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Sovereign Wealth Fund Liability: Private Investors Left Out in the Cold

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**SOVEREIGN WEALTH FUND LIABILITY:
PRIVATE INVESTORS LEFT OUT IN THE COLD**

DANIEL ETLINGER*

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I. INTRODUCTION

“Right now, the U.S. finds itself in a difficult position. Some of our financial institutions have made mistakes and need capital So they raise capital from where it exists, and sovereign wealth funds are the most available form of capital right now . . . [But, b]ecause they are government-owned, noneconomic factors may influence their

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decision-making and the pressure they put on companies that they own a piece of.”¹

The Sovereign Wealth Fund (“SWF”) dilemma has spurred Congressional hearings,² political speeches,³ and Congressional Research Service (“CRS”) reports.⁴ The United States has focused on whether SWFs are friend or foe. New York Senator Chuck Schumer, an influential member of the Senate Finance Committee, recently gave an interview, during which he was asked: “[I]s there any real evidence that these funds plan to use their investments to further political agendas?”⁵ His response, indicative of the general attitude in Congress, was “[w]ell, there’s no track record. They’re brand new. So we just don’t know. . . . So setting rules . . . is the right thing to do.”⁶

The term ‘sovereign wealth fund’ is a recent one, attributed to Andrew Rozanov’s paper *Who Holds the Wealth of Nations?*⁷ However, SWFs have been around for years, the first being created in the 1950s.⁸ There is no universally accepted definition for SWFs, but a composite sketch would state a government controlled investment vehicle with widely varying objectives.⁹ Because there is no agreed upon definition, an exact count is difficult, but the United States Government Accountability Office estimates forty-eight SWFs exist in at least thirty-four countries.¹⁰

¹ Maria Bartiromo, *Chuck Schumer on the Rise of Sovereign Wealth Funds*, BUS. WK., Mar. 6, 2008, available at http://www.businessweek.com/magazine/content/08_11/b4075021424117.htm.

² See generally *Do Sovereign Wealth Funds Make the U.S. Economy Stronger or Pose National Security Risks?: Hearing Before the Joint Econ. Comm.*, 110th Cong. 20-21 (2008) (testimony of Douglas Rediker, Co-Director, Global Strategic Financial Initiative) (reporting to the Committee on transparency and disclosure issues).

³ See generally Henry M. Paulson, Jr., U.S. Sec’y of Treasury, Remarks on Open Investment Before the U.S.-UAE Business Council (June 3, 2008) (focusing in particular on issues for the United States and the Middle East).

⁴ See generally MARTIN A WEISS, SOVEREIGN WEALTH FUNDS: BACKGROUND AND POLICY ISSUES FOR CONGRESS, CRS REP. RL 34336, at 1-2 (2008), available at fpc.state.gov/documents/organization/110750.pdf.

⁵ Bartiromo, *supra* note 1.

⁶ *Id.*

⁷ See generally Andrew Rozanov, *Who Holds the Wealth of Nations?*, 15 CENT. BANKING J. 52 (2005).

⁸ Mathias Audit, *Is the Erecting of Barriers Against Foreign Sovereign Wealth Funds Compatible with International Investment Law* 1 (Soc’y of Int’l Econ. L., Working Paper No. 29/08, 2008) (starting with the creation of the Kuwait Investment Authority (“KIA”) and Kiribati Revenue Equalization Reserve Fund).

⁹ STEPHEN JEN, CURRENCIES: THE DEFINITION OF A SOVEREIGN WEALTH FUND 1 (Oct. 25, 2007), <http://sovereignwealthfunds.files.wordpress.com/2008/01/the-definition-of-a-sovereign-wealth-fund-morgan-stanley-october-2007.pdf>.

¹⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, SOVEREIGN WEALTH FUNDS: LAWS LIMITING

The government directly controls SWFs or, in some cases, indirectly through a government entity.¹¹ This decision balances two key interests – the need for control compared with isolation from political pressures.¹² To address this issue, no country has yet to privatize its SWF (although some have publicly listed subsidiaries).¹³ However, many of the key appointed positions are pulled from the private sector.¹⁴

Based on SWF holdings, Christopher Balding, of the University of California, Irvine, analyzed several SWF characteristics.¹⁵ He determined that SWFs “demonstrate an unmistakable preference for domestic and regional equity investment.”¹⁶ There are several possible explanations. First, there may be less currency risk by investing in companies that operate with the same currency as does the SWF.¹⁷ Second, the SWF may have more knowledge about local institutions, policies and trends.¹⁸ Third, there may be an innate preference for promotion of local businesses and projects.¹⁹

Balding also noted that SWFs “hold lower risk stocks inferring from their large cap stock preference.”²⁰ For the most part these stock positions were diversified and incorporated debt instruments to balance the

FOREIGN INVESTMENT AFFECT CERTAIN U.S. ASSETS AND AGENCIES HAVE VARIOUS ENFORCEMENT PROCESSES 5 n.4 (2009), <http://www.gao.gov/new.items/d09608.pdf> [hereinafter GAO REPORT].

¹¹ Christopher Balding, A Portfolio Analysis of Sovereign Wealth Funds 12 (June 6, 2008) (unpublished manuscript, on file with HSBC School of Business), available at <http://ssrn.com/abstract=1141531>.

¹² *Id.*

¹³ *Id.* at 12-13 (including the Temaske Holdings of Singapore and the Abu Dhabi Investment Authority (“ADIA”).

¹⁴ *Id.* at 12.

¹⁵ *Id.* at 17-38 (including direct holdings data from Thomson One Banker and Bloomberg, and indirect financial flow data from central banks, international organizations, and national treasuries).

¹⁶ Balding, *supra* note 11, at 17 (noting that Norway and Saudi Arabia were the two biggest exceptions).

¹⁷ The Investor, *Currency Risk*, MONEVATOR, Jan. 30, 2009, <http://monevator.com/2009/01/30/currency-risk/>.

¹⁸ See Brian Perry, *Evaluating Country Risk for International Investing*, INVESTOPEDIA, <http://www.investopedia.com/articles/stocks/08/country-risk-for-international-investing.asp> (last visited Apr. 10, 2010).

¹⁹ Bart De Meester, International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State 5 (Nov. 3, 2008) (unpublished manuscript on file with Institute for International Law), available at <http://ssrn.com/abstract=1308542> (noting that one of the objectives of SWFs is to promote national socio-economic programs).

²⁰ Balding, *supra* note 11, at 19 (noting that the two biggest exceptions were the Saudi Arabian Monetary Agency and Government of Singapore Investment Corporation (“GIC”).

portfolio.²¹ Even though SWFs invest heavily in the markets, they only comprise 1.3% of the world's total assets, or \$3 trillion.²² This is far less than many of the other major financial players.²³

Despite holding a small percentage of global assets, SWFs have made some high profile investments in recent years. In September 2007, Borse Dubai agreed to take about a 20% stake in the NASDAQ and a 30% stake in the London Stock Exchange.²⁴ In October 2007, the Chinese SWF announced a \$1 billion investment in Bear Stearns.²⁵ Abu Dhabi Investment Authority ("ADIA") injected \$7.5 billion into Citigroup for a 5% stake in the company.²⁶ All told, Morgan Stanley estimates that SWFs invested over \$44 billion in Western financial institutions in the fourth quarter of 2007 alone.²⁷ And these investments have been sustained as well. In 2008, Qatar Holding took a 13% holding in Barclays, continuing the tradition of Western banks courting oil rich Persian Gulf Funds.²⁸ And in 2009, the Chinese SWF looked to invest a substantial amount in the U.S. real estate market.²⁹

²¹ *Id.* at 34.

²² Gerard Lyons, *State Capitalism: The Rise of Sovereign Wealth Funds*, 14 LAW & BUS. REV. AM. 179, 189 (2008).

²³ Cf. PRESIDENT'S WORKING GROUP ON FIN. MKTS., HEDGE FUNDS, LEVERAGE, AND THE LESSONS OF LONG-TERM CAPITAL MANAGEMENT 1-2 (1999), <http://www.ustreas.gov/press/releases/report3097.htm> (stating that at the turn of the millennium "commercial banks had \$4.1 trillion in total assets; mutual funds had assets of approximately \$5 trillion; private pension funds had \$4.3 trillion; state and local retirement funds had \$2.3 trillion; and insurance companies had assets of \$3.7 trillion."). See also INVESTORS' COMM., PRINCIPALS AND BEST PRACTICES FOR HEDGE FUND INVESTORS 1 (2008), <http://www.treasury.gov/press/releases/reports/investors'committeereportapril152008.pdf> (noting that hedge funds have roughly \$2 trillion in assets).

²⁴ Posting of Steven Davidoff to *A Guide to Speed Dating with Sovereign Wealth Funds*, Dealbook, <http://dealbook.blogs.nytimes.com/2008/01/15/a-guide-to-speed-dating-with-sovereign-funds/> (Jan. 20, 2010, 17:52 EST).

²⁵ *Id.* (explaining the exposure due to the size of the investment, the timing, and the fact that it was a Chinese SWF).

²⁶ *Id.* See also Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 99 (2008) (stating that as part of this investment, Abu Dhabi agreed not to have any ownership or control in Citi, including the restriction they could not appoint a member to the board of directors).

²⁷ WEISS, *supra* note 4, at 3. See Exhibit One – High-Profile SWF Investments in 2007 for a more complete list.

²⁸ See Chip Cummins & Andrew Critchlow, *Persian Gulf's Rich Investors Infuse Banks with Capital*, WALL ST. J., Nov. 3, 2008, at C1.

²⁹ Lingling Wei & Jason Dean, *CIC Looks To Pile Cash into U.S. Real Estate*, WALL ST. J., Sept. 9, 2009, at C1.

These stories gained great exposure in the media, sparking debate.³⁰ Conversations about SWFs have examined their operations, motives, growth and transparency, but little attention has been paid towards its liability. Suppose a SWF committed a securities violation, such as insider trading, and this action damaged an investor. A plethora of issues immediately arise with this simple fact scenario. Is there a private cause of action? Are SWFs immune from suits? Who has jurisdiction over the case? Where can the judgment be enforced? Furthermore, does the United States government have any recourse against the SWF?

The current landscape for an aggrieved investor is woefully articulated, especially compared to public and international responses. Investors must navigate a dense jungle of requirements simply to bring a suit. Eventually, however, most investors should succeed on this point. The real issue is actually recovering anything. The current framework does not adequately address this issue, thus leaving private citizens out in the cold. This is a real issue mainly for two reasons. First, difficulty bringing a suit and recovering damages leaves an entire group (and a large one at that) without any redress for even egregious cases of fraud in the market. This in turn diminishes private confidence in the market. Second, and a derivative threat, is that investors may manifest this frustration inappropriately. Specifically, investors may push for overly-protectionist regulations which will choke out SWF investment altogether. This is undesirable since it prevents a much needed stream of capital into the United States. This leaves us with the initial question posed by Senator Schumer - how does the United States government appropriately walk this tight-rope between SWF investments and regulations?³¹

This article will navigate through these issues and address the liability SWFs face. Part II examines the landscape of sovereign wealth funds more in depth, examining various definitions, performance, policy arguments, and transparency and accounting issues. Part III investigates the legislative environment for a private citizen who feels aggrieved by a SWF. The most important statute in this section will be the Foreign Sovereign Immunities Act of 1976 ("Immunities Act").³² This part concludes that an investor may win a lawsuit against a SWF, but will have great difficulty enforcing a judgment. Part IV explores the remedies in place for the United States government. The public sector's chances for

³⁰ See, e.g., Chip Cummins, *Abu Dhabi Fund Opens Books – A Bit*, WALL ST. J., Mar. 15, 2010, at C1.

³¹ See Bartiromo, *supra* note 1.

³² 28 U.S.C. §§ 1602-1611 (1976).

recovery are strong, with most cases ultimately being arbitrated. Part V evaluates the international responses. The General Agreement on Trades in Services (“GATS”) is significant since it is binding.³³ Its limitation, however, is that it is only applicable in limited circumstances. GATS too points towards arbitration when it’s in force. The International Monetary Fund’s (“IMF”) Santiago Principles are gaining wide support, but it does not directly address this issue.³⁴ However, the Santiago Principles do implicitly point towards private recourse. Lastly, Part VI concludes the article and argues for an amendment to the Immunities Act. Specifically, this provision should tie the amount of recovery to the investment itself to make recovery meaningful.

II. SOVEREIGN WEALTH FUND LANDSCAPE

A. Definitions

SWFs avoid having a standard definition. But, a look at three representative viewpoints will help illuminate the difficulty in classification and highlight several aspects about them. There are numerous ways to categorize or define SWFs, including: geography, age, source of funds, intent and size.³⁵

First, the IMF defines sovereign wealth funds as “special-purpose investment funds or arrangements that are owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies that include investing in foreign financial assets.”³⁶ Furthermore, there are five types of SWFs based on primary objectives – stabilization funds (to smooth out commodity fluctuations), savings funds for future generations (to grow savings accounts), reserve investment corporations (to increase the return on reserves), development funds (to promote new socioeconomic projects) and contingent pension reserve funds (to help future pension funds).³⁷

³³ General Agreement on Trade in Services, Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter GATS].

³⁴ INT’L WORKING GROUP OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: “SANTIAGO PRINCIPLES” 3 (2008), available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> [hereinafter SANTIAGO PRINCIPLES].

³⁵ See Lyons, *supra* note 22, at 202-08.

³⁶ SANTIAGO PRINCIPLES, *supra* note 34, at 3.

³⁷ INT’L MONETARY FUND, SOVEREIGN WEALTH FUNDS – A WORK AGENDA 5 (2008), available at

The IMF's definition of a SWF comes from the objective/intent camp. First, objectives vary among countries. For instance, some countries utilize SWFs to promote economic growth or stability whereas other countries use them primarily to fund internal projects.³⁸ Second, the IMF's implication that SWFs operate for long-term objectives is not universally accepted. Actually, there is quite a bit of tension as to whether SWFs sometimes invest for quick short term deals or not.³⁹ Third, the IMF's definition suggests the source of funding may influence SWFs' purposes (for example, stabilization funds are used primarily by oil rich nations).⁴⁰

A second definition comes from the Peter G. Peterson Institute for International Economics ("Peterson Institute").⁴¹ Edwin Truman, Senior Fellow of the Peterson Institute, testified before the U.S. House of Representatives Committee on Foreign Affairs in May 2008. He defined SWF as follows:

The broadest definition of a sovereign wealth fund (SWF) is a collection of government-owned or government-controlled assets. Narrower definitions may exclude government financial or non-financial corporations, purely domestic assets, foreign exchange reserves, assets owned or controlled by sub-national governmental units, or some or all government pension funds. I use "sovereign wealth fund" as a descriptive term for a separate pool of government-owned or government-controlled assets that includes some international assets. I include all government pensions, as well as nonpensions, funds to the extent that they manage marketable assets. The basic objectives of both types are essentially the same. They raise virtually identical issues of best practices – the focus of my research and analysis – in government

<http://www.imf.org/external/np/pp/eng/2008/022908.pdf>.

³⁸ See WEISS, *supra* note 4, at 5–6.

³⁹ Cf. *Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the United States: Assessing the Economic and National Security Implications*, Hearings Before the S. Comm. on Banking, Hous. and Urban Affairs, 110th Cong. 5 (2007) (testimony of Edwin M. Truman, Senior Fellow, Peterson Institute for International Economics) [hereinafter Peterson Study] (citing Ecuador's Stabilization Fund and Nigeria's Petroleum Trust Fund as two examples of SWFs who operated in the short term realm).

⁴⁰ Int'l Monetary Fund, *IMF Intensifies Work on Sovereign Wealth Funds*, INTERNATIONAL MONETARY FUND, Mar. 4, 2008, <http://www.imf.org/external/pubs/ft/survey/so/2008/POL03408A.htm>.

⁴¹ *The Rise of Sovereign Wealth Funds: Impacts on U.S. Foreign Policy and Economic Interests*, Before the H. Comm. on Foreign Affairs, 110th Cong. 20 (2008) (prepared statement of Edwin M. Truman, Senior Fellow, Peterson Institute for International Economics).

control and accountability regardless of their specific objectives, mandates, or sources of funding.⁴²

The Peterson Institute's definition focuses on composition. The definition demonstrates that, depending on how wide or narrow one defines a SWF, it may capture funds that are not traditionally thought of as SWFs. For instance, a public pension plan may be considered a SWF even though from a policy standpoint the two seem worlds apart. In addition, the Peterson Institute's definition introduces the idea that SWFs can invest in domestic programs as well.

And third, it is useful to review the United States' definitions to better frame how its regulations impact them. There is no official definition but various agencies have advanced positions. CRS takes an extremely broad view and classifies SWFs as "investment funds owned and managed by national governments."⁴³ In contrast, the United States Treasury Department takes a narrower view. According to the Treasury Department, a SWF is a "government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from the official reserves of the monetary authorities (the Central Bank and reserve-related functions of the Finance Ministry)."⁴⁴ The thrust of the Treasury Department's definition is on composition, further dividing SWFs into two categories – commodity funds and non-commodity funds.⁴⁵

In sum, there are several common characteristics. First, the SWF has to be government controlled.⁴⁶ Second, the SWF will invest in a wide variety of securities.⁴⁷ Third, SWFs operate to effectuate a variety of goals, which largely depends on the region and status of the nation.⁴⁸

⁴² *Id.*

⁴³ WEISS, *supra* note 4, at 1.

⁴⁴ U.S. TREASURY DEP'T, REPORT TO CONGRESS ON INTERNATIONAL ECONOMIC AND EXCHANGE RATE POLICIES, at app. 3 (2007), http://www.ustreas.gov/offices/international-affairs/economic-exchange-rates/pdf/2007_Appendix-3.pdf.

⁴⁵ *Id.*

⁴⁶ A. Blundell-Wignall et al., *Sovereign Wealth and Pension Fund Issues 4* (Organisation for Economic Co-Operation and Development, Working Paper No. 14, 2008).

⁴⁷ *See id.* at 10-12.

⁴⁸ *See id.* at 4.

B. *Select Performance*

Middle Eastern funds are important to highlight since they particularly invest in the United States.⁴⁹ Jassim Al Manai, Chairman of the Arab Monetary Fund, recently commented on the relations between SWFs and the Western beneficiaries stating SWFs should not be feared, but they should take active measures to downplay concerns before governments intervene with regulation.⁵⁰

Even the Middle Eastern funds have struggled in the recent conditions.⁵¹ Seven of the largest funds in the region were projected to lose 15% of their value, shrinking from \$1.25 trillion at the end of 2007 to \$1.06 trillion by the end of 2008.⁵² This change in fortune is linked to both the global economic slowdown, as well as changes in crude oil prices.⁵³ This in turn could mark a decline in Western investments. However, there is evidence that at least some of these funds are ready to begin investing substantially again.⁵⁴

Asian funds are important to understand because they have grown so large, invest heavily in Western institutions and loudly voice their opinions on transparency issues.⁵⁵ Like Middle Eastern funds, Asian funds have enjoyed growth for much of the new millennium.⁵⁶ Rather than being fueled by commodities, Asian funds grew through reserves.⁵⁷ In 2006, Asia held 54% of the \$4.2 trillion in reserves worldwide.⁵⁸

⁴⁹ See, e.g., WEISS, *supra* note 4, at 3 (“[S]everal Middle Eastern and Asian SWFs have recently announced or completed large deals, with a focus on multinational financial institutions following the market turmoil in the second half of 2007.”).

⁵⁰ Kathryn Gordon & April Tash, *Foreign Government-Controlled Investors and Recipient Country Investment Policies: A Scoping Paper*, ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, at 3 (2009), available at www.oecd.org/dataoecd/1/21/42022469.pdf (quoting Nadim Kawach, *Western Fears of Gulf SWFs Not Rational, Arab Fund Says*, EMIRATES BUS. 24/7, Sept. 2, 2008).

⁵¹ See Spencer Swartz, *Government Funds in Gulf Face 15% Loss*, WALL ST. J., Nov. 28, 2008, at C3.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Cf. Vladimir Guevarra & Kerry E. Grace, *NYSE Takes a Stake in Qatar Exchange*, WALL ST. J., June 22, 2009, at C2 (discussing a joint venture between NYSE Euronext and the Qatar Investment Authority); Christoph Rauwald & Eyk Henning, *Porsche Nears a Qatar Deal*, WALL ST. J., June 10, 2009, at B3 (discussing a possible deal between Porsche and Qatar Investment Authority).

⁵⁵ Jason Dean et al., *Chinese Premier Blames Recession on U.S. Actions*, WALL ST. J., Jan 29, 2009, at A1.

⁵⁶ See WEISS, *supra* note 4, at 6.

⁵⁷ *Id.* (driving these reserves are “[1] large trade surpluses, [2] net foreign direct investment flows, and [3] high savings rates among Asian economies.”).

⁵⁸ *Id.* at 8. See also Rose, *supra* note 26, at 88 (“[A]s reserves grow, it would be no surprise if additional amounts were used in stages to swell the size of China’s SWF to, say, \$600 billion within two years!”).

In the past year, tensions between China's SWF and America have become strained due to economic woes.⁵⁹ Investments in Morgan Stanley, Fannie Mae and Freddie Mac burned these funds badly.⁶⁰ To recover the Chinese SWFs appointed an advisory board of economic and investment experts to counsel on "international economic environment, corporate governance, development strategy, and investment policy, as well as upgrading and improving [its] corporate image and increasing transparency."⁶¹

The Russian fund is important to examine because it's typically vilified in American literature.⁶² The Russian fund was launched recently in 2004, but has quickly jumped into the top seven in terms of assets.⁶³ Since the fund is largely oil driven, it comes as no surprise that one of its biggest objectives is to reduce commodity volatility.⁶⁴ But the fund has taken a low risk approach.⁶⁵ The fund issues monthly reports to the Russian Parliament with details about their holdings so the government can regularly check on their SWF.⁶⁶ Many Americans feel Russia will use its SWF for inappropriate political gain despite the fund only taking on modest risks and having some regulatory checks in place.⁶⁷

It may come as a surprise to learn the United States has SWFs of its own. One fund is the Alaskan Permanent Reserve Fund.⁶⁸ Launched in 1976, the fund now has more than \$40 billion in assets.⁶⁹ The fund is commodity driven, with most of its funding coming from oil revenues.⁷⁰ The official objective is to provide comfort to future Alaskans once oil reserves become scarce.⁷¹ The fund may come as a surprise for two reasons. Many assume that SWFs are largely populated by Middle Eastern and Asian nations and, thus, may not realize that some are domestic. In

⁵⁹ See Dean et al., *supra* note 55, at A1.

⁶⁰ *Id.*

⁶¹ Terence Poon, *China's CIC Goes Global With Board of Advisers*, WALL ST. J., July 6, 2009, at C2 (quoting CIC statement).

⁶² See, e.g., Bartiromo, *supra* note 1.

⁶³ See Lyons, *supra* note 22, at 185, 215 (holding roughly \$130 billion, which accounts for 14% of the nation's Gross Domestic Product).

⁶⁴ *Id.*

⁶⁵ Balding, *supra* note 11, at 24.

⁶⁶ Lyons, *supra* note 22, at 215.

⁶⁷ See, e.g., Bartiromo, *supra* note 1.

⁶⁸ Lyons, *supra* note 22, at 219.

⁶⁹ *Id.* (reporting data as of 2006).

⁷⁰ See *id.*

⁷¹ *Id.*

addition, SWFs are not explicitly national creatures and several (like in this case) are populated at the state or provincial level.⁷²

Additionally, there are three more American funds. While the Alaskan fund is the largest, the New Mexico State Investment Trust is the oldest, founded in 1958.⁷³ The fund holds roughly \$13 billion in assets through the only non-commodity driven funding of the American funds.⁷⁴ Moreover, there is the Permanent Wyoming Mineral Trust Fund, which holds roughly \$4 billion through mineral reserves.⁷⁵ And lastly, the Alabama Trust Fund holds slightly more than \$3 billion through gas accumulation.⁷⁶

C. General Performance

The field is largely top-heavy; in 2005 the top five in assets accounted for more than 75% of the total SWF portfolio.⁷⁷ Since that time several firms have gained ground; now seven funds have over \$100 billion in assets.⁷⁸ Of the biggest twenty-two, twelve were launched after the millennium, two in the decade preceding and eight before 1990.⁷⁹ Fifteen were largely commodity driven.⁸⁰

SWFs' assets, from the top performers down, have taken a hit in the recent economy, much like many other financial institutions.⁸¹ For instance, the Monitor Group estimates that Gulf foreign reserves and SWFs have a combined loss of \$350 billion for 2008.⁸² Even the largest SWF, the United Arab Emirates' ADIA now faces losses.⁸³ This effect has

⁷² See *id.* (explaining the State of Alaska owns the Alaskan Permanent Reserve Fund).

⁷³ See Sovereign Wealth Fund Institute, New Mexico State Investment Office Trust (2009), <http://www.swfinstitute.org/fund/newmexico.php>.

⁷⁴ See *id.*

⁷⁵ Sovereign Wealth Fund Institute, Permanent Wyoming Mineral Trust Fund (2009), <http://www.swfinstitute.org/fund/wyoming.php> (reporting that the Fund was founded in 1974).

⁷⁶ Sovereign Wealth Fund Institute, Alabama Trust Fund (2009), <http://www.swfinstitute.org/fund/alabama.php> (reporting that the Fund was founded in 1986).

⁷⁷ Rozanov, *supra* note 7, at 53 (stating, as well, that the biggest five are the ADIA, Government Petroleum Fund, GIC, Investment Portfolio and KIA).

⁷⁸ Lyons, *supra* note 22, at 185.

⁷⁹ *Id.* at 202.

⁸⁰ *Id.* at 204.

⁸¹ See Economist Staff, *From Torrent to Trickle: Sovereign Wealth Funds: The Flows are Neither as Big nor as Scary as They Once Seemed*, *ECONOMIST*, Jan. 26, 2009 [hereinafter *Torrent to Trickle*].

⁸² *Id.*

⁸³ Swartz, *supra* note 51, at C3. *But see* WEISS, *supra* note 4, at 9 (stating that beforehand ADIA had enjoyed a 20% rate of return for many years).

been seen throughout the world, in one form or another.⁸⁴ For example, Russian and Chinese SWFs have concentrated their extra reserves to shore up domestic stability rather than stimulate their foreign investment arms.⁸⁵

It is hard to pinpoint the total number of assets because transparency and disclosure regulations vary widely among nations.⁸⁶ For instance, estimates about the largest SWF, ADIA, vary as much as \$500 to \$900 billion!⁸⁷ Currently, there are no agreed upon disclosure requirements across nations.⁸⁸ Gary Kleiman, a senior partner at Kleiman International Consultants, commented “[i]n terms of disclosure on fund performance, investment strategy, or even basic philosophy, many [SWFs] rank below the most secretive hedge fund.”⁸⁹

The Monitor Group, a global advising and research firm, recently released a report studying the behavior and transactions of SWFs entitled *Assessing the Risks: The Behaviors of Sovereign Wealth Funds in the Global Economy*.⁹⁰ The report was based on roughly 1,200 transactions from twenty-five funds spanning from 1975 to 2008.⁹¹

The report drew three key conclusions. First, the data suggests that SWFs are primarily driven by financial, not political, motives.⁹² Second, SWFs do, in fact, take controlling stakes in companies.⁹³ Half of the public transactions involving SWFs resulted in majority positions; however, for the most part these transactions have involved domestic sectors.⁹⁴ Third, SWFs have progressively been taking on greater risks, investing in less conservative asset classes.⁹⁵

⁸⁴ See *Torrent to Trickle*, *supra* note 81.

⁸⁵ See *id.*

⁸⁶ WEISS, *supra* note 4, at 9.

⁸⁷ *Id.*

⁸⁸ *Id.* at 13. Cf. Int'l Monetary Fund, *IMF Intensifies Work on Sovereign Wealth Funds*, IMF SURVEY MAGAZINE ONLINE, Mar. 4, 2008, <http://www.imf.org/external/pubs/ft/survey/so/2008/POL03408A.htm> (discussing the International Monetary Fund's efforts to establish industry standards).

⁸⁹ WEISS, *supra* note 4, at 13.

⁹⁰ See Press Release, Monitor Group, Monitor Group Releases Seminal Report on Sovereign Wealth Funds (June 9, 2008) [hereinafter Monitor Press Release] (commenting on the study, Mark Fuller, Monitor Group's Chairman, stated that “[w]e have seen a glut of opinion about the danger sovereign wealth funds present to the Western world in terms of political and economic influence. However, these fears are based on very little evidence.”).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Monitor Press Release, *supra* note 90.

The report also makes three predictions. First, SWFs will become an important fixture in global financial markets.⁹⁶ Second, the trend of investing in higher risk asset classes will continue.⁹⁷ Third, the push for greater regulatory oversight will increase, particularly concerning transparency issues.⁹⁸

The Monitor Group's first prediction, SWFs will grow in numbers and importance, has been echoed by others.⁹⁹ Currently, SWFs hold over \$3 trillion in assets,¹⁰⁰ accounting for roughly 1.3% of the world's total \$167 trillion in assets.¹⁰¹ According to Stephen Jen, a Morgan Stanley Managing Director and Chief Currency Economist, this figure is expected to balloon to \$12 trillion by the year 2015.¹⁰² This prediction is backed by data on current SWF growth. In 2007, the growth rate for individual funds varied from zero to 100% in a small sample of funds.¹⁰³ An accepted industry average for growth throughout the year was just under 20%.¹⁰⁴

This growth is based on several reasons. First, the rise in commodity prices has been influential.¹⁰⁵ Particularly, rising oil prices help fuel the surging Middle Eastern SWFs.¹⁰⁶ Second, a general increase in "large trade surpluses, net foreign direct investment flows, and high savings rates among Asian economies" helped Asian SWFs rise in strength.¹⁰⁷ Reserve accumulation has been particularly important in the accession of China's SWF, in which there has been a concerted effort to limit the Yuan's appreciation to the dollar.¹⁰⁸ The increase is staggering. Ten years ago "Asian central banks accounted for one-third of global currency reserves, now they account for two-thirds."¹⁰⁹

⁹⁶ *Id.*

⁹⁷ *Id.* This finding, however, may be nullified to some extent in the immediate short term due to the financial situation afflicting the globe. *Id.*

⁹⁸ *Id.*

⁹⁹ Stephen Jen, *Currencies: How Much Assets Could SWFs Farm Out?*, MORGAN STANLEY GLOBAL ECON. FORUM (Jan. 11, 2008), <http://www.morganstanley.com/views/gef/archive/2008/20080111-Fri.html>.

¹⁰⁰ Balding, *supra* note 11, at 3.

¹⁰¹ Lyons, *supra* note 22, at 189.

¹⁰² Daniel Gross, *SWF ISO Bailout*, SLATE, May 22, 2009, <http://www.slate.com/id/2218845>.

¹⁰³ Lyons, *supra* note 22, at 187.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 187.

¹⁰⁶ WEISS, *supra* note 4, at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Lyons, *supra* note 22, at 186.

A third growth factor, the investment performance of SWFs, helps promote a self-reinforcing schedule.¹¹⁰ As funds invested more money, they received larger returns, which in turn let them invest more in the market.¹¹¹ And fourth, the discretionary factors have changed over time.¹¹² How SWFs are funded and what they are allowed to trade in has changed for the betterment of the SWFs.¹¹³

Rozanov highlighted three reasons why the growth in SWFs would gain significant attention.¹¹⁴ First, as SWFs grow in numbers and size their market influence will continue to escalate.¹¹⁵ Second, because SWFs are in such a unique position they are particularly valuable to achieve macroeconomic policies (or in other words, nationalistic objectives).¹¹⁶ And third, other managers (such as central bank managers) might begin to mirror SWF managers.¹¹⁷

D. Policy Arguments

The focus of this article is not whether SWFs are good or bad, nonetheless, the article must acknowledge the policy debate. Many support SWFs as bastions of new funds.¹¹⁸ In general, the Bush Administration was supportive of SWF investments, with former Treasury Secretary Henry Paulson, Jr. commenting that “[m]oney is naturally going to gravitate toward dollar-based assets because of the strength of our economy . . . I’d like nothing more than to get more of that [SWF] money.”¹¹⁹

In addition, SWFs help the marketplace in general. SWFs face less pressure to reduce their size because they generally have no commercial liabilities and many take long positions during times of stress.¹²⁰ And in

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Rozanov, *supra* note 7, at 53-54.

¹¹⁵ *Id.* at 53.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 53-54 (mirroring in terms of structure and investment strategies).

¹¹⁸ See Sir John Gieve, Deputy Governor of the Bank of England, Address to the Sovereign Wealth Management Conference: Sovereign Wealth Funds and Global Imbalances 3 (Mar. 14, 2008) (transcript available at the Bank for International Settlements, <http://www.bis.org/review/r080319d.pdf>).

¹¹⁹ Steven R. Weisman, *Concern About 'Sovereign Wealth Funds' Spreads to Washington*, N.Y. TIMES, Aug. 20, 2007, available at <http://www.nytimes.com/2007/08/20/business/worldbusiness/20iht-wealth.4.7186699.html>.

¹²⁰ Gieve, *supra* note 118, at 3.

good or bad times, SWFs provide liquidity.¹²¹ Second, SWFs help their own countries as well. When SWFs produce gains they invest money into their own infrastructure, helping to raise citizens' quality of life.¹²² In addition, SWFs can provide protection against income fluctuations, providing reserves for bad times.¹²³ Third, when the fund is transparent (such as the Norwegian fund), SWFs help contribute to the accountability in the management of government funds.¹²⁴ And fourth, one subtle advantage is that SWFs may align their interests with their investments.¹²⁵ For example, if a Chinese SWF invests in an African bank, the Chinese would then have an interest in that African bank's health (and by extension the entire African economy).¹²⁶

These sentiments have largely been echoed in the market.¹²⁷ The Chinese Investment Corporation's investment in Morgan Stanley produced a 5.84% increase the first day of trading after the announcement, contrasted to the Standard & Poor's 1.67%.¹²⁸ And Dubai World's foray into MGM yielded an incredible 8.92% increase, well above the 1.54% of the New York Stock Exchange ("NYSE").¹²⁹

Despite these advantages, SWFs do pose risks. National security is the most cited concern. Officials feel threatened that countries could use SWFs to obtain technological or informational advantages, disrupt markets, distort energy supplies and subvert infrastructure.¹³⁰ The Monitor Group's report found that less than one percent of investments were in the fields of defense, aerospace, transportation and technology, but that does not preclude future activity.¹³¹

¹²¹ See *id.*

¹²² See De Meester, *supra* note 19, at 5-6.

¹²³ *Id.* at 6.

¹²⁴ *Id.*

¹²⁵ *Id.* at 7.

¹²⁶ Cf. Terence Poon & Aaron Back, *China Fund to Expand Africa Ties*, WALL ST. J., July 24, 2009, at A10 (documenting the creation and expansion of the China-Africa Development Fund as part of the ongoing relationship).

¹²⁷ Rose, *supra* note 26, at 123-24 (concluding that following four of the six largest SWF investments the market responded more positively than the overall market change).

¹²⁸ *Id.* at 124.

¹²⁹ *Id.* But see Veljko Fotak et al., *The Financial Impact of Sovereign Wealth Fund Investments in Listed Companies 2-3, 7* (Working Paper, Sept. 18, 2008), available at <http://ssrn.com/abstract=1108585> (detailing a new study suggesting the share prices of companies that SWFs have invested in have declined over time).

¹³⁰ See De Meester, *supra* note 19, at 7.

¹³¹ *Id.* at 7-8.

Second, many economists felt SWF investments in failing Western financial institutions were inappropriate.¹³² Recessions help remove ineffective management and poorly performing companies from the marketplace.¹³³ Thus, SWFs disrupted a natural part of the business cycle by propping up failing institutions.¹³⁴ Tangentially, the inclusion of SWFs as shareholders now opens the door for dilemmas down the line when heads of companies or states have to make policy choices that may affect SWF shareholders.¹³⁵

Third, some feel SWFs will receive unequal, or preferential, treatment over other shareholders.¹³⁶ This is because SWFs may have access to superior information and positions, since they benefit from data the government collects.¹³⁷ Fourth, an extension of earlier concerns, is that “some governments question whether their regulatory framework is sufficient to avoid market manipulation and insider trading by SWFs. Even though these rules are without doubt also applicable to SWFs, it is feared that the SWF could hide behind the law of State immunities.”¹³⁸

Fifth, the United States gives preferential tax treatment to income a foreign government receives from its investments in the United States.¹³⁹ Sixth, many economists fear SWF investments themselves.¹⁴⁰ SWFs may have huge positions creating a risk of instability if a SWF were to suddenly sell their shares.¹⁴¹ Other investors may feel the SWF had undisclosed information and thus would pull out as well.¹⁴² For example, nearly 50%

¹³² See *id.* at 8.

¹³³ See *id.* (depicting a process sometimes known as creative destruction. It stands for the premise that weaker companies will fail, and only the strongest companies will survive).

¹³⁴ See *id.*

¹³⁵ See, e.g., Rose, *supra* note 26, at 94 (“What about the day when a country joins some ‘coalition of the willing’ and asks the U.S. president to support a tax break for a company in which it has invested? Or when a decision has to be made about whether to bail out a company, much of whose debt is held by an ally’s central bank?” (quoting Lawrence Summers, Economist)).

¹³⁶ See De Meester, *supra* note 19, at 9.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See I.R.C. § 892(a)(1) (2009). See Victor Fleischer, *Should We Tax Sovereign Wealth Funds?*, 118 YALE L.J. POCKET PART 93 (2008), available at <http://thepocketpart.org/2008/11/17/fleischer.html> (noting this tax treatment discourages private foreign investment and neglects a useful way the United States can exert influence over SWFs).

¹⁴⁰ See De Meester, *supra* note 19, at 9 (sterning from the element of financial instability large SWF investments may provoke).

¹⁴¹ See *id.*

¹⁴² *Id.*

of SWFs investments are in the financial industry.¹⁴³ If SWFs were to suddenly pull out of this sector, then the entire financial industry could be seriously impaled.¹⁴⁴

And lastly, what happens when SWFs lose money? SWFs have increasingly invested in risky assets.¹⁴⁵ Furthermore, the global performance for SWFs is in decline, as evidenced earlier.¹⁴⁶ The government may need to pull money from other areas to support its SWFs, or, they may have to quickly sell their position, which exacerbates the situation.¹⁴⁷ In sum, there are numerous arguments in favor of and against SWF investments. The main argument for SWF investments is the inclusion of a new stream of capital insulated from many market pressures. The main argument against SWF investments is the concern for national security and market protection.

E. *Transparency and Accountability*

The issues with transparency are severe. First, how governments should assess SWF risks suffers due to a lack of transparency.¹⁴⁸ Second, and as a consequence, how governments should regulate SWFs suffers as well.¹⁴⁹

The problems with low accountability are even more startling. First, there is the obvious risk that the SWF (and by extension the government) will mismanage these investments for personal political or economic gain.¹⁵⁰ Second, tit-for-tat protectionism responses may arise due to a lack of cooperation and understanding.¹⁵¹ Third, poor management could lead to uncertainty, market turmoil and eventual decline.¹⁵² And fourth, the monitoring of any conflicts of interest is greatly hindered without these clear guidelines.¹⁵³

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ De Meester, *supra* note 19, at 9.

¹⁴⁶ See, e.g., *Torrent to Trickle*, *supra* note 81, at 78–80.

¹⁴⁷ See De Meester, *supra* note 19, at 9.

¹⁴⁸ See WEISS, *supra* note 4, at 14.

¹⁴⁹ See *generally id.* (speaking to the fact that governments cannot properly isolate overall, let alone specific, concerns to address without transparency).

¹⁵⁰ Peterson Study, *supra* note 39, at 4.

¹⁵¹ See *id.* (predicting foreign SWF abuse will cause a country to anticipatorily enact protectionist measures. Once one country has done so, the likelihood that other countries will rush to do so as well increases to protect their own).

¹⁵² See *id.*

¹⁵³ See *id.* at 9.

The Peterson Institute conducted an empirical study to fully determine SWFs' transparency and accountability.¹⁵⁴ The Peterson Study asked twenty-five questions to various SWFs, giving points for a yes answer (or partial points in some cases) and zero points for a no response.¹⁵⁵ The questions were broken into four groups – Structure, Governance, Transparency and Accountability, and Behavior.¹⁵⁶ Examples of the Structure questions include: Are the SWF's objectives clearly identified?; Are the fund's sources clearly indicated?; Are the fund's uses clearly disclosed?; And are procedural considerations clearly established?¹⁵⁷

Governance questions include: Is there a set of ethical guidelines?; Are there publicly available guidelines for the corporate actions?; And is the manager's role clearly defined?¹⁵⁸ Transparency and Accountability questions ask details about the type and frequency of reports to investors, the audit structure and information on returns.¹⁵⁹ The Behavior category consisted of just a single question – “Does the SWF indicate the nature and speed of adjustment in its portfolio?”¹⁶⁰

The purpose behind the study was to collect data to move towards the development of best practices.¹⁶¹ The Peterson Institute had to use its own judgment in some cases because the information collected was based on public information.¹⁶² It is important to keep in mind SWFs are spread out over a great deal of countries. Some considerations may be relevant to one SWF, but not to another.¹⁶³ For instance, a SWF may have answered “no” to having an audit process, but because of their unique position, that fund does not need one.

The Peterson Study is a useful tool in several aspects. First, the Peterson Study shows that most SWFs are not scoring high on transparency and accountability issues.¹⁶⁴ Second, the study highlights a

¹⁵⁴ See generally *id.* (collecting data from thirty-two separate funds via surveys).

¹⁵⁵ Peterson Study, *supra* note 39, app. at 16.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.* app. at 17-18.

¹⁵⁸ *Id.* app. at 18-19.

¹⁵⁹ *Id.* at 19-20.

¹⁶⁰ Peterson Study, *supra* note 39, app. at 21 (revealing all of the data, the study published the individual answers to all twenty-five questions in Table 4 of the Study). See Exhibit Two – Peterson Study Scoresheet, with the fourth entry being the United States California Public Employees' Retirement System (CalPERS) as a benchmark.

¹⁶¹ Peterson Study, *supra* note 39, app. at 17.

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ See generally *id.*

discrepancy between American and foreign regulations.¹⁶⁵ And third, the Peterson Study helps predict areas of resistance for future reform.¹⁶⁶

III. PRIVATE RESPONSE

A. *Foreign Sovereign Immunity and Immunities Act Background*

Sovereign immunity has enjoyed a long history. The notion has roots dating back to “Roman and Canon law, tribal customs, and feudal traditions.”¹⁶⁷ The idea of extending the doctrine of foreign sovereign immunity has equally been long-standing. The United States has always followed the doctrine.¹⁶⁸ The rationale behind this is two-fold. First, the predominant view is that sovereign immunity (including foreign sovereign immunity) is a fundamental state right.¹⁶⁹ Second, foreign sovereign immunity works as a practical consideration to foster international cooperation and interactions between states.¹⁷⁰

The Supreme Court first recognized this doctrine of international law in *The Schooner Exchange v. McFaddon*.¹⁷¹ Chief Justice Marshall upheld a French naval ship’s immunity plea, which was supported by the Executive Branch in a letter, based on the wide acceptance of foreign sovereign immunity.¹⁷² The Court would come to rely more and more on these letters from the State Department.¹⁷³ This practice culminated in the *Ex Parte Peru* and the *Mexico v. Hoffman* decisions.¹⁷⁴ In response to these cases, the State Department adopted the restrictive view of sovereign

¹⁶⁵ See *id.*

¹⁶⁶ See generally Peterson Study, *supra* note 39.

¹⁶⁷ Matthew A. Melone, *Should the United States Tax Sovereign Wealth Funds?*, 26 B.U. INT’L L.J. 143, 176 (2008).

¹⁶⁸ *Cf. Moitez v. The South Carolina*, 17 F.Cas. 574 (Adm. Ct. Pa. 1781) (No. 9,697) (holding that the seamen on board a vessel belonging to a foreign sovereign could not sue for wages).

¹⁶⁹ See Melone, *supra* note 167, at 180.

¹⁷⁰ *Id.* at 181.

¹⁷¹ 11 U.S. 116 (1812).

¹⁷² *McFaddon*, 11 U.S. at 147; H.R. REP. NO. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

¹⁷³ H.R. REP. NO. 94-1487, at 8.

¹⁷⁴ *Id.* (referring to *Ex Parte Peru*, 318 U.S. 578 (1943) (holding that a Peruvian commercial ship was immune, even though it was operating in a purely commercial setting)); see also *Mexico v. Hoffman*, 324 U.S. 30 (1945) (denying immunity to a Mexican commercial ship based on extremely similar facts). The clearest distinction between the two cases is the State Department’s endorsement of immunity in the first suit, but denial of its support in the second. See generally *Ex Parte Peru*, 318 U.S. 578 (holding that a Peruvian commercial ship was immune, even though it was operating in a purely commercial setting).

immunity, modeled after the Tate Letter of 1952.¹⁷⁵ The restrictive view's main rationale is to grant foreign immunity in cases of public acts, but not those centered on commercial or private acts.¹⁷⁶ However, the State Department did not follow the Tate Letter or the restrictive view in all instances, which led to a great deal of confusion.¹⁷⁷

Congress passed the Immunities Act in 1976 in response to this confusion.¹⁷⁸ Congress had several purposes behind enacting the statute. First, the Immunities Act would codify the restrictive principle; second the statute would provide procedural guidance; and third this would offer relief for a plaintiff who has obtained a judgment against a foreign sovereign defendant.¹⁷⁹ This third purpose, private relief, is important in shaping the eventual solution to the problem of SWF liability. The globalization of financial markets means increasing interactions between foreign sovereigns and private parties, thus making the Immunities Act increasingly valuable as well.¹⁸⁰

B. Immunities Act Application

The first step in this process is for the defendant to assert that the foreign state qualifies for protection under the statute.¹⁸¹ The Immunities Act defines a foreign state as "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."¹⁸² An agency or instrumentality is further defined as a "separate legal person, corporate or otherwise" and "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."¹⁸³ The House Report that accompanies the Immunities Act indicates Congressional intent to interpret these definitions broadly.¹⁸⁴

¹⁷⁵ H.R. REP. NO. 94-1487, at 8; *see also* Letter from Jack B. Tate, Acting Legal Adviser of Dep't of State, to Philip Perlman, Acting U.S. Atty Gen. (May 19, 1952), *reprinted in* 26 DEPT. STATE BULL. 984 (1952).

¹⁷⁶ H.R. REP. NO. 94-1487, at 8 (discussing the absolute immunity doctrine which grants immunity for commercial or private acts).

¹⁷⁷ CHARLES BALDWIN, IV et al., INTERNATIONAL CIVIL DISPUTE RESOLUTION 565 (2d ed. 2008).

¹⁷⁸ 28 U.S.C. § 1330 (1976); *see also* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 1976 (codified in scattered sections of 28 U.S.C.).

¹⁷⁹ H.R. REP. NO. 94-1487, at 7-8.

¹⁸⁰ *See* Melone, *supra* note 167, at 158.

¹⁸¹ 28 U.S.C. § 1604 (1976).

¹⁸² *Id.* § 1603(a).

¹⁸³ *Id.* § 1603(b)(1)-(2).

¹⁸⁴ H.R. REP. NO. 94-1487, at 15-16 ("[E]ntities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading

In interpreting the third category, courts have recognized that companies that are owned by a foreign state will qualify.¹⁸⁵ Furthermore, the definition under section 1603(b)(2) allows for companies to qualify where only the majority of shares are owned by the foreign state.¹⁸⁶ That shares of the SWF may be traded in a market or that the SWF acts in ordinary commercial dealings will not force them out of the category.¹⁸⁷

In sum, there are three separate categories an entity can fall into – foreign state proper, a political subdivision, or an agency or instrumentality. Courts have employed several factors to distinguish the categories, including “ownership and management of the entity; . . . whether such entity is actively supervised by the state; whether the foreign state requires the entity to employ public employees; whether the entity holds some exclusive national right or rights; and the entities treatment under the foreign state’s laws.”¹⁸⁸

Which of the three categories a SWF falls into is important for several reasons. First, this categorization can impact the procedural postures of the case, including notice, venue and discovery.¹⁸⁹ Second, the categorization can impact the settlement, particularly with the issues of punitive damages and execution.¹⁹⁰

SWFs’ operations vary dramatically from nation to nation, but SWFs will mostly fall under the last category – agency or instrumentality. SWFs are owned and operated by the government or a government-linked entity.¹⁹¹ They must actively report their holdings to the government and

corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.”).

¹⁸⁵ See, e.g., *Lopez del Valle v. Gobierno de la Capital*, 855 F. Supp. 34, 35 (D.P.R. 1994) (granting foreign sovereign status to a Venezuelan supplier whose shares were 100% owned by a Venezuelan nationalized company).

¹⁸⁶ See 28 U.S.C. § 1603(b)(2); see also *Carey v. Nat’l Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) (holding the National Oil Company qualified as a foreign state under the Immunities Act since a majority of its shares were held by Libya).

¹⁸⁷ *Erickson v. Alitalia*, No. 90-3895, 1991 WL 117797, at *2-3 (D.N.J. June 5, 1991).

¹⁸⁸ Melone, *supra* note 167, at 185 (relying on Michael A. Granne, *Defining “Organ of a Foreign State” Under The Foreign Sovereign Immunities Act of 1976* (2008), available at http://works.bepress.com/michael_granne/1/).

¹⁸⁹ Compare 28 U.S.C. § 1610(a), with 28 U.S.C. § 1610(b) (highlighting some of the differences between foreign states proper and agencies or instrumentalities. In these sections, immunity for foreign states proper will also consider international law, rights in property, or use of the property).

¹⁹⁰ See, e.g., *id.* § 1606.

¹⁹¹ Balding, *supra* note 11, at 12.

are subject to review.¹⁹² Furthermore, the funds are supported by state resources (such as tax revenue).¹⁹³ Lastly, they are treated as entities of the state by foreign governments, economists and other interested parties.¹⁹⁴

Now that the defendant is recognized as a foreign sovereign, the plaintiff must place the case in an exception in order to proceed. The first exception is when the SWF has contractually waived its immunity.¹⁹⁵ This will most likely come into play when the SWF is engaged in business with another major player, such as a hedge fund or pension plan.

Absent a contract the most obvious exception is section 1605(a)(2), which reads:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .¹⁹⁶

Based on this definition three separate interpretive problems arise.¹⁹⁷ First, what constitutes commercial activity?¹⁹⁸ Second, when is an action *based* on commercial activity or *in connection* with it?¹⁹⁹ Third, what exactly is the nexus needed between the activity and the United States?²⁰⁰

The *Republic of Argentina v. Weltover, Inc.* is the seminal case in determining what is commercial activity.²⁰¹ To stabilize its economy, Argentina issued bonds to be paid in American dollars to several markets,

¹⁹² See Peterson Study, *supra* note 39, at 9, 14.

¹⁹³ See De Meester, *supra* note 19, at 3.

¹⁹⁴ See *id.* at 4.

¹⁹⁵ 28 U.S.C. § 1605(a)(1) (1976).

¹⁹⁶ *Id.* § 1605(a)(2) (explaining the rationale behind the exception is that by acting in a commercial setting a foreign sovereign is no longer acting in an official sovereign capacity and should therefore not enjoy immunity).

¹⁹⁷ GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 260 (4th ed. 2007).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992).

including New York.²⁰² Argentina felt they did not have the necessary funds to retire the bonds when they matured so it unilaterally decided to extend the payment dates.²⁰³ Several bondholders sued; Argentina asserted sovereign immunity under the Immunities Act as a defense.²⁰⁴ The main issue before the Supreme Court was if these actions fell under the commercial activity exception.²⁰⁵

The Court noted that “[w]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within that market, its actions are ‘commercial’ within the meaning of the [Immunities Act].”²⁰⁶ Furthermore, since the Immunities Act specifically states the purpose is not the key factor, it matters not whether the government was aiming to make money or improve the markets, etc.²⁰⁷ Rather, since it is the nature of the activity, the key concern is if this is the *type* of activity a private player would engage in or not.²⁰⁸ Most SWF activity would pass this first prong since their investments are predominantly garden variety (i.e. buying shares, bonds, and options).

This leads into the second issue – when is the activity *based upon* or *in connection* with commercial activity? The Supreme Court in *Saudi Arabia v. Nelson* addressed this issue.²⁰⁹ Nelson, an American, worked at a Saudi Arabia hospital before he charged them with illegal detention and torture.²¹⁰ Saudi Arabia relied on the Immunities Act as a defense and Nelson argued that section 1605(a)(2)’s commercial activity applied.²¹¹ The Court stated that “the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.”²¹² Most cases involving an American plaintiff should qualify since most likely an American corporation, market or financial activity was affected.

Even if the action survives the first two prongs, it may not qualify if it does not pass the third element – nexus to the United States. The Immunities Act section 1605(a)(2) lists three scenarios, or relationships,

²⁰² *Id.* at 609.

²⁰³ *Id.* at 610.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 610-11.

²⁰⁶ *Weltover*, 504 U.S. at 607.

²⁰⁷ *Id.* at 614.

²⁰⁸ *Id.*

²⁰⁹ *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

²¹⁰ *Id.* at 352-54.

²¹¹ *Id.* at 355-56.

²¹² *Id.* at 357.

that would satisfy the nexus requirement.²¹³ First, the actions could be carried out in the United States itself; second, an act could be performed in the United States in connection with commercial activity that occurred elsewhere; or third, an act could be performed outside the United States in connection with a commercial activity that also occurred outside the United States, but with direct effects inside the nation.²¹⁴

The specific facts will be important in determining if the nexus requirement has been met. Examples of the first category include violations that involve American exchanges, false representations made in the United States, or shares of American corporations.²¹⁵ Most notably the second category involves securities violations that occurred outside the United States, but involve American corporations, exchanges or buyers.²¹⁶ The third category has more remote claims, but includes securities violations that directly affect American shareholders or markets.²¹⁷

In general, a SWF will qualify as a foreign sovereign as defined by the Immunities Act. If a plaintiff wishes to proceed, he or she will need to fit the situation into an exception to immunity. First, contractual waivers will be the best case scenario.²¹⁸ Second, absent a contract, a plaintiff will most likely rely on the commercial activity exception.²¹⁹ In either case, the plaintiff will most likely be able to bring a suit against the SWF.

C. Private Recovery

Currently, the United States is not part of any official international treaty that requires reciprocal treatment of judgments.²²⁰ Therefore, enforcement of a United States verdict in a foreign country would rely on the internal laws of that foreign country and the international ideas of

²¹³ 28 U.S.C. § 1605(a)(2) (1976).

²¹⁴ *Id.* See also *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (navigating through the nexus requirement).

²¹⁵ H.R. REP. NO. 94-1487, at 16 (including "its investment in a security of an American corporation").

²¹⁶ *Id.* at 19 (including "an act in the United States that violates U.S. securities laws or regulations").

²¹⁷ *Id.*

²¹⁸ 28 U.S.C. § 1605(a)(1) (1976).

²¹⁹ See *supra* notes 198-208 and accompanying text.

²²⁰ U.S. DEPT OF STATE, ENFORCEMENT OF JUDGMENTS, http://travel.state.gov/law/info/judicial/judicial_691.html (last visited Mar. 25, 2010) (explaining that two plausible reasons for this are: 1) foreign states feel that United States awards are overly generous in relation to liability and 2) foreign states have "objected to the extraterritorial jurisdiction asserted by courts in the United States.").

comity, reciprocity and finality.²²¹ In general, however, a domestic judgment will be enforced if: 1) the original court had proper jurisdiction; 2) the new court has jurisdiction; 3) procedural matters in general were properly enforced (such as notice); 4) there was no fraud in the proceedings; and 5) enforcement of the judgment would not violate that country's public policies.²²² Some countries require that there be specific reciprocity agreements in place.²²³

Even if one wins the suit *and* wins the battle for enforcement, the complex issues of attachment and execution remain. Sections 1609 through 1611 of the Immunities Act outline when and how much property can be attached to the suit.²²⁴ This issue is magnified in intensity when a party will have to execute the judgment in a foreign country.²²⁵

The best case scenario would be when the foreign government of the SWF itself has consented to adjudicative measures or property to be attached.²²⁶ This is most likely the case when a SWF contracts with a hedge fund, corporation or other powerful player.²²⁷ Truman has indicated that he feels most arms-length contracts with SWFs are sufficient, presumably because they incorporate arbitration or other provisions.²²⁸

Absent this contract, a plaintiff would need property that is both located in the forum and connected to the current dispute.²²⁹ Finding sufficient property in the forum that is *connected* to the current dispute will be a problem, especially when the SWF's actions affect a whole class of investors. This means that an entire class of investors will be left with no recourse. Private investors are not given the opportunity to contract with a SWF and therefore must rely on existing laws. When these laws break

²²¹ *Id.*

²²² *See id.*

²²³ Margaret A. Dale, Enforcing U.S. Judgments Abroad, in Proskauer on International Litigation and Dispute Resolution: Managing, Resolving, and Avoiding Cross-Border Business or Regulatory Disputes (Jan. 2009), <http://www.proskauerguide.com/litigation/18/III>.

²²⁴ 28 U.S.C. §§ 1609-1611 (1976).

²²⁵ *See* JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 400-01 (Bureau of National Affairs 1988).

²²⁶ *See* De Meester, *supra* note 19, at 35.

²²⁷ *Sovereign Wealth Funds: New Challenges From a Changing Landscape Before the H. Subcomm. on Domestic and Int'l Monetary Policy, Trade and Tech.*, 110th Cong. 13 (2008) (testimony of Edwin M. Truman, Senior Fellow, Peterson Institute), available at www.house.gov/financialservices/hearing110/truman091008.pdf.

²²⁸ *Id.*

²²⁹ *See* 28 U.S.C. § 1610(a) (1976).

down, as is the case here, it decreases market confidence and leaves a class vulnerable.²³⁰

IV. PUBLIC RESPONSE

A. Available Acts

The United States has several vehicles to bring an action against a SWF. First, SWFs must comply with a plethora of securities regulations. The main ones are highlighted here. SWFs investing in the United States need to comply with the Securities Exchange Act of 1934's ("Exchange Act") Rule 16(a) requirement that issuer's officers or directors and 10% holders disclose their ownership interest to the SEC.²³¹ The Exchange Act's Rule 13(d) requires all owners of 5% or more of an issuer's equity securities to file a Form 13D.²³² In limited instances, investors controlling between 5% and 20%, who do not intend to gain control may file a Form 13G.²³³ Institutional investment managers who exercise over \$100 million must file a 13F as well.²³⁴

Second, there are many sector specific requirements that SWFs must comply with.²³⁵ At least seven of the biggest sectors in the United States economy have specific laws, including – Transportation, Communications, Banking, Natural Resources and Energy (nuclear), Natural Resources and Energy (mineral), Defense, and Agriculture.²³⁶ These regulations restrict control, limit the percentage a SWF can hold, and modify the disclosure requirements and other safety measures.²³⁷

The third public measure is the Exon-Florio Provision, passed in 1988.²³⁸ This provision gives the President the ability to block deals from

²³⁰ See generally Christopher Cox, Chairman, U.S. Sec. and Exch. Comm'n, Address at the American Enterprise Institute Legal Center for the Public Interest: The Rise of Sovereign Business (Dec. 5, 2007) (transcript available at <http://www.sec.gov/news/speech/2007/spch120507cc.htm>) [hereinafter Chairman Cox Speech] (noting private participants need confidence in anti-fraud and transparency measures to engage in the market, otherwise the capital market itself would collapse).

²³¹ Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 78p (2009).

²³² Securities Exchange Act of 1934 § 13(d); 17 C.F.R. § 240.13d-1(a) (2008). See also *id.* § 240.13d-101 for Form 13D.

²³³ 17 C.F.R. § 240.13d-1 (2008). See also *id.* § 240.13d-102 for Form 13G.

²³⁴ 15 U.S.C. § 78m (1978). See also 17 C.F.R. § 249.325 for Form 13F.

²³⁵ See GAO REPORT, *supra* note 10, at 15-16.

²³⁶ *Id.*

²³⁷ See *id.* See Exhibit Three – Sector Specific Laws for Foreign Investors for more details.

²³⁸ Omnibus Trade and Competitiveness Act, 50 U.S.C. app. § 2170 (2000) (amending Title VII of the Defense Production Act of 1950, 50 U.S.C. § 2061 (1950)).

foreigners that would raise national security concerns.²³⁹ President Reagan, in an Executive Order, left the Committee on Foreign Investment in the United States (“CFIUS”) to regulate these provisions.²⁴⁰ Since CFIUS took over, there has been a decline in the number of cases brought each year.²⁴¹ There is, however, some question as to whether the Exon-Florio National Security Test would apply to SWFs.²⁴² To be blocked by the President, he or she must determine that no other legal remedies are available, and more immediately, that the SWF takes over a controlling position.²⁴³

This provision was enhanced in October 2007 when the Foreign Investment and National Security Act took effect.²⁴⁴ This Act extends the ability to review foreign investments for security purposes to transactions involving critical infrastructure and energy.²⁴⁵ Some of the important changes include the definition of foreign person, covered transaction concept, penalties and other provisions.²⁴⁶ It is worth noting that at least twenty-five countries around the world have similar national protections to the United States (including commercial exceptions and executive intervention).²⁴⁷

Private investors have a single course of action. This is starkly different to the public, which has several options. The legislature (and agencies) have outlined a variety of regulations SWFs must follow. In addition, the Executive Branch has the power to suspend SWF activity in

²³⁹ See *id.* § 2170(b)(1)(D).

²⁴⁰ See Exec. Order No. 12661, 54 Fed. Reg. 779 (Dec. 27, 1988).

²⁴¹ See JAMES K. JACKSON, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS), CRS REP. RL 33388, at 17 n.42 (citing CFIUS, WASH. POST, July 3, 2005, at F3), available at www.fas.org/sgp/crs/natsec/RL33388.pdf [hereinafter JACKSON] (“CFIUS has received more than 1,500 notifications since 1988, of which it conducted a full investigation of 25 cases. Of these 25 cases, thirteen transactions were withdrawn upon notice that CFIUS would conduct a full review and twelve of the remaining transactions cases were sent to the President. Of these twelve transactions, one was prohibited.”).

²⁴² WEISS, *supra* note 4, at 17.

²⁴³ See *id.* See also JACKSON, *supra* note 241, at 4-5.

²⁴⁴ Foreign Investment and National Security Act, Pub. L. No. 110-49, 121 Stat. 46 (2007) (codified at 50 U.S.C. app. § 2170).

²⁴⁵ 50 U.S.C. app. § 2170(f)(6) (2007).

²⁴⁶ See *id.* § 2170; see also Sullivan & Cromwell LLP, CFIUS Review on Foreign Investment: U.S. Treasury Department Proposes New Regulations to Govern National Security Review of Foreign Investment in the United States. (May 8, 2008), <http://www.sullcrom.com/publications/detail.aspx?pub=444> (analyzing how the new act will affect the process).

²⁴⁷ See Gordon & Tash, *supra* note 50, at 17 (stating that the additional countries are: Austria, Belgium, Canada, Denmark, Egypt, France, Germany, Greece, Italy, Islamic Republic of Iran, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Portugal, Romania, Senegal, Singapore, South Africa, Spain, Sweden, Switzerland and the UK).

the name of public safety. This multi-directional approach directly feeds into the fact that the public has a higher chance of recovery.

B. *Public Recovery*

The public's chances of recovery are far superior to an individual's. First, SWF compliance with domestic regulation is a widely accepted principle.²⁴⁸ To ensure compliance, the SEC works very closely with its overseas counterparts.²⁴⁹ This means the government (a would be plaintiff) and the SWF (defendant) already have a working relationship. This relationship will strengthen the chances of cooperation in the event of a violation.

Second, the United States has signed five bilateral investment treaties ("BITs") with nations that have SWFs.²⁵⁰ Almost all BIT agreements include an arbitration clause, most of which refer to the International Centre for Settlement of Investment Disputes ("ICSID").²⁵¹ Third, and related, the United States has entered into free trade agreements with six SWF countries and another two are pending.²⁵² Free trade agreements also often include arbitration requirements as well. These eleven agreements are tantamount to the contractual scenario in the private response. This means that the United States has preemptively addressed the issue of liability and recovery in eleven cases (and another two pending).

Fourth, there is a bigger incentive to comply with the United States for numerous reasons. The United States could be seeking to recover in a bigger lawsuit. The United States and the SWF country will most likely have to negotiate future deals, and therefore the need for a strong relationship is key.

For a variety of reasons the United States' chances of recovering at least something are strong. So far, there have been no instances of the U.S. suing or going to arbitration with a SWF. However, the process is

²⁴⁸ See, e.g., SANTIAGO PRINCIPLES, *supra* note 34, at 15.

²⁴⁹ See Chairman Cox Speech, *supra* note 230.

²⁵⁰ See GAO REPORT, *supra* note 10, at 9-10 (demonstrating that the five BITs are with Azerbaijan, Bahrain, Russia, and Trinidad and Tobago. In addition, "Vietnam has entered into a bilateral trade agreement with the United States that contains an investment chapter similar to a BIT.").

²⁵¹ See Audit, *supra* note 8, at 9; see also Gordon & Tash, *supra* note 50, at 19-20 (noting that in *CSOB v. Slovak*, the ICSID determined that SWFs could qualify for their services, so long as they were not a foreign states proper).

²⁵² See GAO REPORT, *supra* note 10, at 9-10 (showing that the agreements are with Australia, Bahrain, Canada, Chile, Oman and Singapore. Agreements with Columbia and South Korea are pending).

applicable to other international bodies (such as pension funds). The process has worked reasonably well when considering this alternative group,²⁵³ and should function for SWFs as well.²⁵⁴

V. INTERNATIONAL RESPONSE

GATS is one of the most important regulations since it is legally binding.²⁵⁵ There are roughly 153 World Trade Organization (“WTO”) members who are committed to GATS.²⁵⁶ Almost every SWF nation is a member or observer to the WTO.²⁵⁷ Therefore, GATS touches nearly every SWF member.

There are some initial threshold requirements to trigger the GATS application. First, SWFs must transact with shares of a business that performs services (including financial, transportation, or professional).²⁵⁸ Studies have found that nearly half of SWF transactions are in the financial industry, while many others are in other approved service industries.²⁵⁹

Second, the SWF must obtain control over the corporation.²⁶⁰ The Monitor Group’s Study showed that in over 25% of the transactions SWFs do in fact take a majority position.²⁶¹ Third, GATS most likely only applies to those SWFs that are agencies or instrumentalities of the government, not the foreign state itself.²⁶² This article has already argued that most SWFs are in fact agencies or instrumentalities.²⁶³

Therefore, in a significant number of instances GATS will be applicable. When GATS is applicable an aggrieved country can bring a

²⁵³ See, e.g., *EDF Int. et. al. v. Arg.*, ICSID Case No. ARB/03/23 (2008) (Park, Kaufman-Kohler, & Remon, Arbs.).

²⁵⁴ See Peterson Study, *supra* note 39, at 5-6 (concluding that this process will adequately protect the public’s interests).

²⁵⁵ GATS, *supra* note 33, at 285 (denoting that members agree to this resolution). See also De Meester, *supra* note 19, at 22.

²⁵⁶ De Meester, *supra* note 19, at 22.

²⁵⁷ GAO REPORT, *supra* note 10, at 9-10 (demonstrating that, in fact, of all the nations with SWFs Kiribati is the only country who is not a member or observer to the WTO).

²⁵⁸ See GATS, *supra* note 33, at art. I; see also De Meester, *supra* note 19, at 22-23.

²⁵⁹ De Meester, *supra* note 19, at 9, 23 (including energy, telecommunications and healthcare).

²⁶⁰ GATS, *supra* note 33, at art. XXVIII(m)(ii); see also De Meester, *supra* note 19, at 22-23 n.113 (dissecting GATS’ language to mean “a ‘commercial presence’ by a ‘juridical person of another Member’ is a juridical person that is ‘owned or controlled by’ (natural or legal) persons of that Member”).

²⁶¹ Monitor Press Release, *supra* note 90.

²⁶² See De Meester, *supra* note 19, at 23.

²⁶³ See *supra* notes 182-94 and accompanying text.

case against a SWF to the WTO Dispute Settlement Panel.²⁶⁴ This provides another important avenue for nationalities to recover against SWFs. To date, SWFs have not been involved in any WTO Dispute Settlement Panel cases.²⁶⁵

A second international response is the IMF's Santiago Principles, passed in 2008.²⁶⁶ The Santiago Principles includes twenty-four best practices for SWFs, known as Generally Accepted Principles and Practices ("GAPP").²⁶⁷ These best practices can be broken into three categories of recommendations.²⁶⁸ The first category revolves around the legal framework; the second are institutional and governance structures; and the third are investment and risk measures.²⁶⁹

Three common criticisms have emerged regarding the Santiago Principles. First, the Santiago Principles are voluntary and therefore may not receive support.²⁷⁰ Second, some economists feel there has been an overemphasis on disclosure and transparency, which ignores other valuable signs of risk.²⁷¹ And third, these principles are broad guidelines with few directives on implementation.

To cure these problems an International Working Group of Sovereign Wealth Funds ("IWG") was created.²⁷² The IWG recently created the International Forum of Sovereign Wealth Funds ("Forum") to further this

²⁶⁴ De Meester, *supra* note 19, at 28.

²⁶⁵ World Trade Organization, Dispute Settlement: The Disputes, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (last visited Apr. 5, 2010) (for a searchable database of disputed cases).

²⁶⁶ SANTIAGO PRINCIPLES, *supra* note 34.

²⁶⁷ *Id.* at 7-9.

²⁶⁸ *Id.*; De Meester, *supra* note 19, at 19 (breaking the principles into three categories).

²⁶⁹ See generally SANTIAGO PRINCIPLES, *supra* note 34; De Meester, *supra* note 19, at 19.

²⁷⁰ See Richard A. Epstein & Amanda M. Rose, *The Regulations of Sovereign Wealth Funds: The Virtues of Going Slow*, 76 U. CHI. L. REV. 111, 120-21 (2009). See also WEISS, *supra* note 4, at 20 (noting that most influential SWFs are not borrowers from the IMF, and therefore not subject to IMF's conditions).

²⁷¹ *Sovereign Wealth Funds: Foreign Policy Consequences in an Era of New Money Before the Comm. on Foreign Relations*, 110th Cong. 2 (2008) (testimony of Douglas Rediker, Co-Director Global Strategic Finance Initiative, The New America Foundation), available at http://www.newamerica.net/publications/policy/sovereign_wealth_funds_foreign_policy_consequences_era_new_money.

²⁷² Press Release, Int'l Working Group of Sovereign Wealth Funds, International Working Group of Sovereign Wealth Funds Presents the "Santiago Principles" to the International Monetary and Financial Committee (Oct. 11, 2008), <http://www.iwg-swf.org/pr/swfpr0806.htm> (comprising the IWG's membership are Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Iran, Ireland, South Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, the United Arab Emirates, and the United States).

purpose.²⁷³ The Forum will promote cooperation, adherence and refinement to the Santiago Principles.²⁷⁴ Therefore, the IWG and the Forum will encourage adoption of the principles and provide details on its execution.

The Santiago Principles do not expressly speak on liability or recovery issues. However, GAPP 15 states that SWF “operations and activities in host countries should be conducted in compliance with all applicable regulatory and disclosure requirements of the countries in which they operate.”²⁷⁵ This suggests that the IMF supports SWF accountability and recovery for aggrieved investors. However, in its current state, the SWF Santiago Principles do not provide a meaningful arena for private or public recovery.

VI. CONCLUSION

There already exists a score of proposed solutions to the “SWF problem.” In large part, these proposals advance national responses. For instance, some feel the CFIUS process should be depoliticized and voting issues further clarified.²⁷⁶ The GAO believes each sector’s agencies should refine their execution tactics for governing applicable regulations.²⁷⁷ A third proposal is to endorse and refine the Santiago Principles.²⁷⁸ And lastly, some feel the United States should refine its BIT models to address the situation.²⁷⁹

These are all well reasoned solutions, but to the wrong problem. Again, this goes back to how the question is being phrased. For most, the debate is whether SWFs are friend or foe. This will inherently direct responses in one of two ways. First, regulations might become overly accepting of SWF investments, or in other words, a race to the bottom.

²⁷³ Int’l Working Group of Sovereign Wealth Funds, “Kuwait Declaration”: *Establishment of the International Forum of Sovereign Wealth Funds*, Apr. 6, 2009, <http://www.iwg-swf.org/mis/kuwaitdec.htm>.

²⁷⁴ *Id.*

²⁷⁵ SANTIAGO PRINCIPLES, *supra* note 34, at 8.

²⁷⁶ See Brendan Reed, *Sovereign Wealth Funds: The New Barbarians at the Gate? An Analysis of the Legal and Business Implications of their Ascendancy*, 4 VA. L. & BUS. REV. 97, 124 (2009).

²⁷⁷ See GAO REPORT, *supra* note 10, at 21.

²⁷⁸ See Amy Keller, *Sovereign Wealth Funds: Trustworthy Investors or Vehicles of Strategic Ambition? An Assessment of the Benefits, Risks and Possible Regulation of Sovereign Wealth Funds*, 7 GEO. J.L. & PUB. POLY 333, 357 (2009).

²⁷⁹ See David Hall, *The False Panacea of International Agreements for U.S. Regulations of Sovereign Wealth Funds*, 5 BYU INT’L L. & MGMT. REV. 137, 165-66 (2008).

This will encourage SWF investments at the expense of market security and investor protection.

The second response is to restrict SWF activity. Indeed, the vast majority of proposals are moving in this direction.²⁸⁰ This has caused Gerard Lyons, Chief Economist and Head of Global Research at Standard Chartered, to comment “[t]here is a need to take seriously the likelihood of Western governments and SWFs being on a future collision course over what they can buy, and where. A protectionist backlash against strategic investments is very real and threatens global trade.”²⁸¹

However, the results are drastically improved when the debate is framed as: are there sufficient market protections? This shifts the concern as to whether an appropriate market recourse exists, rather than focusing on political implications. The aforementioned proposals all seek to add new regulations or burdens for SWFs (or the minority who seek to withdraw existing regulations). The market protection approach does not seek to interfere with the market’s ability to contract with SWFs; rather, it simply examines the liabilities of a SWF when they violate those contracts. This enables the proper amount of regulation, avoiding both the race to the bottom and protectionist outcomes mentioned above.

When examining market protections, there are essentially three major players to investigate. Two of these three are sufficiently protected, the last is not. First, the public has a vast array of regulations and international principles to lean on.²⁸² Through these policies the public is sufficiently protected. Likewise, private citizens who can contract at an arms-length with SWFs can personally negotiate the issues of damages and remedies.²⁸³

Unfortunately, the remaining group, private investors who cannot contract at a arms-length, might be the largest group. Currently they are largely unprotected, and therefore, some change is needed. The best platform to do so is to amend the Immunities Act. First, for an investor to recover anything he or she would need to traverse through the Immunities Act.²⁸⁴ Second, the Immunities Act has a long history, thus providing an element of predictability to the solution.²⁸⁵ Third, the

²⁸⁰ See *supra* Part IV.A.

²⁸¹ Lyons, *supra* note 22, at 194.

²⁸² See *supra* Part IV.B.

²⁸³ See *supra* notes 228-230 and accompanying text.

²⁸⁴ See *supra* Part III.B.

²⁸⁵ See The Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2895 (codified as amended in scattered sections of 28 U.S.C.). The Act has been in place for over forty years.

Immunities Act already governs recovery issues.²⁸⁶ And fourth, a stated purpose of the Immunities Act is to provide relief to individual investors.²⁸⁷

Currently, the Immunities Act ties recovery to property used in connection with the issue.²⁸⁸ In the case of SWFs, which might not have a lot of qualifying property to satisfy the judgment, the Immunities Act should tie the amount of recovery to the amount of the investment in dispute. The practice of tying liability to the size of the investment, as opposed to collateral property (as is currently the case), is already in practice in other areas of securities liability.²⁸⁹

Using the investment as the liability anchor prevents a SWF from being open to limitless liability, since the SWF will only be responsible up to the amount it voluntarily chooses to invest; while at the same time giving investors meaningful property to attach. In addition, the United States could include performance and cooperation incentives for SWFs to limit their liability. For instance, voluntary disclosures or years of investment in the United States could be employed to limit punitive damages or other positive incentives. One thing is for certain, the United States should address this issue before it arises because, by then, it might be too late.

²⁸⁶ See 28 U.S.C. §§ 1609-1611 (1976).

²⁸⁷ See H.R. REP. NO. 94-1487, at 7.

²⁸⁸ See *id.* (specifying that perhaps a private party's best chance is when the property for which the claim is based upon is the same property attached to the judgment).

²⁸⁹ See *e.g.*, A.E. Korpela & L.I. Reiser, *Shareholders' Suits Against Investment Companies*, 30 A.L.R. 3d 1088 (1970).

EXHIBIT ONE
HIGH-PROFILE SWF INVESTMENTS IN 2007²⁹⁰

Target	Size (million USD)	Percent stake held by SWFs
UBS	9,750	9.0%
Citigroup	7,500	4.9%
Morgan Stanley	5,000	9.9%
Blackstone Group	3,000	10.0%
Barclays Bank	2,970	3.1%
Standard Chartered	1,416	3.8%
Carlyle Group	1,350	7.5%
London Stock Exchange	1,274	20.0%
Ochs-Ziff	1,260	9.9%
EADS	833	3.1%
AMD	622	8.1%

²⁹⁰ Epstein & Rose, *supra* note 270, at 116 (quoting David Marchick, *Sovereign Wealth Funds and National Security* 5 (Mar. 31, 2008), <http://www.oecd.org/dataoecd/38/12/40395077.pdf>).

EXHIBIT TWO
PETERSON STUDY SCORESHEET²⁹¹

Country	Fund Name	Structure	Governance	Transparency & Accountability	Behavior	Total
New Zealand	Superannuation Fund	8.00	4.00	12.00	0.00	24.00
Norway	Government Pension Fund–Global	7.50	4.00	10.50	1.00	23.00
Timor-Leste	Petroleum Fund	8.00	2.00	11.75	0.00	21.75
United States – Benchmark	CalPERS	8.00	3.00	10.25	0.50	21.75
Canada	Alberta Heritage Savings Trust Fund	7.50	3.00	9.00	0.00	19.50
United States	Alaska Permanent Fund	7.50	2.00	8.50	0.00	18.00
Australia	Future Fund	8.00	2.00	7.00	0.00	17.00
Azerbaijan	State Oil Fund of the Republic of Azerbaijan	5.00	2.00	9.50	0.00	16.50
Chile	Economic and Social Stabilization Fund	7.00	2.00	6.50	0.00	15.50
Botswana	Pula Fund	5.50	2.00	7.00	0.00	14.50
Kazakhstan	National Oil Fund	6.00	2.00	6.50	0.00	14.50
Singapore	Temasek Holdings	4.00	1.50	8.00	0.00	13.50
Sao Tome and Principe	National Oil Account	8.00	2.00	2.25	0.00	12.25
Trinidad and Tobago	Heritage and Stabilization Fund	6.50	2.00	3.75	0.00	12.25
Kuwait	Kuwait Investment Authority	6.00	3.00	3.00	0.00	12.00
Malaysia	Khazanah Nasional	4.00	1.50	4.00	0.00	9.50
Russia	Stabilization Fund of the Russian Federation	4.00	2.00	3.50	0.00	9.50
Korea	Korea Investment	6.00	2.00	1.00	0.00	9.00

²⁹¹ Peterson Study, *supra* note 39, at 12.

Country	Fund Name	Structure	Governance	Transparency & Accountability	Behavior	Total
	Corporation					
Kiribati	Revenue Equalization Reserve Fund	5.00	2.00	0.50	0.00	7.50
Mexico	Oil Income Stabilization Fund	5.00	0.00	2.00	0.00	7.00
China	Central Huijin Investment Company	5.50	0.00	0.50	0.00	6.00
Venezuela	National Development Fund	1.50	0.50	4.00	0.00	6.00
Iran	Oil Stabilization Fund	4.00	1.00	0.50	0.00	5.50
Venezuela	Macroeconomic Stabilization Fund	3.00	0.50	2.00	0.00	5.50
Oman	State General Reserve Fund	3.00	0.00	2.00	0.00	5.00
Sudan	Oil Revenue Stabilization Account	4.00	0.00	1.00	0.00	5.00
Algeria	Revenue Regulation Fund	3.00	1.00	0.50	0.00	4.50
United Arab Emirates	Istithmar	3.00	0.50	0.25	0.00	3.75
United Arab Emirates	Mubadala Development Company	3.00	0.50	0.00	0.00	3.50
Brunei	Brunei Investment Agency	1.00	0.50	1.00	0.00	2.50
Singapore	Government of Singapore Investment Corporation	1.50	0.00	0.75	0.00	2.25
Qatar	Qatar Investment Authority	2.00	0.00	0.00	0.00	2.00
United Arab Emirates	Abu Dhabi Investment Authority and Corporation	0.50	0.00	0.00	0.00	0.50

Country	Fund Name	Structure	Governance	Transparency & Accountability	Behavior	Total
Total Possible Points		8.00	4.00	12.00	1.00	25.00
Average Number of Points		4.80	1.42	4.02	0.03	10.27

EXHIBIT THREE
SECTOR SPECIFIC LAWS FOR FOREIGN INVESTORS²⁹²

Laws that limit and regulate foreign investment or require approval

Transportation: Aviation and Maritime

- Foreign investment in U.S. air carriers is limited to 25% of voting interest.
- Foreign investors may have up to one third of the directors in U.S. air carriers.
- Foreign investment in U.S. flag coastwise trade vessels is limited to 25% ownership or control.
- Foreign investors may own 100% of a U.S. flagged international trade vessel so long as the vessel owner is organized and incorporated under the laws of the U.S., its chief executive officer and chairman of the board are U.S. citizens, and no more than a minority of the number of its Board of Directors necessary to constitute a quorum are non-U.S. citizens.
- Foreign investment in U.S. commercial fishing vessels is limited to 25% ownership or control.

Communications

- Foreign governments may not hold radio licenses.
- Foreign investment in corporations that hold broadcast, common carrier (telecommunications services), and certain other radio licenses is limited to 20%.

- Foreign investment in U.S. parent company of a company that holds abovementioned licenses is generally limited to 25%.
- License to own or control a cable landing system, or authorization to provide telecommunications service may be withheld based on foreign ownership.

Banking

- Foreign banks must get FRB approval before establishing a branch or agency, or acquiring ownership or control of a commercial lending company, and any company (foreign or domestic) must get FRB approval before acquiring 25% or more or otherwise acquiring control of a U.S. bank.
- Banks must generally be subject to comprehensive supervision on a consolidated basis by appropriate authorities in home country.

Natural Resources and Energy: Nuclear Energy

- Entities that are known or are reasonably believed to be owned, controlled, or dominated by foreign interests may not hold a license for nuclear reactor facilities.
- Foreign ownership of nuclear production, utilization, and enrichment facilities, as well as licensing for source material and special nuclear material, must be evaluated for impact on the common defense and security of the United States.

Natural Resources and Energy: Mining and Mineral Leases

- No foreign investor may directly purchase or own federal mineral deposits that are open to exploration or other important mineral leases.
- Foreign investors may, however, own up to 100% of a U.S. company that holds mineral or mining leases.

- No foreign investor may directly hold a license to construct or operate a deepwater oil or natural gas port beyond State seaward boundaries and beyond the territorial limits of the United States.

Laws that restrict activities of foreign-owned firms or investors after investment is made

Transportation: Aviation and Maritime

- Vessels that are more than 25% foreign owned cannot carry cargo or passengers between U.S. ports.
- Aircraft that are more than 25% foreign owned cannot carry passengers or cargo between two U.S. cities.
- Vessels that are more than 25% foreign owned are only allowed to fish in U.S. fisheries under certain international agreements and are subject to annual quotas.

Banking

- The activities a bank holding company can engage in are limited. (This is not limited to foreign investors.)

Defense

- Non U.S. citizens and companies under foreign ownership, control, or influence are generally not eligible for access to classified information.
- Foreign government controlled companies generally cannot be awarded U.S. defense contracts, or Department of Energy contracts, which require access to proscribed information under a national security program, absent a waiver.

**Laws that do not restrict, but only
require disclosure, of foreign ownership**

Agriculture

- Foreign investors in agricultural land holdings must file a disclosure report.

