGN WEALTH FUND ANNUAL REPORT 2015 61, 61, 63 (2015), http://www.ifswf.org/sites/default/files/Bocconi%20SIL%202016%20Report.pdf.

96. *See generally* Backer, *supra* note 26.

97. *See* Elef Binici, *Turkey's Sovereign Wealth Fund Set to Be Ambitious Player in Capital Markets*, DAILY SABAH (Mar. 5, 2017), https://www.dailysabah.com/economy/2017/03/06/turkeys-sovereign-wealth-fund-set-to-be-ambitious-player-in-capital-markets.

98. *See* Şahin Ardiyok & Müfit Arapoğlu, *Turkey Introduces Sovereign Wealth Fund*, MONDAQ (Sept. 6, 2016), http://www.mondaq.com/turkey/x

Even traditional funds, like the QIA, now have a vigorous program of strategic investing for purposes other than growing money. As one of the less fertile countries in the world, Qatar and the QIA established Hassad Foods,[100] which has "a mandate to run a profitable business with sustainable growth as well as to contribute to the food security programme for Qatar."[101] The goal is to provide Qatar with viable sources of food from outside of the country looking forward for the next 50 to 100 years.[102] The corporation works via joint-ventures, start-ups, and the acquisition of existing companies.[103] Hassad has offices operating in Australia and Sudan, with anticipated expansion into Brazil and Argentina.[104]

Like other SWFs, QIA also has extensive holdings in property. QIA has property holdings mainly in London and Paris, estimated at $42 billion out of a total asset base of around $335 billion,[105] owns the European football team Paris Saint-Germain,[106] and has been rumored to be interested in purchasing a majority of Morgan Stanley's Commodity trading unit.[107] These investments are useful in long-term strategic planning, and are even more welcome to some extent by host states.[108] Real estate serves as a useful way of holding state assets hostage, particularly in forms that are not as inconvenienced by sovereign immunity.

/524366/Fund+Management+REITs/Turkey+Introduces+Sovereign+Wealth +Fund.

99. *Id.* ("Utilization of Islamic finance entities is also intended by the establishment of the Fund.").

100. *See* HASSAD FOOD, http://www.hassad.com/English/Pages/default.aspx (last visited Sept. 13, 2017).

101. *See Hassad Food Company*, HASSAD AUSTL., https://hassad.com.au /hassad-food-company/ (last visited Mar. 30, 2017).

102. Larry Catá Backer, *Part 15 Qatar Investment Authority–Reimagining the State in the Global Sphere: An Inventory of Sovereign Wealth Funds as Regulator and Participant in Global Markets*, L. END DAY (Feb. 26, 2014), http://lcbackerblog.blogspot.com/2014/02/part-15-qatar-investment-authority .html.

103. *See Investment Approach*, HASSAD FOOD, http://www.hassad.com /English/StrategyFocus/Pages/InvestmentStrategy.aspx (last visited Sept. 26, 2017).

104. *See About Us*, HASSAD FOOD, http://www.hassad.com/English/AboutUs /Pages/default.aspx (last visited Sept. 13, 2017).

105. *See* Alba, *Qatar Investment Authority*, BLACK CAPITAL, http://black -capital.com/news/2011/03/qatar-investment-authority/?lang=en (last visited Oct. 3, 2017); Mohammed Sergie, *The Tiny Gulf Country With a $335 Billion Global Empire*, Bloomberg (Jan. 11, 2017), https://www.bloomberg.com/news /articles/2017-01-11/qatar-sovereign-wealth-fund-s-335-global-empire.

106. *Will Qatar's Stake in PSG Set a New Standard in Football Investment?*, THE EDGE (Nov. 19, 2013), http://www.theedge.me/will-qatars-stake-in-psg-set -a-new-standard-in-football-investment/.

107. Shane McGinley, *Qatar Eyes Stake in Morgan Stanley's Commodities Unit*, ARABIAN BUS. (Oct. 4, 2012), http://www.arabianbusiness.com/qatar-eyes -stake-in-morgan-stanley-s-commodities-unit--475182.html.

108. *See id.*

The newly-announced successor to Saudi Arabia's SWF[109] also appears to continue the focus of creating pools of funds for global investment with the principal object of internal development. It is a particularly interesting new development that Saudi Arabia's SWF is going to be funded by the transfer of Saudi Aramco to the Saudi Public Investment Fund, along with some real estate [110]. Then Saudi Aramco will be partially privatized through the sale of a small equity interest in the company to the public in global markets.[111] The newly-augmented SWF will apparently derive revenues both from the operation of the SOE and investments made with those revenues.[112] The revenues will, to some extent, be banked, but there are discussions about the newly-augmented SWFs use to fund projects that both meet revenue generation requirements and serve quite targeted development aims.[113] Among these projects are a possible Saudi Six Flags amusement park,[114] investment in which has been denied for Saudi Arabia but not necessarily as an investment vehicle elsewhere.[115] The exchange highlights both the expected direction of development of SWF operation in some instances—in this case, toward substantial investment in targeted sectors—but also the willingness of SWFs focused on development to begin to take controlling positions in national SOEs. Here, one begins to sense the transformation of SWFs from investment funds to holding companies with substantial investment portfolios.

Real estate holdings of SWFs can be quite sector driven. Since 2016, Singapore's funds have been increasing their investment in

---

109. For the announcement of the new Saudi SWF, see, for example, Adam Brown, *Saudi Arabia to Create New SWF Amid Declining Income*, IR MAG. (Jan. 20, 2016), https://www.irmagazine.com/articles/shareholder-targeting-id/21203/saudi-arabia-create-new-swf-amid-declining-income/#.

110. The Saudi Public Investment Fund is not especially transparent. For a sense of its operation, see, for example, *Company Overview of Public Investment Fund*, BLOOMBERG, http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=12455701 (last visited Sept. 13, 2017).

111. For a discussion of the funding of the SWF, see, for example, Stefania Bianchi, *The Key Questions Asked About Saudi Arabia's $2 Trillion Fund*, BLOOMBERG (May 26, 2016), https://www.bloomberg.com/news/articles/2016-05-25/key-questions-raised-by-the-2-trillion-saudi-wealth-fund-plan.

112. *Id.*

113. *See, e.g.*, Simeon Kerr, *Sleepy Saudi Sovereign Wealth Fund Wakes and Shakes Global Finance*, FIN. TIMES (Jan. 28, 2017), https://www.ft.com/content/bd3d7c34-b877-11e6-961e-a1acd97f622d.

114. *See* Wael Mahdi, Matthew Martin & Dinesh Nair, *Saudi Sovereign Fund Considers Stake in Six Flags*, BLOOMBERG (Feb. 8, 2017, 11:00 PM), https://www.bloomberg.com/news/articles/2017-02-08/saudi-wealth-fund-pif-said-to-consider-taking-stake-in-six-flags.

115. *See* Andrew Torchia, *Saudi Sovereign Fund Says It's Not Considering Stake in Six Flags*, REUTERS (Feb. 10, 2017, 6:40 AM), http://www.reuters.com/article/us-six-flags-entmt-saudi-idUSKBN15P19Y.

ownership of student housing, especially in Germany[116] and elsewhere.[117] In September 2016, Singapore's GIC bought a student housing portfolio in the UK from Oaktree Capital Management covering 7,150 beds, which will be managed in partnership with student accommodation operator GSA, was reportedly sold for approximately £700m (€811.1m) according to media reports.[118] "The sleeper in the investment world – student accommodation – is suddenly wide awake. A record €14.4bn in new capital has gone into the long-overlooked sector in the past 18 months as institutional investors jostle for position."[119] The value of this investment is that it provides income-generating investment while offering substantial appreciation, not just as a going concern but also with respect to the underlying value of the real restate. The Canada Pension Plan Investment Board ("CPPIB")[120] has also invested over €2.4bn in student housing.[121]

The China Africa Development Fund is particularly interesting for its hybridity. It combines the focus on development with the flexibility to work together with other SWFs in projects.[122] What makes it most interesting is its mandate to serve as a vehicle to finance Chinese SOEs in their efforts to comply with state-directed outward investment programs.[123] Wen Jiabao, then China's Premier noted in 2009 that, "[w]e should hasten the implementation

116. *See* Richard Lowe, *GIC, GSA Expand Student-Housing Partnership into Germany IPE Real Estate*, INV. & PENSIONS EUR. (Oct. 4, 2016), https://realestate.ipe.com/news/investors/gic-gsa-expand-student-housing-partnership-into-germany/10015494.fullarticle; Pooja Thakur Mahrotri & Klaus Wille, *'Recession-Proof' Student Housing Attracts Singapore Investors*, BLOOMBERG (Apr. 19, 2017, 6:00 PM), https://www.bloomberg.com/news/articles/2017-04-19/gic-mapletree-go-back-to-school-in-student-housing-buying-spree.

117. *See GIC Buys Large Student Housing Portfolio from Oaktree*, INV. & PENSIONS EUR. (Sept. 29, 2016), https://realestate.ipe.com/news/investors/gic-buys-large-student-housing-portfolio-from-oaktree/10015411.article?utm_term=&utm_source=IPE%20Real%20Estate%20Top%2010%2F5&utm_medium=Email&utm_content=1.%20GIC%20buys%20large%20student%20housing%20por.

118. *Id.*; Rhiannon Bury, *Singaporean Sovereign Wealth Fund Snaps Up £700m of UK Student Digs,* THE TELEGRAPH (Sept. 29, 2016, 2:00 PM) http://www.telegraph.co.uk/business/2016/09/29/singaporean-sovereign-wealth-fund-snaps-up-700m-of-uk-student-di/.

119. Florence Chong, *Student Housing: A Sleeper Emerges*, INV. & PENSIONS EUR. (May–June 2016), https://realestate.ipe.com/markets-/sectors/alternatives/student-housing-a-sleeper-emerges/10013136.article.

120. CAN. PENSION PLAN INV. BOARD, http://www.cppib.com/en/ (last visited Sept. 13, 2017).

121. Chong, *supra* note 119.

122. *See* Barney Jopson, *China Seeks Africa Joint Ventures*, FIN. TIMES (Nov. 9, 2009), https://www.ft.com/content/ed5195d6-cd56-11de-8162-00144feabdc0?mhq5j=e2 (noting the involvement of the Fund in promoting cooperative investment between Chinese state-owned development companies and African governments).

123. *See id.*

of our 'going out' strategy and combine the utilisation of foreign exchange reserves with the 'going out' of our enterprises."[124] At the time HSBC's chief China economist noted that, "'This is the first time we have heard an official articulation of this policy . . . to directly support corporations to buy offshore assets.'"[125]

E. SWFs as a means for strengthening governance in weak governance zones.

Many of the stabilization funds created around extractives wealth in developing states might be understood to serve not just as a means of fiscal stability and future funds (revenues for when extractives derived wealth depleted) but also as a means of strengthening governance in weak or developing governance zones. The Fundo Soberano de Angola ("FSA")[126] is an interesting effort to use SWF forms to discipline spending, but one in which the almost picture-perfect formal organization has been dogged by charges of corruption.[127] It is also notable for making explicit the agenda of international development and lending organizations, like the International Monetary Fund ("IMF"),[128] to think about SWFs as an important disciplinary tool that ought to be in the toolkit of developing states with large reserves of natural resources, especially petroleum.[129] By 2011, Angola was reporting to the IMF of its efforts to establish what it then called an Oil for Infrastructure Fund,

> In the medium term, we see a need to enact policies that avoid the disruption caused by the boom-bust cycles associated with

124. Jamil Anderlini, *China to Deploy Foreign Reserves*, FIN. TIMES (July 21, 2009, 6:10 PM), https://www.ft.com/content/b576ec86-761e-11de-9e59-00144feabdc0.

125. *Id.*

126. FUNDO SOBERANO DE ANGOLA, http://www.fundosoberano.ao/language/en/ (last visited Sept. 13, 2017).

127. *See, e.g.*, Rafael Marques de Morais, *Angola's Sovereign Wealth Fund Pays $100 Million to a Shell Company*, MAKA ANGL. (Apr. 12, 2015), https://www.makaangola.org/2015/04/angolas-sovereign-fund-pays-us-100-million-to-a-shell-company/ (documenting one instance in which Angola's SWF transferred funds to a practically non-existent business entity with ties to the current chairperson of the SWF).

128. *About the IMF*, INT'L MONETARY FUND, http://www.imf.org/external/about.htm (last visited Sept. 13, 2017).

129. *See* Int'l Monetary Fund, *Angola—Fifth Review Under the Stand-By Arrangement, Request for Waiver of Applicability of Performance Criteria, and Request for Modification of Performance Criteria* 8 (Dec. 2011) [hereinafter *IMF 2011 Angola Report*], https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Angola-Fifth-Review-Under-the-Stand-By-Arrangement-Request-for-Waiver-of-Applicability-of-25419 (noting the IMF "sees the merit of establishing a sovereign wealth fund, with a share of the revenue from non-renewable resources being transformed into financial assets" as a step towards reducing Angola's vulnerability to volatility in the oil market).

> oil price volatility . . . . For the time being, an Oil for Infrastructure Fund was set up in February 2011 (but is not yet operational) in order to secure financing for very high priority investments, mainly in water and energy. This fund will is fully integrated in our budget.[130]

This was to serve as a stabilization fund.[131] "We are continuing to consider alternative fiscal rule, perhaps to be formalized in legislation for a stabilization fund, which would help to smooth public spending over the oil price cycle and prevent the disruptive and sharp contraction of investment spending recorded in 2009–10."[132] Building on this, the IMF proposed that

> The OIF should be used as a fiscal buffer. To be effective in this regard, the OIF would need to be fully funded, and withdrawals judiciously managed until absorption capacity is strengthened. This would allow a gradual scaling up of investment, and protect priority projects from detrimental stops and starts. The OIF could also help sterilize liquidity.[133]

The IMF Report noted that "Angola would . . . set aside excess revenues in a stabilization fund while gradually scaling up investment. In . . . a repeat of the 2008 oil price shock, investment program[s] could go forth uninterrupted by drawing on the resources set aside in the stabilization fund."[134] All of this was viewed positively by the global investment community. "Angola's decision to set up a sovereign wealth fund is positive news, Fitch Ratings says. It reaffirms our view that government policies are reducing the economy's exposure to movements in the oil price, and laying a foundation for sustainable growth."[135]

At the time of its establishment reports indicated that the "money will target domestic agriculture, water, power generation and transportation to attract foreign investment to Angolan infrastructure projects, according to fund documents. Hotel projects including a hospitality school in Angola are part of the fund's plans."[136] Among projects initially identified for promotion were a

130. Memorandum from Carlos Maria da Silva Feijó to Christine Lagarde, *in IMF 2011 Angola Report*, *supra* note 129, at 10–11.

131. *IMF 2011 Angola Report*, *supra* note 129.

132. *Id.* at 10.

133. Int'l Monetary Fund, *Angola Staff Report for the 2012 Article IV Consultation and First Post Programming Monitoring* 23 (2012) [hereinafter *IMF 2012 Angola Report*], https://www.imf.org/external/pubs/ft/scr/2012/cr12215.pdf.

134. *Id.* at 38.

135. *Sovereign Wealth Fund Plan Positive for Angola*, FITCH RATINGS (Oct. 23, 2012, 12:32 PM), https://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/Sovereign-Wealth-Fund?pr_id=765930.

136. Candido Mendes & Colin McClelland, *Angola Starts Sovereign Wealth Fund With $5 Billion*, BLOOMBERG (Oct. 17, 2012), https://www.bloomberg.com

dedicated Hotel Fund to promote the hospitality sector and projects to finance infrastructure projects in Sub-Saharan Africa.[137] Interestingly, it also includes a social charter that, were it to be operationalized to any significant degree, would serve as an innovative and useful mechanism for economic progress among the poorer segments of a political community.[138]

The Mongolian SWF ("MSWF") may serve as an example of its value to IFIs and its risks where governance is weak and discipline is even harder to come by. At the time of the creation of the MSWF outside analysts were not convinced that the state was stable enough and its governance cultures deep enough to implement its plans for the MSWF.[139] These analysts did recognize the appeal of what they call "resource nationalism," and its manifestation in the techniques of sovereign wealth funds.[140] Further impetus for the establishment of a SWF came from the IMF,[141] which, as in the cases of its investment in other developing states, viewed with favor the establishment of such a fiscal disciplinary device.[142]

> Directors emphasized the need for a clear policy to ensure that the Development Bank of Mongolia (DBM) can help meet the long-term infrastructure needs of Mongolia in a macro-economically sustainable manner with minimal fiscal risks. In particular, public investment projects financed by the DBM should be taken into account when setting the path of fiscal policy, consistent with the new fiscal framework. Directors welcomed efforts to explore the establishment of a sovereign wealth fund, which could be an important complement to the fiscal framework.[143]

At the time, the IMF Staff report also noted, "Implementation of the [2012 Social Welfare Law] should be a priority and the

---

/news/articles/2014-04-23/angola-sovereign-wealth-fund-starts-hotel -infrastructure-pools.

137. *Investment Strategy*, FONDO SOBERANO DO ANGL., http://www.fundosoberano.ao/investments/ (last visited Sept. 13, 2017).

138. *See generally Overview*, FONDO SOBERANO DO ANGL., http://www.fundosoberano.ao/social-charter/ (last visited Sept. 13, 2017) (noting the many social initiatives funded by the Angolan SWF, including education, healthcare, clean water access, and professional training).

139. Loch Adamson, *Institutional Investor: Mongolia Aims to Join the SWF Ranks*, ORIGO PARTNERS PLC, http://origoplc.com/press/institutional-investor -mongolia-aims-to-join-the-swf-ranks/ (last visited Sept. 13, 2017).

140. *See id.*

141. *See Public Information Notice: IMF Executive Board Concludes 2012 Article IV Consultation and Third Post-Program Monitoring with Mongolia*, INT'L MONETARY FUND (Nov. 21, 2012), https://www.imf.org/en/News/Articles /2015/09/28/04/53/pn12131 [hereinafter *IMF 2012 Mongolia Report Notice*].

142. *Compare IMF 2011 Angola Report*, *supra* note 129, at 8, *with IMF 2012 Mongolia Report Notice*, *supra* note 141.

143. *IMF 2012 Mongolia Report Notice*, *supra* note 141.

establishment of a sovereign wealth fund would be an important complement to the FSL's counter cyclical fiscal policy framework."[144] Indeed, in order to understand the establishment of the MFSF, one must understand the "intermeshing" of IFIs (World Bank and IMF), their development of fiscal management principles, and their coordination of client states in the implementation of these principles across the globe. This was noted in a recent World Bank related report:

> As part of its reform efforts and with the assistance of the World Bank and the International Monetary Fund (IMF), the government began an intensive south-south exchange, notably with Chile, another major copper producer, on strengthening the policy environment. The dialogue proved critical in the passage of several landmark laws within the space of a few years, including a fiscal stability law modeled after Chile, and the accompanying integrated budget and procurement and social welfare laws.[145]

Intermeshing is an important notion in the construction of "cultures" of SWFs common to states understood as occupying similar socio-economic sovereign space. The concept was developed by the German academic, Gunther Teubner in the context of theorizing the development of governance systems in globalization.[146] For Teubner, intermeshing involves the Europeanization of multinational regulatory enterprises.[147] Just as the Member States of the European Union together might create broader and more powerfully effective cross-state norms, so too might multinational "states" do the same within cooperative regulatory communities.[148] Thus, he noted, "[T]he emergence of inter-company networks as an extension of the corporate code onto an entire production network. Global commodity chains have

144. INT'L MONETARY FUND, MONGOLIA STAFF REPORT FOR THE 2012 ARTICLE IV CONSULTATION AND THIRD POST-PROGRAM MONITORING 19 (2012) [hereinafter IMF 2012 MONGOLIA REPORT], https://www.imf.org/external/pubs/ft/scr/2012/cr12320.pdf.

145. ADAM B. ROBBINS & GREGORY SMITH, CASE STUDY: WORLD BANK ENGAGEMENT WITH MONGOLIA'S SOVEREIGN WEALTH FUND 3–4 (2014), http://documents.worldbank.org/curated/en/450721468060545662/pdf/858180BRI0REPL00Box382147B00PUBLIC0.pdf; ROGIER VAN DEN BRINK ET AL., SOUTH-SOUTH COOPERATION: HOW MONGOLIA LEARNED FROM CHILE ON MANAGING A MINERAL-RICH ECONOMY 1 (2012), http://documents.worldbank.org/curated/en/193081468238167388/pdf/729460NWP0Econ0C0disclosed090270120.pdf.

146. Gunther Teubner, *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination*, *in* CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND 211–12 (Rainer Nickel ed., 2010).

147. *Id.* at 211.

148. *See id.*

developed, which constitute neither market relationships nor integrated multinationals."[149] These are "networks of independent companies, which have generated their own governance structures."[150] In the context of SWFs, intermeshing involves the internationalization of sovereign investing through the nexus institutions of the IMF and World Bank. These serve to create regulatory communities bound together through the economic power of the IFIs.[151]

It is in this context that one can understand the inter-connectedness—the intermeshing—of the Mongolian Fiscal Stability Law of 2010, the IFIs and the establishment of the MFSF under the tutelage of the Chilean SWF managers. "Mongolia passed its Fiscal Stability Law in 2010 as part of its Stand-By Agreement with the IMF which expired on the 30th of September 2010."[152] Moreover,

> The World Bank has been supporting the Mongolian government to improve the design of their Sovereign Wealth Fund. The MTAP and Governance Partnership Facility provided funds to support the Ministry of Finance with this task. Central to support has been involvement of experts from Chile and in organizing an international conference on SWFs . . . . Policy dialogue was extended to discussion of the objectives of the fund and its governance . . . . Panama, Colombia, and other countries have also adopted rule based fiscal policies with integrated SWFs that perform counter-cyclical functions.[153]

But internal development in Mongolia is also meant to be funded through its recently established Development Bank.

> In 2011 the Mongolian government created a state-owned development bank with a mandate to finance railroads, roads, power plants, and water supply. The inventory of possible projects is large by any standard. Mongolia scores 118 out of 142 countries in quality of infrastructure, as rated by the Global Competitiveness Report 2011–2012 (in comparison, other countries with large mining sectors like Chile rank 41st, Peru 88th, and Botswana 92nd). The majority of roads are

149. *Id.* at 212.
150. *Id.*
151. *Id.*
152. Richard Dutu, *Managing Mongolia's Wealth: Constructing and Stimulating a Formula for the Fiscal Stability Fund Second Report* 27 (2012), https://www.mof.gov.mn/wp-content/uploads/resource/MANAGING%20MONGOLIA'S%20WEALTH.pdf.
153. ROBBINS & SMITH, *supra* note 145, at 3–4 ("Beginning in 2008, the World Bank and Mongolia have worked together to improve the country's mineral revenue management framework, drafted and passed a rule-based fiscal policy law, maintained dialogue of fiscal policy, and pursued the design of an effective Sovereign Wealth Fund. . . .").

> unpaved. The funding requirements for rail lines alone run in the multibillion dollar range, in comparison to Mongolian GDP of $3 billion in 2010. The government guarantees the debt issued by the development bank, which is now a contingent liability that will have to be backed by future mining revenues.[154]

The MSWF is among the smaller SWFs. Even so, it could do little to survive the gyrations of commodity price fluctuations and changes in management objectives. Its SWF strategies veered from the Chilean to the Singaporean Model in reports published in 2015.[155] The SWF strategies also retraining Mongolian administrative personnel to apply a Canadian management model in 2016.[156] By 2017, the MSWF had collapsed, requiring an IFI bailout and a reboot of the economic model.[157]

II. BREAKING THROUGH THE SANTIAGO PRINCIPLES CAGE

What might these trends in utilizing SWFs tell us about the value of the framework memorialized as the Santiago Principles? From the standpoint of aspirational goals consistent with the basic structures of globalization substantially stable through 2016, they continue to define the ideal form of state to state investment in their respective markets. Though the Santiago Principles are centered the "ideal transaction"—public funds invested in the private markets of foreign states—it is just as useful for the structuring state-to-state transactions as well. Yet even the brief survey of developments described in the preceding section suggests some fundamental shifts in the reality of SWF operation across the increasing number of states that find the "SWF vehicle" useful. This section identifies some of the emerging tensions and issues that may result as reality pulls away from the Santiago Principles ideal. This section also identifies the growing prominence of issues that the Santiago Principles tended to avoid, including the compatibility of these changes within the normative framework of the Santiago

154. Theodore H. Moran, PETERSON INST. FOR INT'L ECON. POLICY BRIEF NO. PB13-18, AVOIDING THE "RESOURCE CURSE" IN MONGOLIA 3 (July 2013), https://piie.com/sites/default/files/publications/pb/pb13-18.pdf.

155. *Sovereign Wealth Fund: Mongolia's Temasek Fixation*, EUROMONEY (Sept. 11, 2015), http://www.euromoney.com/Article/3487739/Sovereign-wealth-fund-Mongolias-Temasek-fixation.html.

156. *See Mongolian Delegation Trained in Managing Wealth for Future Generations*, U. CALGARY (Dec. 16, 2016), https://www.ucalgary.ca/utoday/issue/2016-12-16/mongolian-delegation-trained-managing-wealth-future-generations.

157. *Mongolia and International Monetary Fund Agree to Bailout Deal*, WJDB RADIO (Feb. 20, 2017, 11:06 AM), http://www.wjbdradio.com/business-news/2017/02/20/mongolia-and-international-monetary-fund-agree-to-bailout-deal; *see* Gary Kleiman, *Mongolia Struggles Through Financial Instability*, ASIA TIMES (Mar. 4, 2017, 12:38 PM), http://www.atimes.com/mongolias-entrenched-mining-pitfalls/.

Principles and some emerging regulatory issues—from transparency initiatives in hard law, to national extraterritoriality projects, to the emerging business and Human Rights frameworks in operations and financial transactions.

Taken together, the emerging trajectories of SWF activity among all SWFs—each different in its own way and some more common to specific sorts of SWFs than others—can be grouped into three distinct strategic categories. These are *regionalization strategies*; *financial objectives strategies*; and *governance strategies*. Each is considered in turn. Together they suggest the contours of the return to sovereign investing as an important tool of public policy.

A. Regionalization Strategies.

1. Real Estate and Operational Obligations.

For a long time, SWFs have also invested in real estate.[158] That makes sense for those SWFs with a very long-term time horizon. Yet SWFs have now discovered a means of combining both a long-time horizon for wealth maximization and the possibility of generating potentially substantial returns in the short and medium term—by entering into the market for the exploitation of education services.[159] But rather than enter this market at its core—by investing in universities—the smart SWF is now investing in peripheral but essential services.[160] These include student dorms, food services, tutoring, and the like.[161] These investments, when projected onto foreign states, have another benefit—they avoid any political or societal obligation that a state organ might otherwise bear to its own people. Investing in peripheral services in foreign states permits the state to avoid any public service burden. And, because they operate as a quasi-private capacity, they might owe only a corporate responsibility to respect human rights, rather than a state duty to protect them. The obligations of states and enterprises under the United Nations Guiding Principles for Business and Human Rights might suggest otherwise.[162]

---

158. *See, e.g.*, *Sovereign Wealth Funds Investing in Real Estate*, 10 PREQIN REAL EST. SPOTLIGHT, no. 3, May 2016, at 2–4, https://www.preqin.com/docs/newsletters/RE/Preqin-Real-Estate-Spotlight-May-2016.pdf.

159. *See, e.g.*, Champaign Williams, *Student Housing's 'Economic Resilience' Will Continue to Drive Record Foreign, Domestic Investment in U.S. Assets*, BISNOW (June 5, 2017), https://www.bisnow.com/national/news/student-housing/this-recession-proof-asset-is-seeing-record-inflows-of-cash-75197?.

160. *See id.*

161. *See id.*

162. *See generally* OFFICE OF THE HIGH COMM'R, UNITED NATIONS HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (describing in detail throughout and providing commentary on the

More generally, SWFs that take controlling positions in enterprises might well convert those into variations of SOEs. Indeed, in that context, might an SWF not be considered a holding company operating to further the ultimate political aims of its owner rather than an investment vehicle? The Santiago Principles exclude SOEs from their definition of SWFs; one cannot be both under the Santiago Principles framework.[163] Yet, the Santiago Principles have little to say about the relationship between the state engaging in economic activity through operating companies (e.g. SOEs) and the state engaging in economic activity through investment.[164] Moreover, the inverse can be as troubling—the SOE itself hedges by taking equity or debt positions in other companies. The SOE, to some extent, is then functioning in part as a SWF, though it hardly fits the definition. Should that matter? It could be argued that the SOE presents a unique variant on the SWF. Though it is neither a fund, nor an instrument created for the purpose of investing in other entities, an SOE might naturally engage in such activities.[165] But it does so in the context of maximizing its own business operations rather than as an end in itself.[166] Yet, those business operations, as classically understood, are themselves undertaken to maximize the interests of the entity (and its shareholders). If there is a unity between shareholder and corporate interests—for example, where the entity's shares are wholly owned by the state—then it would be logical to assume that the maximization of state value in such enterprises includes the political value of that enterprise's operations. On the other hand, even if that is the case, at least with respect to its global operations, such an entity (and its state owner) would be liable in host jurisdictions, for breaches of duty, abuse of power, looting and the like in its relationships with its foreign owned subsidiaries. Consequently, the similarities may mask significant differences between states as owners of SWFs and states as sole shareholders of operating entities that may also invest in foreign undertakings.

United Nation's dual principles of "The State Duty to Protect Human Rights" and "The Corporate Responsibility to Protect Human Rights").

163. SANTIAGO PRINCIPLES, *supra* note 29, at 3 n.6.

164. *But see* SANTIAGO PRINCIPLES, *supra* note 29, at 5 (noting that a SWF in voluntary compliance with the Santiago Principles would ideally be structured to avoid political influence).

165. *See* ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL INVESTMENT OF SOVEREIGN WEALTH FUNDS: ARE NEW RULES NEEDED? 4 (Oct. 2007), https://www.oecd.org/daf/inv/investment-policy/39979894.pdf (recognizing that SOEs engage in cross-border investment activities like SWFs).

166. *See, e.g.*, Greg Levesque, *Here's What's Driving China's Investments in Africa*, BUS. INSIDER (June 27, 2012, 12:58 PM), http://www.businessinsider.com /heres-whats-driving-chinas-investments-in-africa-2012-6.

2. SWF Joint Ventures and Markets for Sovereign Debt.

There is nothing inherently contradictory between the conventional model of SWFs and the notion of SWF joint venturing or asset pooling. Yet, both the objects of pooling assets for funding investments, and also the potentially more radical notion of pooling sources of income for investment, can take the SWF in radically new directions.[167] At their extremes, these arrangements can begin to function not just like development banks, but also like IFIs.[168] With enough pooling of assets, SWF joint ventures could conceivably begin to project their financial power into the business of conditional lending that has been the province of IFIs and the largest private lenders backed by the usual "Clubs."[169] The political ramifications could be significant. At a minimum, and with enough funding, SWF funding in this sector could affect the basic presumptions of sovereign debt financing, especially with respect to the standard package of conditions that tend to be imposed. On a smaller—and perhaps more realistic—scale, such joint ventures could serve as a means of both hedging income sources to smooth variations in income flows—where the joint ventures derive fund income from different sources, such as petroleum, copper, agricultural products, etc.—and providing value to regional development that takes advantage of broader markets and thus augments investment returns. Alternatively, they might also serve to produce a more targeting investment strategy directed toward those sectors of greatest interest to the macro-economic strategies of the venture partners. There is an intimation of this in current practice; the possibilities have yet to be fully explored.

3. Joint Ventures suggest the Possibilities of Regionalization.

Regionalization appears to be the silent elephant in the room of SWFs and SWF strategies. Yet, it is inherent in the way that SWF differentiation is already moving. When one thinks of the functional differentiation of SWFs—stabilization funds, futures funds,

167. *See, e.g.*, Jonathan Williams, *Irish SWF Welcomes 'Prototype' Joint Venture to Develop Brewery Site*, INV. & PENSIONS EUR. (Apr. 22, 2016), https://www.ipe.com/countries/ireland/irish-swf-welcomes-prototype-joint-venture-to-develop-brewery-site/10012938.article.

168. *See* Javier Santiso, *Sovereign Wealth Funds and Spain: (Re)thinking Opportunities, in* SOVEREIGN WEALTH FUNDS 28 (Javier Santiso ed., 2012), http://itemsweb.esade.edu/wi/Prensa/SWFsReport2012.pdf (documenting several examples of SWF joint ventures funding the development of other countries' infrastructure projects).

169. *See* Douglas Appell & Sophia Baker, *SWFs Evolving into Competitors for Clients*, PENSIONS & INV. (July 13, 2015), http://www.pionline.com/article/20150713/PRINT/307139981/swfs-evolving-into-competitors-from-clients (noting SWFs have begun moving away from investing in privately-held funds and towards direct investment in "private equity, real estate and infrastructure, with co-investment as the initial step. . . .").

strategic development funds, pension funds, etc.—one is already creating those categories that suggest amalgamation by time. It is a very small step from functional differentiation of funds to the notion that functionally differentiated funds should begin pooling. And that pooling can range from expertise and capacity building to the pooling of assets and operations. Already there is a move in that direction in stabilization funds. The work of the IMF and the Chilean Fund in creating a template for similar funds among states with similar needs points, in rudimentary form to be sure, to this future. Whether or not it will be realized remains unclear—but the door has certainly been opened and tentative steps have been taken, even if they were substantially unconscious.

B. Financial Objectives Strategies.

1. Definitions.

It would appear, then, that the once vibrant and intellectually stimulating focus on the definition of SWFs has been overtaken by inconvenient facts. Here, the Santiago Principles may actually be helpful. It has always been recognized that "SWFs have diverse legal, institutional, and governance structures. They are a heterogeneous group, comprising fiscal stabilization funds, savings funds, reserve investment corporations, development funds, and pension reserve funds without explicit pension liabilities."[170] Yet, even here there is tension. The Santiago Principles' definition is constrained by three principles[171]—government ownership, investment in foreign financial assets, and investment to achieve financial objectives.[172] It is certainly the last two that may require reconsideration in light of current practices. More importantly, it is not clear that the division between SOEs and SWFs can remain undisturbed. Though clearly, in their classical states, the two point to very different forms of government investment—SOEs focus on investment in operations[173] while SWFs focus on investment in securities and estate,[174]—the two converge when SWFs own controlling interests in operating companies and when SOEs operate SWFs.[175]

170. SANTIAGO PRINCIPLES, *supra* note 29, at 3.
171. *See id.* at app. 1.
172. *Id.*
173. Fotak et al., *supra* note 19, at 20.
174. *Id.*
175. *See, e.g.*, Sahin Ardiyok & Müfit Arapoglu, *Turkey Introduces Sovereign Wealth Fund*, MONDAQ (Sept. 6, 2016), http://www.mondaq.com/turkey/x/524366/Fund+Management+REITs/Turkey+Introduces+Sovereign+Wealth+Fund; Elef Binici, *Turkey's Sovereign Wealth Fund Set to be Ambitious Player in Capital Markets*, DAILY SABAH (Mar. 5, 2017), https://www.dailysabah.com/economy/2017/03/06/turkeys-sovereign-wealth-fund-set-to-be-ambitious-player-in-capital-markets.

And at the margins, the SWF form itself appears to fracture along a spectrum of different paths. At one end is the Palestinian SWF, which suggest that the SWF form can be inverted. Here is a SWF that invests sums it receives from others (perhaps even from entities that are themselves attached to foreign SWFs) and whose primary purpose is to funnel outside investments into Palestinian territories.[176] At the other end are the Venezuela Macroeconomic Stabilization Fund, Fondo para la Estabilización Económica ("FEM") and the National Development Fund ("NDF").[177] But these have been utilized interchangeably under the presidency of Hugo Chavez and his successors. Two principal points are relevant here. The first is that the NDF is meant to serve internal investment administered by the Venezuelan government.[178] The second is that the NDF is neither autonomous from the state nor are its operations transparent. This latter point has raised issues of accountability.[179] This does not make it unique but it does suggest that the fund will have limited reach in private global markets, except perhaps indirectly. Yet, this is consonant with the moves to embrace a state-to-state ideology of trade that is reflected in the construction of the ALBA regional trade association.[180]

And indeed, even as the Venezuelan state has starved FEM, it has continued to fund NDF for local development, abandoning in effect, the stabilization function of the FEM—which is viewed ideologically as contrary to the socialist ideology of the current government. "Despite a fitful US dollar flow, the Venezuelan government has instructed both the Central Bank of Venezuelan ("BCV") and oil giant Pdvsa to transfer USD 11.7 billion to the National Development Fund ("Fonden") this year."[181] This suggests that Venezuela has also joined the growing number of states that

---

176. *See* PIF, *supra* note 75, at 9.

177. Larry Catá Backer, *Part 19 Venezuela SWFs (Stabilization (FEM) and Development (Fonden))—Reimaging the State in the Global Sphere: An Inventory of Sovereign Wealth Funds as Regulator and Participant in Global Markets*, L. END DAY (Mar. 3, 2014, 12:08 PM), http://lcbackerblog.blogspot.com/2014/03/part-19-venezuela-fem-macroeconomic.html.

178. *Id.*

179. Miguel Octavio, *Is $29 Billion Missing from Hugo Chavez's Fonden Development Fund?*, CHRISTIAN SCI. MONITOR (Aug. 30, 2011), http://www.csmonitor.com/World/Americas/Latin-America-Monitor/2011/0830/Is-29-billion-missing-from-Hugo-Chavez-s-Fonden-development-fund.

180. *See* Larry Catá Backer & Augusto Molina, *Cuba and the Construction of Alternative Global Trade Systems: Alba and Free Trade in the Americas*, 31 U. PA. J. INT'L ECON. L. 679, 725 (2010).

181. Mayela Armas H., *Central Bank of Venezuela to Transfer USD 3.7 Billion to Fonden*, EL UNIVERSAL (Jan. 24, 2014), http://www.eluniversal.com/economia/140114/central-bank-of-venezuela-to-transfer-usd-37-billion-to-fonden ("The move may have an impact on Venezuela's international reserves, currently at USD 20.8 billion, a level that is not sufficient to meet the country's economic needs.").

have functionally differentiated their SWFs among stabilization, development, investment and other functions, but also that in Venezuela's case, these funds appear to be operated more as facilities for budgeting than as investment vehicles. For purists, the question then becomes, is this a SWF? And if so, what does that tell us about the evolution of the concept, or has it become so broad that it ceases to have meaning?

2. Development Strategies and Financial Objectives.

One of the more interesting developments in sovereign investing through SWFs has been the broadening of financial objectives that tend to blur the line between development and investment. There is a case to be made that development, even domestic development, and investment (especially in targeted sectors and infrastructure) have important global secondary effects.[182] This is not just the conventional notion that development better embeds the developing state in global production chains. Instead the notion is that such development brings with it the possibility of investment in foreign enterprises that are connected to those production chains now more directed to the SWF home state.[183] SWF investment, then, can be used to produce greater investment opportunities in foreign enterprises that are targeted to the enterprises that have the greatest economic and political effects on the SWF home state through their position in global production chains.

C. Governance Strategies.

1. The Issue of Corporate Social Responsibility and Human Rights.

The issue of the application of national and international soft and hard law touching on the human rights duties of states as the owners of SWFs, and the responsibilities of SWFs to respect human rights in their own right, touch on core issues of the character of the relationship between these entities, and the legal character of their relationship. The core legal issues are fairly straightforward. All states may regulate their own entities and exact such obligations and responsibilities as their polities desire or are willing to tolerate.[184] States that venture into the territory of another may subject themselves to these regimes as, and to, the extent the host

182. Certainly a case can be made for infrastructure investment in its own right. *See, e.g.*, *Sovereign Wealth Funds Investing in Infrastructure*, 1 PREQIN REAL ASSETS SPOTLIGHT, no. 1, May 2016, at 2–5, https://www.preqin.com/docs/newsletters/ra/Preqin-Real-Assets-Spotlight-May-2016.pdf (noting the infrastructure investments of Chinese, Gulf State and Australian SWFs).

183. *Id.* at 4–5.

184. ORG. FOR ECON. CO-OPERATION & DEV. INV. DIV., *supra* note 16, at 4.

state desires or is able to enforce.[185] Typically, that power is mediated by treaty—bilateral and multilateral investment and related treaties—and the rules that provide a special deference to state assets located in the territory of another (rules of sovereign immunity subject, in turn, to their own waivers).[186] States may also have obligations under international law that certainly apply to them, and under some circumstances may also reach their instrumentalities and others.[187] Lastly, states and others operate in global economic activities within a rich matrix of declarations, standards, guidelines, and the like that can set important expectations.[188] By their very nature as informal legal rules, these guidelines are better enforced through societal and private mechanisms, rather than through the traditional formal mechanisms of law.[189]

This web of law and norms applies with particular emphasis in the context of human rights. For SWFs and the states that own them, this raises two distinct issues. The first is the extent to which the SWF, as a commercial vehicle operating within the strictures of the "ideal investor" standards of the Santiago Principles, has a responsibility to respect human rights under instruments like the United Nations Guiding Principles of Human Rights and the Organization for Economic Cooperation and Development ("OECD") Guidelines for Multinational Enterprises.[190] This, in turn, raises two subsidiary issues. One is the extent to which these responsibilities applies to the organization and internal operations of the SWF itself. The other is the extent to which these

185. Mark Plotkin, *Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together to Make the United States More Secure*, 118 YALE L.J. POCKET PART 88 (2008), http://thepocketpart.org/2008/11/17/plotkin.html.

186. David Gaulrodger, *Foreign State Immunity and Foreign Government Controlled Investors* (OECD Working Papers on Int'l Inv., No. 2010/02, 2010), https://www.oecd.org/corporate/mne/WP-2010_2.pdf.

187. *Id.*

188. *See generally* SANTIAGO PRINCIPLES, *supra* note 29 (discussing generally accepted principles and practices that help set SWF expectations).

189. *See, e.g.*, OFFICE OF THE HIGH COMM'R, *supra* note 162, at 13. Guiding Principle 11 Commentary explains "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights." *Id.*

190. *See Final Statement,* NORWEGIAN NAT'L CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 7 (May 27, 2013), http://www.responsiblebusiness.no/files/2013/12/nbim_final.pdf ("The OECD Guidelines apply to the financial, sector, as they do to all sectors. They do not make any exception for sub-groups of investors, nor do they exempt minority shareholders . . . . The question is thus not whether the OECD Guidelines apply to the financial sector and minority shareholding but how they apply.").

responsibilities also apply to the investment decisions of the SWF, and the way in which the SWF exercises its shareholder rights. Public organization consensus has been moving toward the position that the SWF responsibility expends to both. The second touches on the extent to which the state itself, in its operation and control of the SWF, has a duty, cognizable under international law, to protect human rights. This duty may be constrained by the scope of international human rights obligations a state may have embraced, and may be expanded by the state's own constitutional principles. But the extent of the state duty itself may impact the autonomy of the SWF and may reshape the understanding of the financial objectives principles embedded in the Santiago Principles.

2. Governmental functions and global economic activity.

The public/private divide between the SWF (or SOE) and the state that owns it also has ramifications that acquire a different character as the function and operation of SWFs change, and as the differences between SWFs and SOEs begin to blur. Among them are issues of standing in investment treaty arbitration regimes.[191] They also suggest issues in sovereign immunity regimes that are worth considering.[192] For example, the Santiago Principles make clear that SWFs may seek to negotiate sovereign treatment from host states so that they might compete as private entities but be treated as public sovereign entities simultaneously.[193] In both cases, the legal regimes were constructed for instrumentalities that no longer resemble the emerging forms of either SOEs or SWFs. That creates the usual problem of fitting doctrines into the reality of function. This "fitting problem" invites the sort of strategic behaviors that may bring disorder and regulatory reform–the value of which would be difficult to gauge. Related issues apply to tax regimes.[194]

III. A BRIEF APPLICATION OF THESE TRENDS AND A LOOK FORWARD.

The essence of the changes in SWFs serve as variations on a potentially transformative shift in the object of SWFs—from mere investment vehicles, or even as normalizers of global rules, but now

191. *See, e.g.*, Mark Feldman, *The Standing of State-Owned Entities Under Investment Treaties*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010–2011 (Karl P. Sauvant ed., 2012).

192. *See, e.g.*, Victorino J. Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, 25 U. MIAMI BUS. L. REV. 1, 73 (2016), http://repository.law.miami.edu/umblr/vol25/iss1/3.

193. SANTIAGO PRINCIPLES, *supra* note 29, at 22 ("However, recipient countries may grant to SWFs certain privileges based on their governmental status, such as sovereign immunity and sovereign tax treatment" Ibid, Explanation and Commentary n. 35).

194. *See* Kazuhiro Nakatani, *Sovereign Wealth Funds: Problems of International Law Between Possessing and Recipient States*, 2015 INT'L REV. L. 1, 6–9 (2015), http://dx.doi.org/10.5339/irl.2015.swf.7.

also of capacity building for states, and discipline in the conduct of economic activity. One sees the movement toward this view in the operations of most SWFs. For the largest SWFs, the object may be global legal and normative capacity building.[195] Norway serves as a great example.[196] For China it may be to operationalize approaches to state-based multilateral economic relations.[197] And most importantly, for developing states, the turn toward capacity building underlines efforts to use SWFs to build government capacity, to develop anti-corruption cultures, and to serve as models of fiscal discipline.[198]

But the largest SWFs operated out of the most developed and powerful host states tend to be able to take care of themselves. Their wealth and the power of their home states tend to overcome the strictures of soft law, and in any case, their actions invariably tend to provide the functional effect of a sort of legal "glossing" in action.[199] These funds make the rules of the community by their actions and through the acquiescence of markets, especially those in rich host states.[200] For these states, the conventional Santiago Principles ideology serves as a useful structure behind which they do as they wish.

While these large SWFs tend to drive collective thinking about the nature and characteristics of all SWFs, they do not entirely define the field of sovereign investing, nor do they provide a clear view of the challenges and responses of non-elite funds It is for the much larger group of large funds operated by small states, and funds operated by developing states or states with weak governance structures, to which the untapped potential of the SWF device, hinted at in the preceding section, offers greater possibilities. These might well transform the SWF from a construct that reflects the desires and consensus of key host and home state, to one that better serves the requirements—not all of them grimly situated in wealth maximization—through programs of conventional hedged investment in foreign and domestic markets (and reinvestment).

The possibilities for SWFs in the context of regionalism and development might be most usefully illustrated by considering the strategies from the perspective of African SWFs. For these SWFs, regionalism and development strategies might produce a move toward a set of transformative changes in approaches to SWF instrumentality. Consider nine strategies that African SWFs might deploy in structuring and operating their SWFs within a globalized economic order. These strategies are meant to avoid the circular

---

195. Fotak et al., *supra* note 19, at 12–13.
196. *Id.*
197. *See infra* note 227.
198. *See, e.g.*, *infra* note 222 (analyzing examples of developing countries).
199. *See generally* SANTIAGO PRINCIPLES, *supra* note 29.
200. *See generally id.*

characteristics of current discussions grounded on premises of finance instrument silos and state based systems that no longer accord with the realities of, and fail to take advantage of, the possibilities now offered through global finance.[201] The strategies can be broadly understood as falling into the three transforming categories suggested in Section III: regionalization strategies, financial objectives strategies, and governance strategies.[202]

The discussion around African SWFs that follows is offered as a matter of convenience. Regionalization is not limited to Africa—a similar set of challenges might also produce similar approaches for Latin American SWFs, for instance, and others. Nor are these strategies dependent on territorial alignment. Any grouping of funds with similar objectives or challenges could as easily adopt most of the strategies to augment their positions in global finance and for the advancement of their public and macro-economic/political objectives.

A. The regionalization strategies are perhaps the most important element in enhancing the effectiveness, power and viability of African SWFs as macro-financial and governance instruments:

1. Create a regional working group, a regional forum, of African SWFs.

This regional forum can operate along the same lines and parallel to the global forum established through the IMF, the creator of the Santiago Principles, that now operates as the International Forum of Sovereign Wealth Funds ("IFSWF").[203] But it ought not to be part of the IFSWF. African SWFs could of course participate as members of both, but Africa needs its own regional forum as a space where Africans can focus on African issues while engaging in the global discussions about SWFs, macro-finance, and governance.[204]

This regional forum of African SWFs might be located within the architecture of the African Union,[205] or exist independently.[206]

---

201. Larry Catá Backer, Remarks Made at Chatham House Conference—Africa's Sovereign Wealth Funds: Demand, Development and Delivery: International Monitoring and Oversight: Africa's Increasing Presence (Sept. 6, 2014), http://lcbackerblog.blogspot.com/2014/09/international-monitoring-and-oversight.html#more).

202. *See supra* text accompanying notes 195–201.

203. *Kuwait Declaration*, *supra* note 31.

204. On regionalism, see, for example, Joseph S. Nye, *Comparative Regional Integration: Concept and Measurement*, 22 INT'L ORG. 855 (1968), https://doi.org/10.1017/S0020818300013837. *See also* Ernst B. Haas, *The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing*, 24 INT'L ORG. 606 (1970), https://doi.org/10.1017/S0020818300017495.

205. *See* Backer, *supra* note 201.

It might be sponsored solely from and out of the revenues of the African SWFs that choose to participate.[207] But critically, it must use those funds to establish a permanent Secretariat, and an *African Sovereign Wealth Fund Institute*, to generate research and discussion among experts, and provide autonomous monitoring services and technical assistance.[208]

Perhaps the most useful early objective might be to develop an *African Santiago Principles*—a set of standards for the ethical and appropriate operation of SWFs that incorporate African values and practices as both home and host states. The overall goal here is to get Africans speaking authoritatively about African issues and to break the usual pattern of global discourse where Africans voices are rarely heard authoritatively—rarely heard authoritatively, but rather talked to about themselves by well-meaning foreigners and expected to listen. The issue is of these fund's own making to some extent; many of them are directed by foreign investment managers whose global sensibilities might override more nuanced regional concerns. That requires an African think tank worthy of the name. The African Union might provide the space for such a project. The model could be transposed The model could be transposed to other regional clusters of developing states and their SWFs. Yet, that project would require a move from the ideal of the Santiago principles to the realities of the practices and objectives of the regional funds.

2. Insist that IFIs, and especially the World Bank and IMF, develop facilities to provide technical assistance to African SWFs on a regional basis.

IFIs should be prodded by African SWFs to develop deep capacity to cluster SWF strategies based on regional needs. That capacity should not be limited to technical assistance, but also include monitoring and assessment capacity.[209] Perhaps loan work might be creatively re-imagined within a regional as well as national context as well. The goal is to create conditions that might induce IFIs to begin to think and act regionally, as well as nationally.[210] Yet this is a position easier to state than to apply. Global IFIs have their own cultures and their own deeply embedded senses of entitlement, especially an entitlement to the privilege of their approaches. For this objective to be realized it is likely that

206. *Id.*
207. *Id.*
208. *Id.*
209. On the scope of current technical assistance, see, for example, INT'L MONETARY FUND, ANNUAL REPORT 2016, at 75–84 (2016), http://www.imf.org/external/pubs/ft/ar/2016/eng/pdf/ar16_eng.pdf.
210. *See, e.g.*, MASAHIRO KAWAI AND DOMENICO LOMBARDI, FINANCIAL REGIONALISM AND THE INTERNATIONAL MONETARY SYSTEM (2013).

the principles of the market will have to be deployed. In this case, a move away from conventional IFIs to their competitors and development and infrastructure banks being established by emerging economic powers, might provide the leverage necessary to move global institutions in more positive ways.

3. Focus on regional intra-SWF investment/development projects.

Multi-SWF projects, especially intra-African projects, may well serve as a better source of discipline through the aggregation of effort and the positive deployment of self interest in joint work. Infrastructure development that ends at national borders are far less useful for the development of robust private economic activity than regional projects.[211] If nothing else, the histories of the United States and Europe ought to have taught the lessons (as flawed as those lessons might be) of the value of developing single markets or integrating units for specific ends.[212] Additionally, the construction of China's One Belt One Road policy suggests the importance of this approach in the contemporary global economy.[213] Larger markets increase collective economic power,[214] and that increase can translate into a more substantial political voice in the transnational

---

211. On multilateral development projects, see, for example, Willem Buiter & Steven Fries, *What Should the Multilateral Development Banks Do?* (European Bank for Reconstruction & Dev., Working Paper No. 74, June 2002), http://www.ebrd.com/downloads/research/economics/workingpapers/wp0074.pdf; *The IDB, a Strategic Partner of the IIRSA*, INTER-AMERICAN DEVELOPMENT BANK, http://www.iadb.org/en/topics/regional-integration/iirsa/the-idb-a-strategic-partner-of-the-iirsa,1414.html (last visited Sept. 13, 2017); *IGAD Celebrates 31 Years*, IGAD, https://igad.int/index.php/divisions/agriculture-and-environment/1465-igad-ministers-launch-cross-border-development-projects (last visited Sept. 13, 2017).

212. For an example in the United States, see the "Negative" or "Dormant" Commerce Clause of the U.S. CONST. art. I, § 8, cl. 3, which states, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, among the several States . . . .". *See also* Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 155 (2008) ("As defined by the modern Court, the Dormant Commerce Clause 'denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.'") (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994)). For the European example, see *The Crisis of the European Common Market*, STRATFOR (Apr. 11, 2013), https://www.stratfor.com/analysis/crisis-european-common-market.

213. On China's One Belt One Road policy, see, for example, Joe Ngai & Kevin Sneader, *China's One Belt, One Road: Will It Reshape Global Trade?*, MCKINSEY PODCAST (July 2016), http://www.mckinsey.com/global-themes/china/chinas-one-belt-one-road-will-it-reshape-global-trade.

214. *See* Backer, *supra* note 201.

sphere.[215] On a more practical level, aggregation, with its larger capital base can provide for more effective investing.[216]

This strategy need not lead to consolidation of national SWFs as much as it needs to suggest the power of coordination on projects that may be valuable to shifting groups of such funds.[217] Developing the flexibility to engage in joint efforts with different groups of funds and to coordinate that activity regionally produces greater likelihood of social and developmental objectives than purely national efforts constrained as they are by borders developed in the capitals of Europe in the 19th century.[218] The strategy looks to the creation of coordinated SWF cross-border regional investment in partner states that deepen those webs of cross-investment, which in turn facilitate the growth of private economic activity.[219]

4. Strengthen and increase participation in non-regional multi-SWF projects.

It is becoming quite common for SWFs to develop coordinated strategies and engage in joint projects.[220] Recent agreements of this kind among funds from China, Korea, Russia, and the Middle East, as well as others, have begun to exploit the logic and power of aggregation of resources to meet common ends.[221] African SWFs might also use these vehicles for a number of objectives. First, as part of deals with investor states seeking to exploit African natural resources, it might be useful to tie such deals to coordinated investment projects overseen through the SWFs of each of the participating states.[222] Second, like intra-Africa SWF coordination and joint project work, these activities can be used to enhance governance and fiscal discipline.[223] Third, these provide yet another method of leveraging financial power of small funds, especially with respect to projects or investments to which they would have been

---

215. *Id.*

216. *Id.*

217. Certainly the current practice of national sovereign wealth funds to develop joint ventures points in the direction of coordination over a longer term and within a wider scope of activity. For current practice consider the joint ventures of the Russian and Korean SWFs. *See, e.g.*, Press Release, *supra* note 92.

218. *See* Backer, *supra* note 201.

219. *Id.*

220. *See* discussion *supra* Sections II.C, III.A.2, III.A.3.

221. *See* Claire Milhench, *Russian State Fund Expects $1 Billion Capital Injection in 2017*, REUTERS (Feb. 7, 2017), http://www.reuters.com/article/us-russia-swf-rdif-idUSKBN15M2NU.

222. Andrew Bauer, *Six Reasons Why Sovereign Wealth Funds Should Not Invest or Spend at Home*, NAT. RESOURCE GOVERNANCE INST. (Apr. 7, 2015), http://www.resourcegovernance.org/blog/six-reasons-why-sovereign-wealth-funds-should-not-invest-or-spend-home-0.

223. *See id.*

able to participate on their own.[224] If regionalization is essential to the enhancement of the success of African SWFs, macro-financial strategies build on regionalism, and expand them.

5. Refocus SWF objectives to enhance the value of specialization and to target coherence with the portfolios of finance and development ministries.

Among the more important cluster of issues to consider in this regard arise from the use of "mixed-objective" SWFs that are sometimes created either as single or multiple investment vehicles. Mixed-objective SWFs do not seem to do well.[225] the difficulty is functional coherence, though in theory they can be all things to all people, but in practice, investment coherence tends to be lost on—or subsumed within—contests for ordering priorities within SWFs. There is another consequence to the use of such SWFs—they might appear to encourage abuse. Multiple objectives can serve to justify virtually any decision. Where public governance structures are weak, or within states facing the challenges of corruption, multi-objective SWFs could lend themselves to use by decision makers for the furtherance of personal rather than public interests.[226]

Adoption of a strategy of significant separation by objective—stabilization, development, futures funds, and the like—may better rationalize approaches to operation and enhance monitoring and accountability. Specialization of SWFs, especially in Africa, combined with regional organization of these specialized entities, would target objectives and leverage power more effectively, especially in global markets in which individually each of these funds may be quite insignificant.[227] These strategies, of course, build on the regionalization already suggested as essential to the success of African SWFs.[228]

While coherence requires specialization within SWFs, it also requires coordination with other actors that shape the macro-finance behaviors of states. There are three noteworthy actors with which coordination is useful. First, competition with development banks results in waste, confusion, and duplication.[229] SWFs,

224. *See id.*
225. *See id.*
226. *See, e.g.*, Velijok Fotak et al., *Financial Role of Sovereign Wealth Funds*, *in* OXFORD HANDBOOK OF CORPORATE GOVERNANCE 593–94 (Mike Wright et al. eds., 2013).
227. *Id.* at 594.
228. *See supra* Section IV.
229. On the work of development Banks, see, for example, John W. Head, *For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 KAN. L. REV. 241, 241, 254 (2004). For a discussion about the overlap of SWFs and development banks, see, for example, Alan Gelb et al., *Sovereign Wealth Funds and Long-Term Development Finance* 1, 14 (The World Bank Poverty Reduction & Econ. Mgmt. Network Pub. Sector

whatever their investment objectives, must work with and not against development banks (much less the central banks). Second, failures of coordination with state-owned resource extractive enterprises produce a weak link in the production of wealth.[230] The passive relationship between SWFs and SOEs ought to be reshaped to enhance coordinated efforts. Third, coordination with government ministries responsible for selling rights to extractive resources ought to be better coordinated as well.[231] The system of wealth production ought to be seamless from the operation of enterprises, to the public policies that operationalize those enterprises, to the investment strategies that augment and manage the wealth production made possible through those enterprises.

6. Reconsider the approach to stabilization and development models for SWFs, especially were governance controls are weaker than they could be or in resource rich states.

One of the oddest aspects of stabilization and development SWFs is their quite instrumental approach toward intervention in domestic markets in the context of a global order that increasingly emphasizes organic and market-driven development. In a sense, SWFs can be misapplied as a vehicle for the kind of public central planning of the national economy that is both inimical to the logic of globalization and which has been discredited in virtually every state in which it has been applied aggressively, irrespective of the political ideology on which the state is organized.[232] The use of SWFs as a means of governmental direction for economic planning or operation is perhaps a substantial misuse of the SWF form in an endeavor that fights against, rather than complements, the logic of the global financial and economic rules of play that are now dominant—and is, ironically enough, detrimental to the development that such planning vainly seeks to enhance.

In a sense, such approaches to development or stabilization objectives echo *Ancien Regime* sectorial protection or enhancement efforts[233] that appear as an attempt to mimic the industrial revolution in France more instrumentally than that of the United

Governance Unit & Sustainable Dev. Network Oil, Gas & Mining Unit, Working Paper No. 6776, Feb. 2014).

230. *Id.*

231. *See id.*

232. Some of the thrust of the Angolan Fund may provide a case in point. *See* Larry Catá Backer, *International Financial Institutions (IFIs) and Sovereign Wealth Funds (SWFs) as Instruments to Combat Corruption and Enhance Fiscal Discipline in Developing States*, INT'L REV. L. 1, 15–18 (2015), http://dx.doi.org/10.5339/irl.2015.swf.5.

233. *See, e.g.*, Bruce Bartlett, *The Truth About Trade in History*, CATO INST. (July 1, 1998), https://www.cato.org/publications/commentary/truth-about-trade-history.

Kingdom.[234] That was a dismal failure, though it did produce one of two industries that have been quite well celebrated—hardly enough though to justify the effort.[235] Closer to our own time, it suggests the central planning taken to more extreme lengths by those states practicing Soviet economic practices and which lingers on in an attenuated way in perhaps only one state.[236]

Rather than instrumental spending to subsidize targeted activities—something we have heard spoken of in this Article—SWF stabilization/development spending might be better used to fund and develop the foundations on which private markets can grow of their own accord and consonant with economic conditions in context. SWF development spending ought to enhance but allow the market to determine which sectors should develop, and in what way. The state might provide general guidance with respect to the direction of development—the Chinese approach[237]—but otherwise it ought to use its power to regulate markets rather than to micro-manage its operation at the level of local economic activity. They might also engage in strategic investing that brings global production chains back into a national context. It is possible for regionally aggregated SWFs to buy their way into the apex position of global production chains, or to enhance their position in key industrial sectors.[238] Reducing barriers to private economic activity rather than supporting a favored few is a more effective way of building economic strength with a broader base. It might be more efficient, in this respect, for development SWFs to devote their resources to enhancing markets in the technology sector rather than to devote funds to the training of coding; the state, unlike the market, is hardly ever in a position to anticipate and meet demand in a timely way, much less to adjust activities as demand changes.[239] SWFs

234. *See, e.g.*, Jacob Soll, *Colbertism Failed in France. Will It Work for China?*, BOS. GLOBE (July 14, 2013), https://www.bostonglobe.com/ideas/2013/07/13/colbertism-failed-france-will-work-china/Q9iiZEpieHhcTOhbkYrJSP/story.html.

235. *See id.*

236. On a critique of European central planning models of the 20th century, see, for example, Eleftherios Botsas, *Trade and the Collapse of Central Planning in Europe*, 26 E. EUR. Q. 239 (1992).

237. *See, e.g.*, HU ANGANG, THE MODERNIZATION OF CHINA'S STATE GOVERNANCE (Springer 2017).

238. Temasek's investing provides a useful case in point. *See, e.g.*, Press Release, Intapp, Intapp Announces Investment from Temasek as It Seeks to Further Accelerate Growth (April 12, 2017), http://www.intapp.com/company-news/item/intapp-announces-investment-from-temasek-as-it-seeks-to-further-accelerate-growth.

239. For the classic critique, see N.G. Pierson, *The Problem of Value in the Socialist Society*, *in* COLLECTIVIST ECONOMIC PLANNING 41, 41–42 (F.A. Hayek ed., 2009) (1935), https://mises.org/system/tdf/Collectivist%20Economic%20Planning_2.pdf?file=1&type=document. But, of course, the issue is sometimes subtler. *See, e.g.*, Leslie Young, *Central Planning Versus Market*

that protect bottom-up economic development, which manages but does not oversee this development, will likely serve their people better in the long run.[240]

To that end, building market capacity rather than industry capacity better leverages spending. States are very bad at anticipating market needs and national capacities, much less the demand and tastes of the population for certain activity.[241] States are much better at fashioning the parameters and rule systems within which those desires and demand might be satisfied through individual action, and providing the mechanics through which opportunity to engage in those actions is possible.[242] Well-planned infrastructure development is also essential and good work for the instrumentalities of the state, as are institutional structures protective of private economic activity.[243] To this end, ownership of external operations or supply flows in industries critical to national economic activity and that affect internal markets might be the best way to spend development funds. Even resource rich states require productive capacity along supply and value chains, access to which might be enhanced through SWF ownership or control.[244] Thus the paradox—development SWFs might be most effective when investing outside of the home state and in industries critical to internal development—that is at development choke points in globalized economic activity. The Chinese model of sovereign investing has certainly demonstrated the value and viability of this approach. The governance strategies are also a necessary element to creating institutionally strong African SWFs capable of attaining the regional and macro-financial strategies suggested.

7. Effect greater and better targeted transparency.

Transparency has become a standard rhetorical gesture when speaking to SWFs.[245] It has become fairly meaningless in soft law

---

Economy: A False Dichotomy, FORBES (Oct. 26, 2015), https://www.forbes.com/sites/ckgsb/2015/10/26/central-planning-vs-market-economy-a-false-dichotomy/#25a5b50719af.

240. For the classic critique, see Georg Halm, *Further Considerations on the Possibility of Adequate Calculation in a Socialist Community*, *in* COLLECTIVIST ECONOMIC PLANNING 131, 139–143 (F.A. Hayek ed., 2009) (1935), https://mises.org/system/tdf/Collectivist%20Economic%20Planning_2.pdf?file=1&type=document.

241. *See* Pierson, *supra* note 239.

242. *See* Pierson, *supra* note 239.

243. Young, *supra* note 239.

244. Gelb et al., *supra* note 229, at 14–15.

245. The work of Truman in this respect is especially noteworthy. *See, e.g.*, ALLIE E. BAGNALL & EDWIN M. TRUMAN, PETERSON INST. FOR INT'L ECON., POLICY BRIEF NO. PB13-19, PROGRESS ON SOVEREIGN WEALTH FUND TRANSPARENCY AND ACCOUNTABILITY: AN UPDATED SWF SCOREBOARD (2013), https://piie.com/sites/default/files/publications/pb/pb13-19.pdf; Ted Truman, *More Transparency Needed*, GLOBAL PUB. INV. 2014, at 92, https://piie.com/sites/default/files

efforts like the Santiago Principles.[246] Beyond its utility as rhetoric, robust transparency can be effectively used to strengthen SWFs in the delivery of financial and governance enhancing products.[247] To that end, transparency must be understood to serve a purpose similar to that of financial statements that are meant to inform the investing community of the performance of an enterprise to aid in investment decisions, and at the same time, are also meant to provide the information necessary for the enterprise to more effectively manage the enterprise.

The problem is that principles of transparency are not elaborated in that fashion. Indeed, transparency is not very useful when understood in its conventional sense as a one-size-fits-all disclosure strategy. This approach touches on two quite distinct issues. The first is the assumption that transparency need not be sensitive to context.[248] Transparency principles might be equally applicable across all classes of SWFs.[249] The second, and more important, issue touches on the need to distinguish between

/publications/papers/truman201406.pdf. The Santiago Principles nod in this direction as well. *See* INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS GENERALLY ACCEPTED PRINCIPLES AND PRACTICES "*SANTIAGO PRINCIPLES*," 4–5, 16, 23–24 (2008). The Norwegian Pension Fund Global speaks eloquently to the importance of transparency. *See, e.g.*, *Transparency*, NORGES BANK INV. MGMT., https://www.nbim.no/en/transparency/ (last visited Sept. 13, 2017).

246. On criticism of the transparency guidelines of the Santiago principles and its failure of application, see, for example, Adam D. Dixon & Ashby H. B. Monk, *Reconciling Transparency and Long-Term Investing Within Sovereign Funds*, 2 J. SUSTAINABLE FIN. & INV. 275, 276 (2012), https://gpc.stanford.edu /sites/default/files/dixonmonkreconcilingtransparencyandlong -terminvestingwithinsovereignfunds.pdf.

247. On the importance of transparency in SWF governance, see, for example, Bagnall & Truman, *supra* note 245.

248. This is an issue nicely treated in an essay, Adam D. Dixon, *Enhancing the Transparency Dialogue in the "Santiago Principles" for Sovereign Wealth Funds*, 37 SEATTLE U. L. REV. 581, 584–85 (2014) (distinguishing among political, procedural, policy, operational, and performance transparency).

249. For a discussion, see, for example, Edwin Truman, PETERSON INST. FOR INT'L ECON., POLICY BRIEF NO. PB07-6, SOVEREIGN WEALTH FUNDS: THE NEED FOR GREATER TRANSPARENCY AND ACCOUNTABILITY 1, 7 (2007), https://piie.com/publications/pb/pb07-6.pdf. The Santiago Principles speak to the responsibility of SWFs to publicly disclose SWF risk management frameworks. *See* INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, *supra* note 245, at GAPP 22.2 (the Explanation and Commentary suggests that the responsibility for transparency even in this context is necessary to "help achieve the aim of maintain a stable, transparent, and open investment environment"). The Santiago Principles also speak to the preparation and distribution of an annual report. *See* INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, *supra* note 245, at GAPP 10–11.

transparency that is internally relevant and that which is relevant to outsiders.[250]

Instead, especially in the case of small funds for developing states, one might start by rethinking transparency as a more nuanced and complex set of vehicles for engagement and communication.[251] One ought to consider transparency in two aspects. Internal transparency is necessary to ensure engagement with national stakeholders (including the political and business establishment) and to reduce an unhealthy detachment from elected officials. External transparency is necessary to ensure adequate communication with investors and investor markets, including IFIs.

Internal transparency focuses more on engagement strategies within states and among the appropriate sectors of the government apparatus.[252] Its purpose is to broaden consultation in the formation of policy (an ex ante function) and to ensure broad bases of accountability (an ex post function).[253] External transparency might be better used shorn of any pretense to engagement. External transparency focuses more on communication. Its purpose is to communicate rather than to engage directly. It is meant to convey information about performance and operations in the manner of financial performance reports of enterprises whose securities are traded in securities markets.[254] Internal transparency permits participation in forming policy and making decisions; external transparency facilitates choices among those to whom communication is directed.

8. Detach SWF operations from governmental discretionary decision-making.

The engagement potential of transparency must be constrained to avoid abuse. While deep participation by the government may be useful for developing policy for which the SWF may serve as instrument, it is far less useful for the decision making required to operate an SWF with respect to specific investment decisions and internal operations.[255] This is an intuition that reflects one of the great insights of the Santiago Principles as well.[256] It is therefore necessary to adopt a strategy that would institutionalize deep

250. Dixon, *supra* note 248, at 586 n.27 (citing Anna Gelpern, *Sovereignty, Accountability, and the Wealth Fund Governance Conundrum*, 1 ASIAN J. INT'L L. 289, 295–307 (2011)).

251. Discussed generally in Larry Catá Backer, *Transparency and Business in International Law, in* TRANSPARENCY IN INTERNATIONAL LAW 101, 122 (Anne Peters & Andrea Bianchi eds., 2013), https://ssrn.com/abstract=1984346.

252. *See id.* at 121, 138.

253. *See id.* at 131–32

254. *See* INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, *supra* note 245, at GAPP 12.

255. *See id.* at GAPP 6, 9.

256. *See id.* at GAPP 1.

constraints on engagement by officials (including elected officials) and the political community generally, especially respecting investment decisions. The only exception would touch on Norwegian-type SWFs, established specifically as a public instrument for leveraging national policy through targeted interventions in private markets.[257]

Beyond that quite specific sort of SWF, constraint strategies would require a strong functionally effective routinization of contributions and withdrawals and of investment decisions by formula and related methodologies.[258] These strategies ought to target conduct well beyond the usually elegantly drawn formal division of authority posted to virtually every SWF's web site. In particular, the discretionary power to deviate from formula, or to vest a high-ranking official with authority to direct specific investment powers usually embedded in the fine print of SWF operational rules, requires sustained attention and substantial tightening.[259]

Along with these measures, SWFs might consider strategies that strengthen internal management controls and oversight, and which make these appropriately transparent. These internal controls ought to be coherent with whatever external controls are developed. The value extends beyond those embedded in the Santiago Principles. It touches on the quasi-fiduciary obligations a sovereign instrumentality may have to other investors.[260] Among the duties that the SWF may owe are those connected to sustainability, a duty that might benefit from appropriate institutional design.[261] In that respect, for example, China has already begun moving its financial and investment practices in that direction.[262]

9. Insist on changes to the way in which states with SWFs engage with IFIs to enhance rather than to continue obstacles to better state performance.

IFI conditionality, technical assistance approaches and monitoring regimes should better target rewards for good SWF

257. *See Strategy*, NORGES BANK INV. MGMT., https://www.nbim.no/en/organisation/strategy-plan/ (last visited July 5, 2017).

258. On the value of routinization, see, for example, MAX WEBER, ECONOMY AND SOCIETY 249 (1978), https://archive.org/details/MaxWeberEconomyAndSociety.

259. *See* INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, supra note 245, at GAPP 9.

260. *See* Backer, *supra* note 26.

261. *Id.*

262. *See* Press Release, The People's Bank of China, The People's Bank of China and Six Other Agencies Jointly Issue "Guidelines for Establishing the Green Financial System" (Sept. 1, 2016), http://www.pbc.gov.cn/english/130721/3131759/index.html.

performance in attaining fiscal results, improvement in governance, and incorporation of technical assistance in which states have enjoyed effective consultation.[263] While a broad and politically charged topic,[264] one can think of three fairly direct methods that might be useful measures of success for this strategy. First, IFIs might incorporate investor loan cost reductions (interest, fees and the like) that are triggered on attaining certain performance markers. Second, IFIs might incorporate principal reduction terms for meeting goals along similar lines. Third, and perhaps most important, IFIs might more aggressively and, with the cooperation of African SWFs and their governments, more effectively incorporate international norms on business and human rights as a measure of the effectiveness of SWF investing decisions. This would include the incorporation of the methodologies of human rights due diligence in investment decisions and oversight that are central to the U.N. Guiding Principles on Business and Human Rights.[265] There is a great disciplinary mechanism that is transnational in scope and helpful to the people who are the ultimate beneficiaries of the work of African SWFs.

Taken together, these strategies suggest the trajectories of developments in SWF operations, whose uneven and tentative appearance has been evident in the actions of SWFs described in Section II. These strategies also serve to tease out some of a set of fairly broad and aggressive possibilities inherent in current practice that would also substantially disrupt the current narrative of the ideal SWF and its "bargain" with rich host states. It would surprise no one, then, to suggest that many of these strategies are no doubt controversial. Some are aspirational. All are based on the assumption that the application of late 20th century political models in an environment of twenty-first century globalization, in which borders are more porous and permeable, in which public power is fractured, and in which investment operates under the complex logic

263. On the current objectives of these programs within the World Bank and IMF, see *Capacity Development: Technical Assistance and Training,* INT'L MONETARY FUND (Sept. 28, 2016), www.imf.org/external/np/exr/facts/tech.htm; *IMF Surveillance*, INT'L MONETARY FUND (Sept. 28, 2016), www.imf.org/external/np/exr/facts/surv.htm.

264. IFI conditionality has always been controversial. *See, e.g.*, JOHN W. HEAD, THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS: AN EVALUATION OF CRITICISMS LEVELED AT THE IMF, THE MULTILATERAL DEVELOPMENT BANKS, AND THE WTO 228–29, 241 (2005); John W. Head, *Law and Policy in Global Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 KAN. J.L. & PUB. POL'Y 194, 214–217 (2007). Yet here it might be turned to good use as a technique autonomous of the institutions that tend to use them. The same could be said of technical assistance. *See, e.g.*, IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES II.139–46 (1995).

265. *See, e.g.*, Backer, *supra* note 26.

of polycentric governance systems, will neither serve Africa, nor the global community of which Africa is an important part.

CONCLUSION

SWFs have already started moving well beyond their idealized form. The aspirational parameters of the Santiago Principles are less relevant to emerging forms of sovereign investment. It is certainly time for a Santiago Principles II to emerge. Yet, that is unlikely in the absence of the sort of financial crises that drove home and host states to the creation of the Santiago Principles in the first place. Alternatively, it may be necessary to distinguish between now "classical" SWFs and the universe of emerging forms of sovereign investing that do not fit within the narrow definition of the classical form. However, that might reduce the subject of SWFs to irrelevance.

The next generation of SWFs, perhaps better understood as sovereign investment funds ("SIFs"), now advance important public goals beyond augmenting he value of state wealth. These SIFs now advance important public goals beyond augmenting the value of state wealth. These SIFs now advance political and economic projects of states, serve to strengthen governance, are the focal point for the normalization of global human rights in economic activities projects, and also serve to advance the development goals of states. The old issues of the commercial character of these mechanisms, and of their effects of the financial markets and ownership structures of rich home states remain important, but may no longer be the central element pushing the development of SWFs. The reality of market behavior suggests a movement from SWFs to sovereign investing.[266] Law and regulatory structures lag far behind the realities that are taking shape on the ground. The public/private divide, the constraining structures of national principles of taxation and sovereign immunity are now ripe for contestation and change. But on what basis? That remains very much to be seen. This Article has sought to provide a glimpse both at the changes in practice and the possibilities they raise for future conduct of SWFs. As to the future, we will know soon enough.

266. *See, e.g.*, *Sovereign Investors 2020: A Growing Force*, PWC 23 (2016), http://www.pwc.com/gx/en/sovereign-wealth-investment-funds/publications/assets/sovereign-investors-2020.pdf.