The "Santiago Principles" for Sovereign Wealth Funds: The Shortcomings and the Futility of Self-Regulation

RÉGIS BISMUTH[1]

Abstract

The risks associated with sovereign wealth funds (SWFs) transactions are essentially two-fold: political, to the extent that SWFs could be used as the armed wing of States' foreign policy, and economic, since there is a risk of public subsidization or other types of market distortions through their investments. It is within this framework that the idea of international best practices aimed at a better regulation of SWFs was envisaged. This led to the adoption of the "Generally Accepted Principles and Practices" for SWFs, also labelled as the "Santiago Principles". While the Santiago Principles may be useful for a better regulation of the relationship between fund managers and owners, they are nevertheless absolutely futile for considering and protecting the interests of the host States of sovereign investments. Thus, the Santiago Principles go against their founding objective. To this extent, the Santiago Principles shall not be regarded as a genuine form of international regulation, but rather as a veneer of respectability to improve the way recipient States perceive sovereign investors.

1. Introduction

In 2007, the Republic of Costa Rica and the People's Republic of China signed a confidential memorandum of understanding in which Costa Rica pledged to break its diplomatic relationships with Taiwan[2] as soon as it established others of the same nature with China. In return, China guaranteed to strengthen its bilateral cooperation with Costa Rica through several means. These included negotiations on a free trade agreement (signed in 2010),[3] China's support to Costa Rica's candidacy for a non-permanent seat at the United Nations Security Council (which Costa Rica finally held

[1] Professor of Law at Sciences Po Law School (Ecole de Droit de Sciences Po, Paris). The author can be reached at: regis.bismuth@sciencespo.fr.

[2] Art. I of the *Memorando de Entendimiento entre el Gobierno de la República de Costa Rica y el Gobierno de la República Popular China sobre el Establecimiento de Relaciones Diplomáticas* (1 June 2007) (published *in* Ministerio de Relaciones Exteriores y Culto, *Memoria Institucional 2008–2009* (San José, 8 May 2009) 148–150.

[3] *Memorando de Entendimiento* (n 2) Art. III-3. This free trade agreement was eventually concluded on 8 April 2010 and entered into force on 1 August 2011 <http://www.sice.oas.org/Trade/CRI_CHN_FTA/Texts_Apr2010_e/CRI_CHN_ToC_e.asp#PDF> accessed 28 January 2016.

between 2008 and 2009),[4] and other political as well as trivial underhand dealings.[5] The agreement also included a pecuniary section in which China committed to provide \$130 million in non-repayable financial aid,[6] and to purchase \$300 million of Costa Rican treasury bonds.[7] China's fulfilment of the latter obligation has lifted the veil on that agreement. The press was willing to discover the circumstances and conditions of these acquisitions. The Chinese and Costa Rican authorities, having refused to publish the memorandum, put forward a confidentiality obligation. The daily paper *La Nación* appealed that decision, and filed a writ of *amparo* before the Costa Rican constitutional court in order to rule in favour of the memorandum's publication. Basing its decision on the citizen's right to information, particularly in public finance, the Court ruled that all agreements concerning the purchase of treasury bonds should be made public.[8]

This is how the practical details of this operation were unveiled. The Costa Rican bonds were purchased by the State Administration of Foreign Exchange (SAFE), an opaque entity whose mission is to invest Chinese foreign exchange reserves. For a long time, SAFE has refused to admit the existence of subsidiaries in offshore financial centres from which it makes some of its investments, which it also refuses to make public.[9] SAFE, one of the main two Chinese sovereign wealth funds in terms of assets under management,[10] has thus become the armed wing of Beijing's foreign policy and, more precisely, of its diplomatic offensive against Taiwan.[11] Beyond its interest in terms of separation of powers or transparency of national foreign policy, this affair sheds light on one of many issues raised by SWFs, which can be defined simply as investment vehicles that are created, funded and controlled by States.[12]

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[4] *Memorando de Entendimiento* (n 2) Art. III-7.

[5] *Inter alia*: provision of twenty scholarship grants to study in China (article III-4), promotion of Chinese tourism in Costa Rica (article III-5), promotion of Chinese investments in Costa Rica (article III-6) and support of Costa Rica's participation in APEC (article III-7).

[6] *Memorando de Entendimiento* (*supra* n 2), Art. III-1.

[7] *Ibid.*, Art. III-2.

[8] Sala Constitucional de la Corte Suprema de Justicia, Expediente n° 08–003718–0007-CO, Sentencia nº 2008–013658 (5 September 2008) <http://www.poder-judicial.go.cr/salaconstitucional> accessed 28 January 2016.

[9] Jamil Anderlini, *Secretive Beijing Agency Uses Forex Reserves to Isolate Taiwan* Financial Times (12 September 2008).

[10] On SAFE activities, see, Yann Marin, *Chinese Sovereign Wealth Funds: Past, Present and Future* 9 Revue d'Économie Financière 105 (2009).

[11] Eric Helleiner, *The Geopolitics of Sovereign Wealth Funds: An Introduction* 14 Geopolitics 302 (2009); Jean-Marc Puel, *Les fonds souverains – Instruments financiers ou armes politiques?* 72 et seq (Paris; Editions Autrement, 2009).

[12] There is neither an accepted legal definition of sovereign wealth funds in international law nor even a purely descriptive definition that has reached a broad consensus (Edwin M Truman, *Sovereign Wealth Funds – Threat or Salvation?* 9 *et seq*. (Washington, D.C.; Peterson Institute for International Economics, 2010); Andrew Rozanov, *Definitional Challenges of Dealing with Sovereign Wealth Funds* 1 Asian Journal of International Law 251 (2010)). However, the main definitions of sovereign wealth funds suggested by various authors or by public or private entities have put into perspective three key elements highlighting their connection to their States of origin: they are created, controlled and funded by States. The definition adopted by the International Working Group of Sovereign Wealth Funds

The context of this affair is also very telling. While it caused great political stir in Costa Rica,[13] it went relatively unnoticed elsewhere. Indeed, it was simultaneous with the collapse of Lehman Brothers, which made the international financial system falter.[14] States were more afraid that SWFs would liquidate their investments. Besides, Lehman Brothers' filing for bankruptcy was announced after negotiations with several SWFs for its recapitalization failed.[15] However, Chinese diplomats were very upset by the bad press – though it was toned down by the crisis – the SAFE received, at a time when its other sovereign wealth fund, the China Investment Corporation (CIC), redoubled its efforts to be considered a serious and respectable investor solely guided by the profitability of its investments.[16]

Chinese authorities' irritation could be understood in the context of global mistrust and suspicion towards SWFs prevalent before the 2008 financial crisis. Indeed, those funds had carried out a few operations that had nonetheless provoked some turmoil (e.g. CIC's acquisition of Blackstone and Morgan Stanley shares in 2007).[17] Furthermore, cross-border investment projects led by public corporations – which were not sovereign wealth funds – in highly sensitive fields (e.g. American harbour projects led by the Dubai Ports World corporation in 2006 or the American oil company, Unocal, led by the China National Offshore Oil Corporation) faced strong political opposition in the United States for national security reasons, and consequently failed.[18] Besides, the American legislation concerning foreign investments control was amended as a result of those events.[19]

(IWGSF) established in 2008 provides: "SWFs are defined as special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives. … The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports"; IWGSF, *Generally Accepted Principles and Practices (Santiago Principles)* (October 2008) (Appendix I (Defining Sovereign Wealth Funds), n° 2) <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> accessed 28 January 2016 [hereinafter "Santiago Principles"]. See also, Régis Bismuth, *Les fonds souverains face au droit international – Panorama des problèmes juridiques posés par des investisseurs peu ordinaires* 56 Annuaire Français de Droit International 571 (2010).

[13] Álvaro Murillo, *Gobierno mintió al país sobre venta de bonos a China* La Nación (11 September 2008); *Costa Rica: Le président Arias reconnaît avoir menti à propos de Taïwan* Agence France Presse (13 September 2008).

[14] Puel (n 11) 72.

[15] Chip Cummins and Evan Ramstad, *Crisis on Wall Street: Sovereign Funds Choose to Wait* The Wall Street Journal (16 September 2008).

[16] Andrew Batson, *China Used its Reserves to Win Over Costa Rica* The Wall Street Journal Asia (15 September 2008).

[17] Friedrich Wu and Arifin Seah, *The Rise of China Investment Corporation: A New Member of the Sovereign Wealth Club* 9(2) World Economics 45 (2008).

[18] Puel (n 11) 46; Colleen Baker, *Sovereign Wealth Funds*, in *Finance Ethics – Critical Issues in Theory and Practice* 253 (New York; Wiley, 2010).

[19] The United States amended their foreign investment review procedure carried out by the Committee on Foreign Investments in the United States (CFIUS). Originally, this committee, created in 1975, was only an advisory committee chaired by the Secretary of Treasury (Locknie Hsu, *Sovereign Wealth Funds, Recent US Legislative Changes, and Treaty Obligations* 43 Journal of World Trade 455

Recipient States have a somewhat schizophrenic attitude towards sovereign wealth funds. These investors are considered to be, on the one hand, white knights in shining armour for the rescue of an ailing financial sector and, on the other, a Trojan horse for a rather dubious foreign policy. The hopes, fears and fantasies they generate are probably exacerbated by the image of the decreasing influence of Western countries on the international scene their growing importance reflects. However, the use by States of their economic power for foreign policy purposes is not new; it is certainly a permanent feature of international relations.[20] Yet, the development of sovereign wealth funds deeply modifies the way economic influence is exercised. Such influence does not operate through traditional diplomatic channels or unofficial equivalents. Instead, it relies on liberalization mechanisms of international investments that were created to support operations carried out by economic players which are supposed to be driven by financial motivations. Hence, it is legitimate to wonder whether States can be regarded as ordinary foreign investors when it comes to sovereign wealth funds. This perspective likely constitutes the keystone of the issues related to these actors. It does not, however, exhaust the problems that need to be addressed, since their activities raise several unprecedented legal issues. Such issues are to be found in the fields of financial stability, market integrity, monetary management, corporate governance, competition rules and human rights. Revisiting frequently preconceived ideas about SWFs requires a brief outline of such issues.

Firstly, sovereign funds may pursue aims that do not necessarily guide their owners' interests directly. Beyond expensive "prestigious" or "trophy" assets, such as soccer clubs or luxury brands,[21] some sovereign wealth funds want to make sure that they invest in firms respectful of fundamental rights and engaged in honourable activities. This is the case for the Norwegian fund Government Pension Fund – Global which has a "Council on Ethics" that targets its investments and rules out acquisition of tobacco-producing companies, firms participating in the production of weapons prohibited by international humanitarian law or involved in corruption activities,

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(2009)). A first reform (the 1988 Exon-Florio amendment) empowered the President to freeze transactions when there was "credible evidence to support a belief that the foreign interest exercising control of the US person to be acquired might take action that threatens to impair the national security" (31 CFR § 800.501(2)). The Foreign Investment and National Security Act (FINSA) amended this procedure in 2007 in order to improve its transparency. Furthermore, this new regulation broadened the scope of CFIUS control on the basis of new factors (transactions run by a foreign government-controlled entity, withdrawal of the 10% minimum limit of capital, etc.) thereby covering most of the transactions carried out by SWFs (Fabio Bassan, *Host States and Sovereign Wealth Funds, Between National Security and International Law* 21 European Business Law Review 185 (2010) (noting that before 2007 "SWF activities remained exempt from the application of this rule because in most cases these funds invest in shares without voting rights or purchase non-controlling interest, below 10% of the capital stock")).

[20] See Régis Bismuth, *L'internationalisation du capitalisme d'État en question – Les failles de l'encadrement juridique des risques politiques et économiques posés par les investissements souverains étrangers (entreprises d'État et fonds souverains)* 45 Études internationales 381 (2014).

[21] Puel (n11) 85–86. For instance, the acquisition by the Libyan Investment Authority of a 7,5% stake in the Juventus Football Club, enabling one of Muammar Gaddafi's son to start his career as a football player in Italy; Lina Saigol, *Opaque Libyan Fund Built Diverse Portfolio* Financial Times (21 February 2011).

massive human rights violations or damages caused to the environment.[22] Some of its disinvestments were particularly resounding, especially the blacklisting of the American corporation Wal-Mart in 2006 for "complicity in serious or systematic violations of internationally recognised standards for human rights and labour rights,"[23] a decision that provoked vivid protests by the United States ambassador to Norway who accused the fund of trying to export its ethical standards.[24]

Secondly, sovereign funds do not only carry out investments abroad, but also invest in domestic markets. France indeed has at least two entities which form or resemble a sovereign wealth fund: the *Fonds de Réserve pour les Retraites* (Retirement Fund) created in 1999 and the *Fonds Stratégique d'Investissement* (Strategic Investment Fund) created in 2008.[25] The latter, commonly designated as a "French-style SWF",[26] invests in small or medium-sized companies as well as in strategic sectors in order to secure the structure of their shareholding and to protect national jobs. The economic conditions of these investments can thus generate competition distortions that could be taken into account from the perspective of both WTO and EU rules.[27]

Thirdly, even respectable sovereign wealth funds may be criticised for activities regarded as contentious. The aforementioned Norwegian fund Government Pension Fund – Global, considered as the most transparent fund by various international rankings that bloomed in recent years,[28] has been publicly criticised by Reykjavik for

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[22] Simon Chesterman, *The Turn to Ethics: Disinvestment From Multinational Corporations for Human Rights Violations – The Case of the Norway's Sovereign Wealth Fund* 23 American University International Law Review 577 (2009).

[23] Council on Ethics for the Norwegian Pension Fund – Global, *Annual Report* (2006) 27.

[24] Chesterman (22) 612; Truman (n 12) 41; Eric C Anderson, *Take the Money and Run – Sovereign Wealth Funds and the Demise of American Prosperity* 127 (Santa Barbara, CA; Praeger, 2009). Conversely, this Norwegian fund has also decided to consider as an acceptable an investment in the American corporation L-3 Communications following its decision to stop producing components necessary to cluster munitions prohibited by the 2008 Oslo Convention. This decision was based on a recommendation of its Council on Ethics (Council on Ethics for the Norwegian Pension Fund – Global, *Recommendation* (15 November 2010) <http://www.regjeringen.no/upload/FIN/etikk/2011/l3_eng.pdf> accessed 28 January 2016). More recently, the Council of Ethics decided to put the Brazilian company Petrobras under observation due to the risk of gross corruption (Council on Ethics – The Government Pension Fund – Global, *Recommendation to Put a Company in the Government Pension Fund Global under Observation: Petroleo Brasileiro SA* (21 December 2015) <http://etikkradet.no/files/2016/01/Recommendation-Petrobras-21-December-2015.pdf> accessed 28 January 2016).

[25] Puel (n11) 20.

[26] Jean Arthuis and Philippe Marini, *Sovereign Wealth Funds: Potential and Conditions for Partnerships* 9 Revue d'Économie Financière 322 (2009).

[27] See Bismuth (n 12) 598. Besides, the European Commission decided in 2010 to launch an investigation concerning investments carried out by the French Strategic Investment Fund (*State Aid – Commission Opens In-Depth Inquiry into €55 Million Investment into French Car Component Supplier Trèves*, IP/10/100 (29 January 2010)). Eventually, after its investigation, the Commission found that these transactions did not constitute State aid under Art. 107(1) TFEU (*European Commission Decision of 20 April 2011 on Suspected Aid to the Company Trèves C 4/10 (ex NN 64/09) Implemented by the French Republic*, 2011/676/EU (9 October 2011)).

[28] Sarah Bagnall and Edwin M Truman, *Progress on Sovereign Wealth Fund Transparency and Accountability: An Updated SWF Scoreboard* 3 Peterson Institute for International Economics Policy

having massively sold Icelandic bonds in 2006, a few months after their purchase, thus generating a short financial crisis.[29] This operation had been carried out despite the existence of a "Nordic mutual-defence pact against financial destabilization", the latter being recalled by the Prime Minister of Iceland as an unfriendly act on the side Norway.[30]

Therefore, the risks associated with SWFs are essentially two-fold: political and economic. The risks are political to the extent that SWFs could be used as the armed wing of States' foreign policy or could lead to concerns related to national security. From an economic standpoint, beyond financial stability issues, there is a risk of public subsidisation or other types of market distortions through SWF investments. This has led several recipient States to intensify their screening procedures for the admission of sovereign investments.[31] While international trade and investment agreements authorise States to restrict trade and investment flows for national security reasons, they happen to be insufficient since it is almost impossible to prove or reasonably anticipate that, at the time of their admission, investments made in sensitive sectors and industries (for instance energy, military, telecommunications, etc.) are in reality prompted by political agendas instead of financial reasons.[32] It is within this framework that the G7 in 2007 envisaged international best practices for better regulation of SWFs. This led to the adoption of the "Generally Accepted Principles and Practices" for SWFs, also labelled as the "Santiago Principles."[33]

Surprisingly, the vast majority of the literature is either extremely laudatory about the Santiago Principles[34] or does not target the main flaws of this instrument.[35] A meticulous analysis of these principles requires a closer scrutiny beyond the stamp

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Brief No. 13–19 (August 2013); Sven Behrendt, *Sovereign Wealth Funds and the Santiago Principles: Where Do They Stand?* 3 Carnegie Paper No. 22 (2010) <http://carnegieendowment.org/files/santiago_principles.pdf> accessed 28 January 2016.

[29] Truman (n 12) 41; Daniel W Drezner, *Sovereign Wealth Funds and the Insecurity of Global Finance* 62 Journal of International Affairs 118 (2008).

[30] *Asset-Backed Insecurity – Sovereign Wealth Funds* The Economist (19 January 2008).

[31] See Bismuth (n 12) 589.

[32] For an overview of the issues, see Bismuth (n 20) 383–394; Bismuth (n 12) 592–602.

[33] See Santiago Principles (n 12).

[34] Donghyun Park and Gemma Esther Estrada, *Developing Asia's Sovereign Wealth Funds: The Santiago Principles and the Case for Self Regulation* 1 Asian Journal of International Law 383 (2011).

[35] Joseph J Norton, *The "Santiago Principles" for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes* 13 Journal of International Economic Law 645 (2010); Maurizia De Bellis, *Global Standards for Sovereign Wealth Funds: The Quest for Transparency* 1 Asian Journal of International Law 349 (2011); Georges Kratsas and Jon Truby, *Regulating Sovereign Wealth Funds to Avoid Investment Protectionism* 1 Journal of Financial Regulation 95 (2015); Anthony Wong, *Sovereign Wealth Funds and the Problem of Asymmetric Information: The Santiago Principles and International Regulations* 34 Brooklyn Journal of International Law 1081 (2009). However, the latter article is the only one pointing out that the Santiago Principles are "too focused on SWFs as entities and not enough on their relationship with recipient countries" (1105), one major criticism discussed in this article. For a more nuanced approach and a critical analysis of the Santiago Principles, see Eliza Malathouni, *The Informality of the International Forum of Sovereign Wealth Funds and the Santiago Principles: A Conscious Choice or a Necessity?*, in *Informal International Law Making: Case Studies,* 251 (Berlin; Torkel Opsahl 2012).

of "international standard for SWFs" they have – unduly – received. Rather, it should highlight that they do not live up to the expectation of effectively regulating SWF activities. This analysis focuses on three aspects. First, it is important to revisit the drafting history of the Santiago Principles since it sheds light on a regulatory capture by the funds themselves which deliberately prevented its possible multilateralisation to better include the interests of the host States (see Section 2). Second, an analysis of the Principles themselves clearly indicates that their content is inadequate to address the concerns raised by the activities of the funds, particularly when it comes to protecting host State national security or ensuring investment transparency (see Section 3). Third, the Santiago Principles have also proven to present significant deficiencies concerning the institutional framework dedicated to their promotion and implementation (see Section 4). Ultimately, it appears that the Santiago Principles constitute more the product of a public relations strategy than a genuine example of international regulation (see Section 5).

2. The Santiago Principles: A Suspect Drafting Process

The development of the Santiago Principles was carried out in a surprisingly expeditious way and only involved a very limited number of actors.[36] These principles originated in a context of growing mistrust towards investments made in Western countries by SWFs, particularly those from China and the Middle East. However, this vivid reluctance should not eclipse the favourable consideration SWFs received at the same time by certain actors and political bodies in the same countries. This ambivalence, especially blatant in the United States, is at the origin of the core deficiencies of the Santiago Principles.

A few months before the adoption of the Santiago Principles, a significant asymmetry existed between the US legislative and executive branches' positions. The US Congress had proven to be reluctant, if not hostile, towards sovereign investments, regardless of whether they were carried out by SWFs or State-Owned Enterprises (SOEs). Besides, it took several initiatives in order to exert more stringent control over foreign investments in the US.[37]

As to the executive branch, while the Bush administration expressed some concerns about certain acquisitions by sovereign investors from the Middle East, it had proven to be more open and benevolent to Asia and more particularly China, with which it was willing to develop economic ties. This more favourable stance can be explained by Wall Street's influence within the US executive branch. US financial institutions perceived SWFs as a vast source of liquidity for their recapitalisation after the beginning of the subprime crisis in early 2007. It is therefore no coincidence that the main architect of international initiatives eventually leading to the adoption of the Santiago Principles was none other than Henry Paulson, then US Secretary of Trea-

[36] For a detailed history of the drafting process of the Santiago Principles, see Norton (n 35) 645.

[37] See *supra* n 19.

sury. Paulson spent most of his career at an investment bank, Goldman Sachs, starting in 1974. He served as a chairman between 1999 and 2006, before taking up his new position within the Bush administration.[38] Besides, it is widely known that Henry Paulson had forged privileged economic ties with China, a country he visited more than seventy times during his time at Goldman Sachs.[39]

It was indeed Henry Paulson that proposed that the G7 include international regulation of SWFs on its agenda in October 2007, just before the annual meeting of the International Monetary Fund (IMF) and the World Bank. Initially, the G7 invited the IMF, the World Bank and the OECD to develop guidelines for SWFs. In this respect, the G7 Statement noted:

> "SWFs are increasingly important participants in the international financial system and […] our economies can benefit from openness to SWF investment flows. We see merit in identifying best practices for SWFs in such areas as institutional structure, risk management, transparency and accountability. For recipients of government-controlled investments, we think it is important to build on principles such as non-discrimination, transparency, and predictability […]. We ask the IMF, World Bank, and OECD to examine these issues […]."[40]

Eventually, the World Bank played no role within this framework and the work program revolved around two main areas: OECD guidelines for recipient States of sovereign investment,[41] and IMF international standards for better SWF regulation and reassurance that investments were driven by economic objectives. With regard to the IMF, the first debates were held within its International Monetary and Financial Committee (IMFC)[42] at the end of 2007, but there had been serious calls that challenged the organization's legitimacy. This was particularly clear in the statement made at the IMFC by the Governor of the United Arab Emirates Central Bank on behalf of a constituency of Middle East countries. He surprisingly questioned the IMF expertise

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[38] Norton (n 35) 650.

[39] See for instance, *Paulson Urges China to Continue With Currency Reforms* The Wall Street Journal (2 December 2008); Zheng Wang, *What Bush Did Right – On China* The Washington Times A21 (19 February 2009) (noting about Paulson that, while at the head of Goldman Sachs, "his time on Chinese soil has been spent cultivating relationships, understanding the Chinese mentality, and creating the necessary cultural fluency required to build a successful bridge of communication between the two powerful nations"). See also, Henry M Paulson, *Dealing with China: An Insider Unmasks the New Economic Superpower*, xii (New York; Twelve, 2015).

[40] G7, *Statement of G7 Finance Ministers and Central Bank Governors*, Washington (19 October 2007) <http://www.g8.utoronto.ca/finance/fm071019.htm> accessed 28 January 2016.

[41] OECD, *OECD Guidance on Recipient Country Policies towards SWFs* (11 October 2008) <http://www.oecd.org/investment/investment-policy/oecdguidanceonsovereignwealthfunds.htm> accessed 28 January 2016.

[42] The IMFC is an IMF body providing guidance to the IMF Executive Board. See, Alexander Shakow, *The Role of the International Monetary and Financial Committee in IMF Governance*, Independent Evaluation Office of the International Monetary Fund (Background Paper BP/08/03) (May 2008) <http://www.ieo-imf.org/ieo/files/completedevaluations/05212008BP08_03.pdf> accessed 28 January 2016.

as well as its ability to develop international standards for SWFs. The Governor expressed that such an initiative could affect investments in the delicate context of the emerging subprime crisis, thereby threatening recipient States. He openly pointed out:

> "we reiterate our misgivings regarding the Fund's involvement in setting best practices for Sovereign Wealth Funds (SWFs). The Fund does not have the requisite expertise in the areas of governance and transparency to take the lead in producing a set of best practices for SWFs. We are also concerned that the treatment of SWFs, to the exclusion of other types of institutional investors with proven track record of excessive risk taking and destabilizing behavior, would introduce a severe element of bias and lack evenhandedness in financial surveillance. Finally, the timing of this exercise and its political dimensions could inadvertently disrupt the flow of much-needed long-term capital from SWFs to institutions in the U.S. and elsewhere that face both liquidity and capital shortage issues."[43]

The IMFC eventually surrendered to the threats of this group of States, letting them develop a set of standards for SWFs. It is in this context that in 2008 the International Working Group of Sovereign Wealth Funds (IWGSWF) was established by these States – and not by the IMFC – to create an international standard. The IMF was only a host to this group and did not intervene in any way in its work. This explains the confusion surrounding the origin of the Santiago Principles. The establishment of the Working Group was decided within (and not by) the IMF and the latter only offered administrative assistance to facilitate its work.[44] Thus, on the face of it, the IMF gave its multilateral *imprimatur* to the IWGSWF which solely reflects the plurilateral interests of the funds.

Among the 26 SWFs represented within the IWGSWF, some of them had only very little economic and financial clout.[45] While the membership of the IWGSWF was thus characterised by the heterogeneity of its members, this should not eclipse their common objective of limiting the scope of the regulation. The rapidity at which the Santiago Principles were developed is surprising since they intended to address a sensitive issue for which long-lasting negotiations between different stakeholders would have been necessary. Indeed, only three meetings held over five months were sufficient to reach an agreement and adopt the Generally Accepted Principles and

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43 IMF, *Statement by Statement by His Excellency Sultan N Al-Suwaidi Governor of the United Arab Emirates Central Bank (On behalf of Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Maldives, Oman, Qatar, Syria, United Arab Emirates, and Yemen)*, IMFC 17th Meeting, 6 (12 April 2008) <https://www.imf.org/External/spring/2008/imfc/statement/eng/uae.pdf> accessed 28 January 2016.

44 The IMFC noted that it "welcomes the IMF's initiative to work, as facilitator and coordinator, with SWFs to develop a set of best practices by the 2008 Annual Meetings" (Communiqué of the IMFC of the Board of Governors of the IMF (12 April 2008) <https://www.imf.org/external/np/cm/2008/041208.htm> accessed 28 January 2016).

45 For instance, Azerbaijan, Botswana, Equatorial Guinea, Ireland, Timor-Leste, Trinidad and Tobago. See, Santiago Principles (n 12) 1.

Practices (GAPP) for SWFs, labelled the "Santiago Principles" after the third and last meeting of the Working Group held in the Chilean capital. In that respect, five months could be considered as "a very quick period of time for [the development of] an international code."[46]

Another element shows the extent to which the Santiago Principles mainly reflected the interests of sovereign funds. The Working Group was comprised of about twenty "member countries" represented by their funds and government officials.[47] Two funds established by a federated State of the US as well as a Canadian province were considered as representatives of their country of origin[48] and, in that respect, the Santiago Principles indicated that Canada and the US were considered as "member countries" of the Working Group.[49] However, it was specifically stated that the Working Group "also benefited from the input from a number of recipient countries" including France, Germany and the UK (which were not "represented" via a fund within the Working Group), but also Canada and the United States,[50] suggesting that the interests of the latter two were at the same time represented through a different diplomatic channel. It is therefore obvious that a clear distinction existed within the Working Group between the "member countries" that genuinely represented the interests of the funds and the invited recipient countries which attended meetings but played no substantial role in devising the Principles. This is why the Santiago Principles should be regarded more as a form of self-regulation.

The development of an international standard, irrespective of its legally binding dimension, shall ideally be based on the equitable participation of all stakeholders[51] and be developed by bodies whose membership is open and not restricted to a limited number of States.[52] Given the rather passive role of recipient countries in the process

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[46] David Murray, *Negotiating a Voluntary Code*, in *The Role of State Capital in the New Financial Order*, 151 (London; Imperial College Press, 2011).

[47] Santiago Principles (n 12) 28.

[48] The Alaska Permanent Fund for the United States, and the Alberta Heritage Savings Trust Fund for Canada.

[49] Santiago Principles (n 12) 1 (n 2).

[50] Santiago Principles (n 12) 2.

[51] See Thomas Perroud, *Standardisation internationale privée et Global Administrative Law*, in *La standardisation internationale privée – Aspects juridiques*, 185 (Brussels; Larcier, 2014); Lucy Koechlin and Richard Calland, *Standard Setting at the Cutting Edge: an Evidence-Based Typology for Multi-Stakeholder Initiatives*, in *Non-State Actors as Standard Setters*, 84 (Cambridge; Cambridge University Press, 2009).

[52] The open membership of standard-setting bodies is a key requirement when identifying an international standard according to WTO agreements. The SPS Agreement indeed refers to standards "promulgated by other relevant international organizations open for membership to all Members" (Annex A, Art. 3(d)). In the GATS, international standards are adopted by "relevant international organization" defined as international bodies whose membership is open to the relevant bodies of at least all Members of the WTO" (Art. VI:5(b) n 3). On this issue, see Régis Bismuth, *Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law* 44 Journal of World Trade 489 (2010). See also, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Report of the Appellate Body* (16 May 2012), WTO Doc. WT/DS381/AB/R, paras 343–401.

of development of the Santiago Principles and the strictly plurilateral dimension of the Working Group, it is inconceivable to consider the GAPP as a genuine international standard. At the same time, it is unfortunate to regard GAPP as an IMF standard, as the economic press did after their adoption.[53] Arguably, the ambiguity revolving around the IMF-paternity of the Santiago Principles has conferred a veneer of legitimacy on them. This façade suited the Principles, as it tempered the concerns of Western States – in particular, the United States.[54] Beyond these aspects which suggest that the Santiago Principles are also are a part of a broader public relations strategy, the strict plurilateral dimension of their development essentially focused on the interests of the funds. This had an impact on the content of this self-regulation, since the concerns of recipient States were completely neglected.

3. The Santiago Principles: An Inadequate Regulation

It is unnecessary to provide an exhaustive analysis of the – quite poorly drafted – 24 Santiago Principles adopted by the SWFs. Instead, it is useful to shed light on their deficiencies. Indeed, they do not address the main concerns that the recipient States have expressed and which are at the origin of the same principles, mainly the possibility of using SWFs for political ends, and the risks of economic distortions. In order to demonstrate the inadequacy of the Santiago Principles, it is first necessary to resort to a corporate governance matrix analysis (3.1). Indeed, this will be helpful to then conceptualise the relations between the fund and the fund owner (as a shareholder) (3.2), and those between the fund and the recipient States of the fund's investments (as stakeholders) (3.3).

3.1. Using the Corporate Governance Matrix Analysis

Assessing the relevance of the Santiago Principles first requires to better understand the nature of the relations among the different actors involved. In this respect, SWF regulation involves three main categories of actors: the owner of the fund (the State), the fund itself (acting through its managers), and the recipient State. These different categories of actors are not necessarily all interacting with one another. Two types of relations are mainly observable: 1) between the fund and its owner, and 2) between the fund and recipient States of its investments.

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[53] See, for example, Robin Wigglesworth, *IMF Guidelines Spur Steps Towards Transparency* Financial Times (18 March 2010) (noting that "this led the International Monetary Fund to develop 'best practices' for SWFs to improve their transparency and governance. … The IMF guidelines, known as the Santiago Principles, are voluntary but many funds are tentatively responding to calls for more openness").

[54] Doug Palmer, *Rise of China State-Owned Firms Rattles US Companies* Reuters News (17 August 2011) ("A year-long negotiation led by the International Monetary Fund resulted in the so-called Santiago Principles, a voluntary set of 'best practices' for sovereign wealth funds that has helped dampen the concerns in the United States").

In this light, it is tempting to draw a parallel between the issues related to the regulation of SWFs and those related to corporate governance. Corporate governance clarifies the relations among three categories of actors: between the shareholders and the management of the firm (where shareholders and managers could have divergent interests and the objective is to ensure that managers act in the shareholders' best interest), and between the firm and all its stakeholders (such as employees, suppliers or creditors). In an Anglo-Saxon model of corporate governance, the core objective is the maximisation of shareholder value and the governance structure mainly focuses on the shareholder/manager nexus, and the conflicts inherent in the relation between the two.[55] The continental European corporate governance model perceives the firm not only as a contract between shareholders, but more broadly as an institution with an impact on various stakeholders – whose interests must also be taken into consideration.[56]

An analysis of the Santiago Principles clearly shows that, through a corporate governance matrix analysis, it is essentially the interests of the fund owner, as shareholders, that are duly taken into consideration. However, the relation between the fund and its owner – which is purely a domestic policy issue – has no importance when it comes to address the concerns raised by SWFs at the international level.

3.2. The Futility of the Principles Regulating the Relations Between the Fund and the Fund Owner

The Santiago Principles include several rules on the relations between the fund and the fund owner. Surprisingly, these rules do not restrict in any way the possibility for the owner of influencing the investment policy of the fund. They rather aim at asserting the shareholder rights of the owner and ensuring its protection through a control of the fund managers. In that respect, "the owner should set the objectives of the SWF",[57] its investment policy and strategy,[58] and "appoint the members of its governing bod(ies)."[59] Other principles are dedicated to ensuring a greater transparency of the fund towards its owner and more specifically rules concerning the scope of information that shall be made available to the owner. Indeed, "the relevant statistical data pertaining to the SWF should be reported on a timely basis to the owner",[60] and that "data should be treated with customary confidentiality by the national agencies as set out in the statistical [*sic*] law/regulation(s)."[61] Moreover, the SWF should be audited

[55] Christine A Mallin, *Corporate Governance*, 15 (Oxford; Oxford University Press, 2013). See also Christopher M Bruner, *Corporate Governance in the Common-Law World – The Political Foundations of Shareholder Power*, 28–107 (Cambridge; Cambridge University Press, 2013).
[56] Mallin (n 55) 20.
[57] GAPP 7.
[58] GAPP 18.
[59] GAPP 7.
[60] GAPP 5.
[61] GAPP 5 (Commentary) (Santiago Principles (n 12) 15).

annually,[62] and the "external audit report prepared by an independent commercial auditor should be submitted to the owner."[63] Other principles have a solely domestic outreach. For instance, it is provided that SWF's activities having significant direct domestic macroeconomic implications should be coordinated with the domestic fiscal and monetary authorities.[64]

These principles are particularly interesting when it comes to the protection of the fund owner from any form of mismanagement by the fund managers. The operational management of the fund must implement the investment strategy devised by the owner,[65] follow the rules and procedures regarding "the SWF's general approach to funding, withdrawal, and spending operations",[66] and operate within a sound risk management framework.[67] These rules establishing specific procedures concerning the use of the fund's assets are also useful in order to protect the fund from its owner when the latter is likely to divert the assets for domestic political ends.[68] Likewise, such rules have a purely domestic focus and do not take into consideration the interests of recipient States of SWF investments.

Moreover, while certain authors have praised the Santiago Principles[69] for insisting on the independence that the operational management should enjoy from the fund owner,[70] such rules are of no interest if the fund managers are willing to follow the instructions of governmental authorities. Notably, the Santiago Principles recognize the right of the owner to appoint the members of its governing bodies,[71] but do not include any rule guaranteeing the organic or functional independence of the fund managers, similar to that of an independent financial regulatory authority or a central bank. It shall also be recalled that a SWF is very different from a private investment fund (pension fund, hedge fund or private equity fund). Indeed, in the latter, the relation between the fund provider (the subscriber) and the fund manager is contractual in nature and, in most cases, a subscriber's financial contribution represents only a minority of the managed funds. Conversely, the relation between the SWF and its owner is hierarchical and institutional in nature, as the State establishes the fund, appoints its managers, defines its investment policy and is its exclusive financial contributor. In this regard, the SWF can be seen as an outgrowth of the State. This exclusive proprietary ownership dimension of SWFs radically contrasts with the conflict of interest issues that corporate or fund managers might have with sharehold-

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62 GAPP 12.

63 GAPP 12 (Commentary) (Santiago Principles (n 12) 18).

64 GAPP 3.

65 GAPP 9.

66 GAPP 4.

67 GAPP 22.

68 Loch Adamson, *Sovereign Wealth Funds Starting to Embrace Transparency* Institutional Investor Magazine (1 September 2011) (noting that "Botswana's Pula Fund observed that transparency mitigated the potential use of the fund by politicians for development projects against the spirit of saving for future generations and has helped created the checks and balances needed for preservation of capital").

69 Park and Estrada (n 34) 397; De Bellis (n 35) 375; Wong (n 35) 1104.

70 See, GAPP 6, GAPP 9 and GAPP 16.

71 GAPP 7.

ers or subscribers. In conclusion, the Principles regulating the relations between the SWF and its owner are futile. Likewise, the Principles pertaining to the relations between the SWF and recipient States are immaterial.

3.3. The Irrelevance of the Principles on the Relations between the Fund and the Recipient States

The few rules included in the Santiago Principles – seemingly – related to the relations between the SWFs and the host States of their investments are formulated in excessively lax or open-ended terms. Moreover, a careful analysis of these rules shows a significant gap between the intention stated in the Principle on the one hand, and the way the Working Group intended to interpret the Principle on the other. In this regard, the "explanation and commentary" sections of the Santiago Principles are extremely useful.

For example, GAPP 14 provides that "dealing with third parties for the purpose of the SWF's operational management should be based on economic and financial grounds, and follow clear rules and procedures", while GAPP 19 notes that "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". Both Principles seem to suggest that SWFs shall seek to maximise their financial performance and refuse to carry out investments for political purposes. However, the way the Working Group interpreted these principles suggests otherwise. According to the Working Group, GAPP 14 seeks "to ensure good governance and efficient use of resources."[72] It is therefore a pure internal governance rule aimed at preventing the misuse or the excessive use of SWF financial resources. Despite being seemingly a principle applicable to the relation between the fund and stakeholders, it seeks to regulate the relation between the fund and its owner. Likewise, while GAPP 19 indicates that only economic and financial considerations should be taken into account in investment decisions, the Working Group interpreted this principle differently. Indeed, "subprinciple" GAPP 19–1 provides that "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". In that respect, its commentary refers to an investment policy taking only social, environmental, ethical or religious reasons into consideration[73] since it would be extremely naïve to expect that SWFs publicly disclose the geopolitical motives of their investments.[74]

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[72] GAPP 14 (Explanation and commentary) provides that "to ensure good governance and efficient use of resources, it is important that the SWF, its owners, or the entities in charge of the SWF's operational management establish clear rules and procedures for dealing with third parties" (Santiago Principles (n 12) 19).

[73] GAPP 19–1 (Explanation and commentary) (Santiago Principles (n 12) 22).

[74] It is also noteworthy that "subprinciple" GAPP 19–2 ("the management of an SWF's assets should be consistent with what is generally accepted as sound asset management principles") simply rephrases GAPP 14. Besides, the commentary of "subprinciple" GAPP 19–2 underlines that "the process of authorization and incurrence, and amounts paid, should be transparent to its owner or its governing

Other provisions also confirm this impression of the double-talk dimension of the Santiago Principles. By stressing 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", GAPP 15 merely reiterates the obvious obligation that, absent an explicit waiver, all investors have to comply with domestic regulations of host countries. Besides, international investment agreements usually provide that treaty protection is limited to investments that have been made in accordance with the laws and regulations of the host State.[75] While GAPP 15 does not add anything to SWF regulation, it expresses a commitment to comply with domestic regulations which seems in contradiction with GAPP 20. GAPP 20 provides that "the SWF should not seek or take advantage of privileged information or inappropriate influence by the broader government in competing with private entities", and should therefore comply with national competition or securities laws,[76] as suggested by GAPP 15. Surprisingly, a footnote accompanying the commentary of GAPP 20 specifies that, "however, recipient countries may grant to SWFs certain privileges based on their governmental status, such as sovereign immunity and sovereign tax treatment."[77] Therefore, GAPP 20 suggests that SWFs intend to comply with domestic law, but if a breach were to occur, SWFs reserve their right to invoke sovereign immunity which could bar domestic jurisdiction. Beyond the fact that it undermines the credibility of the commitment to comply with domestic laws, it also highlights another aporia in the Santiago Principles. On the one hand, SWF investment decisions should be guided by financial motives, and its managers should be independent from political authorities. On the other, this insinuates that the fund is still "sovereign enough" to benefit from the sovereign immunity protection. In other words, SWF investments should be perceived as *jure gestionis* acts, but should be treated as *jure imperii* acts from a legal standpoint: the art of saying one thing and then the very opposite!

An analysis of the Santiago Principles therefore leads to a disconcerting conclusion. The provisions on the relations between the fund managers and the fund owner are related to domestic policy issues. Furthermore, the provisions on the relations between the fund and the recipient States are ineffective in addressing the latter's concerns regarding possible use of SWF for political ends, with an additional risk of economic distortion. Credible commitments would include a real-time disclosure of all SWF investments and a waiver of their (perceived) entitled privileges and immunities, at the minimum. Hence, it is no exaggeration to say that the Santiago Principles are part of a broader public relations strategy devised by the funds themselves to

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body(ies) and follow clear rules and procedures, and be subject to ethics rules (see GAPP 14)" (Santiago Principles (n 12) 22).

[75] OECD, *International Investment Law – Understanding Concepts and Tracking Innovations*, 76 (Paris; OECD, 2008).

[76] GAPP 15 (Explanation and commentary) (Santiago Principles (n 12) 19).

[77] Santiago Principles (n 12) 22 (n 35).

minimize the reluctance of some host States.[78] For instance, the US executive branch actively promoted the Santiago Principles to overcome the hostility of the Congress. It is not surprising to notice that the then US Senator Hillary Clinton took a very critical position on SWFs before the Santiago Principles were adopted,[79] but assumed a much more positive stance as US Secretary of State a few years later. In this regard, she pointed out that "when the international community grew worried about sovereign wealth funds, countries, institutions, and the funds themselves came together to agree on the Santiago Principles, a code of conduct designed to reassure all stakeholders that these funds would act responsibly."[80]

4. The Santiago Principles: A Flawed Implementation

Given the inadequacy of the Santiago Principles to address the concerns raised by SWFs, the issue of their implementation should be of very limited interest. However, studying the implementation mechanisms reveals another objective of this instrument, namely to ensure a façade of respectability for SWFs.

Described as "a voluntary set of principles and practices that [SWFs] support and either have implemented or aspire to implement",[81] the Santiago Principles can be seen as a soft-law instrument. Their implementation primarily depends on the SWFs and their State of origin. The sole reference to Santiago Principles implementation is found in GAPP 24, which states that "a process of regular review of the implementation of the GAPP should be engaged in by or on behalf of the SWF". Insofar as self-assessment performed by the funds is of a limited interest considering its possible bias, attention needs to be directed towards the institutional mechanism established to promote implementation. In that respect, the Working Group that adopted the principles decided to maintain an institutional platform by establishing the International Forum of Sovereign Wealth Funds (IFSWF) in April 2009.[82] In light of the soft-law dimension of the Santiago Principles, the IFSWF clearly stated from its inception that

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[78] See Malathouni (n 35) 281 (noting that "the Santiago Principles constitute a compromise document through which SWF holder countries attempted to appease the concerns of SWF recipient countries").

[79] See Laura Badian & Gregory Harrington, *The Evolving Politics of Sovereign Wealth Funds*, in *Sovereign Wealth Funds – A Legal, Tax and Economic Perspective*, 138 (New York; PLI, 2010).

[80] *Speech of Hillary Clinton, Secretary of State, Economic Club of New York* (14 October 2011) <http://www.state.gov/secretary/20092013clinton/rm/2011/10/175552.htm> accessed 28 January 2016.

[81] Santiago Principles (n 12) 5. The introductory note further points out that "the GAPP denotes general practices and principles, which are potentially achievable by countries at all levels of economic development. The GAPP is subject to provisions of intergovernmental agreements, and legal and regulatory requirements. Thus, the implementation of each principle of the GAPP is subject to applicable home country laws."

[82] IWGSWF, *"Kuwait Declaration": Establishment of the International Forum of Sovereign Wealth Funds* (6 April 2009) <http://www.iwg-swf.org/index.php?home=kuwaitdec.php> accessed 28 January 2016. This declaration states that the purpose of the Forum "will be to meet, exchange views on issues of common interest, and facilitate an understanding of the Santiago Principles and SWF activities."

"the Forum shall not be a formal supranational authority and its work shall not carry any legal force."[83] However, despite the good intentions displayed at that time, it turns out that the forum does not contribute to the implementation of the Santiago Principles by SWFs. Four salient elements can be mentioned to support this view.

Firstly, the forum's limited membership significantly reduces its significance. Indeed, only 30 funds coming from 28 countries are represented.[84] Several States with significant SWFs (Saudi Arabia, Algeria, Brunei) are not represented at all. In a more insidious way, some States owning several SWFs are represented only by one fund at the forum. Such is the case for China, whose China Investment Corporation (CIC) is an active IFSWF member, whereas its other significant fund, the State Administration of Foreign Exchange (SAFE), is not. The latter is responsible for managing China's foreign exchange reserves, and its financial clout is equivalent to CIC. SAFE has carried out controversial investments indicating it acted on directives from the Chinese government.[85] This suggests that the CIC acts as the star of Chinese sovereign investments, a situation preventing that any excessive attention is given to SAFE and its investments.

Second, there is a blatant lack of institutional control concerning the implementation of the Santiago Principles within the Forum. While "the Forum members shall be the SWFs who […] endorsed the Santiago Principles", it appears that about a third of the members – particularly sovereign funds from the Middle East – have never been subject and never intended to conduct an external assessment of the implementation of the Santiago Principles. This is the case for the second largest sovereign wealth fund in the world, the Abu Dhabi Investment Authority (ADIA), with more than 700 billion USD in assets. Its head – ironically – acted as the co-chair of the International Working Group of Sovereign Wealth Funds in charge of drafting the Santiago Principles.[86] As to the Santiago Principles, the ADIA only published a statement on its website noting that it "created a multi-disciplinary team to conduct a thorough internal compliance review", and concluded that "through this self assessment, we have verified and hereby confirm ADIA's compliance with the Santiago Principles."[87] No evidence of such assessment has been published so far, and little credence should be given to such statements, which lack precision as to the degree of compliance with the Santiago Principles. Besides, independent studies have been conducted on the ADIA, and they indicate that in fact there is a poor level of accountability and transparency.[88] Beyond the issue of compliance with the Santiago Principles, some authors have also pointed to the "inactive membership" of some funds

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[83] *Ibid*.

[84] The list of IFSWF members is available at <http://www.ifswf.org/members> accessed 28 January 2016.

[85] For the precedent concerning the investment in bonds issued by Costa Rica, see (n 2–9) and accompanying text.

[86] Adamson (n 68).

[87] Statement made on the ADIA's website available at <http://www.adia.ae/en/Governance/Santiago_Principles.aspx> accessed 28 January 2016.

[88] Truman (n 12) 76. See also Behrendt (n28) 6, 9.

within the Forum, underlining that "such behavior reflects adversely on the other members and on the credibility of the forum as an institution."[89]

Third, several aspects of IFSWF operations reinforce the perception of a lack of commitment and seriousness. Indeed, while it intends to promote transparency of sovereign funds, the Forum distinguishes itself by its opacity as well as discretion.[90] For instance, it did not publish any information between May 2010 and April 2011, only ending its silence for the announcement of its upcoming general assembly.[91] On this occasion, an SWF specialist ironically noted: "This is Just In: The IFSWF Said Something", while wondering at the same time "how should we, the public, understand SWFs based on eleven months of silence?".[92] This silence was all the more disconcerting that, during that period, the UN Security Council decided to freeze the assets of one of the Forum members, the Libyan Investment Authority.[93] Since then, the IFSWF has improved its institutional visibility, at least quantitatively, by publishing about ten short communiqués every year, mainly addressing matters of marginal importance (annual meetings, new members, relocation of the secretariat, etc.).[94]

Fourth and lastly, there is a significant gap between the values the Santiago Principles intend to promote[95] and the stance taken by some officials exercising substantial responsibilities in the Forum. The most striking example is certainly that of Mr Jin Liqun, former head of the CIC and former IFSWF chairman. Two questionable statements he made are insightful in determining a far-reaching contradiction between good intentions enshrined in the Santiago Principles and their actual application. Calling into question the welfare State systems in Europe, he declared in November 2011, in the wake of the European debt crisis that, "if you look at the troubles which have happened in European societies, this is purely because of the accumulated troubles

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89 Sarah Bagnall and Edwin M Truman, *IFSWF Report on Compliance with the Santiago Principles: Admirable but Flawed Transparency* 5 Peterson Institute for International Economics Policy Brief No. 11–14 (August 2011) <http://www.iie.com/publications/pb/pb11–14.pdf> accessed 28 January 2016. See also, Anne-Sylvaine Chassany, *QIA Leads Fund Rankings for Missing Santiago Governance Standards* Financial Times (27 October 2014); Simon Clark, Mia Lamar, and Bradley Hope, *The Trouble With Sovereign-Wealth Funds* Wall Street Journal (22 December 2015) (noting that the IFSWF Chairman "has little power to get funds to comply, as membership in the forum doesn't require funds to implement the high standards he is urging. At least five of the 29 forum members don't publish public annual reports. At least four don't disclose their asset size").

90 See also, Kratsas and Truby (n 35) 132.

91 For the communiqués published by the IFSWF, see <http://www.ifswf.org/news> accessed 28 January 2016.

92 See <https://oxfordswf.wordpress.com/2011/04/13/this-just-in-the-ifswf-said-something> accessed 28 January 2016. The blog of this author has been relocated to: <http://www.institutionalinvestor.com/Blogs-and-Columns-Ashby-Monks-Avenue-of-Giants.html#> accessed 28 January 2016.

93 See paras 19–21 of UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

94 See also Malathouni (n 35) 285 (noting that many documents published by the IFSWF are only accessible to IFSWF members).

95 As pointed out by the IFSWF: "the Forum is open to new members and welcomes sovereign funds willing to endorse the Santiago Principles and the values on which the Forum rests" (IFSWF, *Santiago Principles – 15 Case Studies* 8 (2014) <http://www.ifswf.org/sites/default/files/blog/files/SantiagoP15CaseStudies1_1.pdf> accessed 28 January 2016).

of the worn-out welfare society. The labour laws induce sloth and indolence rather than hard work."[96] He had also declared earlier that "China cannot be expected to bail out the Eurozone unless it opens hurdles to China and other high-growth markets."[97] The first statement could have been made by any private investor unwilling to invest in economies perceived as less efficient. While targeting an economic and social model and carrying particular weight due to his position, the first statement suggests the CIC is guided purely by economic and financial motives – and would thus be compatible with the Santiago Principles. The second statement is more controversial: it suggests that CIC investments in the Eurozone are contingent on a change within the EU and the foreign policies of its Member States; specifically, more Chinese access to European markets. Such a declaration would be nonsensical if made by a private investor, and this indicates that CIC investments are also guided by political and geopolitical motives which are certainly absent from its investment policy, and surely goes against the very spirit of the Santiago Principles.

Overall, the IFSWF as a cooperation platform for SWFs appears more akin to a "country club" that exclusively serves the interests of its members than a genuine international institution willing to impose discipline for the general interest.[98] Therefore, it seems extremely difficult to agree that the IFSWF "serves a global role of ownership and guardianship of the Santiago Principles."[99]

5. Conclusions

Ultimately, the genesis and the content of the Santiago Principles as well as the institutional framework allegedly dedicated to their implementation clearly show that this enterprise rather constitutes that of a public relations stunt to improve Western economies' perceptions of SWFs. Further confirmation is given by the statements of the former head of the CIC that "implementing the Santiago Principles can help a particular sovereign wealth fund to be better understood and accepted in the countries in which it invests."[100] The Santiago Principles shall neither be regarded as a genuine form of international regulation[101] nor as an international standard,[102] but rather as a veneer of respectability.

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[96] Tony Barber, *Enter the Technocrats* Financial Times (Asia Edition) 7 (12 November 2011).

[97] *A Chinese Lesson for Europe* Financial Times (Asia Edition) 2 (30 September 2011).

[98] One report dedicated to the implementation of the Santiago Principles pointed out in this respect that "the original intention was for the report to be a resource for members to learn from each other, which was one of the purposes of the establishment of the IFSWF" (IFSWF, *IFSWF Members' Experiences in the Application of the Santiago Principles* 45 (7 July 2011) <http://www.ifswf.org/sites/default/files/press-release/files/2011%20Report%20-%20Application%20of%20the%20Santiago%20Principles.pdf> accessed 28 January 2016).

[99] IFSWF (n 95) 8.

[100] Adamson (n 68).

[101] The IFSWF recently stated that the Santiago Principles constitute a "generally agreed global framework for SWFs" (IFSWF (n 95) 8).

[102] See n 52 and accompanying text.

This conclusion does not insinuate that sovereign funds, despite their compliance with the Santiago Principles, should be perceived as necessarily having political motives. However, it does assert that compliance with this instrument does not preclude a sovereign fund form carrying out investments based on political motives. Insofar as they do not adequately address the main concern of the host States of sovereign investments, the Principles should be considered futile. Eventually, created by sovereign funds for their own use, the Santiago Principles give us the opportunity to reflect on Adam Smith's warning made more than two centuries ago on what is now referred to as self-regulation:

> "The interest of the dealers, however, in any particular branch of trade […] is always in some respects different from, and even opposite to, that of the public […]. The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public."[103]

[103] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Book I, Chap. IX).