Asian Journal of International Law, 1 (2011), pp. 349–382
doi:10.1017/S2044251310000123
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First published online 11 November 2010

Global Standards for Sovereign Wealth Funds: The Quest for Transparency

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Abstract

Sovereign Wealth Funds (SWFs) are currently under increased scrutiny. This article aims at identifying the features and likely impact of the Generally Accepted Principles and Practices (GAPP), using two lenses, both well known to legal scholars, especially within global administrative law (GAL) studies: global standards and transparency. On the one hand, contrasting the GAPP with other types of global financial standards can help identify the most powerful incentives to foster compliance. On the other hand, even though the transparency provisions requesting SWFs to provide public information concerning their legal basis, structure, and financing decisions appear to be a step in the right direction, they need further clarification so that a proper balance between disclosure and the need to avoid unnecessary costs can be struck. Moreover, this article claims that the effectiveness of disclosure provisions in fostering the accountability of the funds depends also on the existence of structural elements.

Sovereign wealth funds (SWFs)—government-owned investment vehicles—have been around for decades. Yet they are currently under increased scrutiny because of their exceptional growth in number and size, and their relationship to prominent Western financial institutions. On the one hand, they work as pivotal actors by providing liquidity to Western companies, going as far as acting as "white knights" in the unfolding of the global financial crisis.[1] From this point of view, they constitute an opportunity deeply intertwined with the very future of capital markets.[2] On the other hand, some have expressed concern, mostly about the possible political (rather than economic) considerations guiding the conduct of the funds and their impact on the stability of the international financial system. The lack of transparency of these

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1. Among the latest ones to emphasize such a role, see Simon ROUGHNEEN and Diana IONESCU, "Sovereign Wealth Funds: White Knights to Ride Again?" *World Politics Review* (24 February 2009), online: World Politics Review <http://www.worldpoliticsreview.com/article.aspx?id=3345>.

2. See Richard A. EPSTEIN and Amanda M. ROSE, "The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow" (2009) 76 The University of Chicago Law Review 111.

https://doi.org/10.1017/S2044251310000123 Published online by Cambridge University Press

secretive funds, many of which are based in undemocratic countries, magnifies such worries.[3]

These concerns have led to a number of initiatives, first at the national and later on at the international level, to increase the regulation of the funds. Between 2007 and 2008, some governments restricted investments by SWFs. In the United States (US), Congress passed the Foreign Investment and National Security Act of 2007 (FINSA), which amended existing regulation regarding foreign acquisition and gave stronger powers to the Committee on Foreign Investment in the United States (CFIUS).[4] At the European Union (EU) level, only non-binding acts have been passed, calling for the application of existing legal instruments and supporting an international approach, based on the principle of transparency.[5] Several European states (Germany and France above all), though, have called for developments similar to the ones that took place in the US. Legislative action has been delayed but nevertheless the strong protectionist rhetoric was enough to spark SWF discontent.[6]

At the international level, the pivotal development has been the drafting of the Generally Accepted Principles and Practices for SWFs, the so-called "Santiago Principles" or "GAPP", published in October 2008.[7] They constitute an ambitious attempt to square the circle, so to speak, addressing Western countries' anxieties about the lack of accountability of the secretive funds, on the one hand (in this sense—as has been pointed out—they have a pre-emptive purpose against the adoption of protectionist and nationalist measures),[8] without, on the other hand, affecting the free

3. Concerns of this type are widespread and common to policy-makers and scholars alike. For a fuller discussion of the different concerns, see sections I.C and IV.

4. For a general overview of the functioning of CFIUS, see Paul ROSE, "Sovereigns as Shareholders" (2008) 87 North Carolina Law Review 102 at 126–37. See also Jennifer COOKE, "Finding the Right Balance for Sovereign Wealth Fund Regulation: Open Investment vs. National Security" (2009) 2 Columbia Business Law Review 728 at 748–65.

5. The roots of the EU approach to SWFs can be found in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. See Commission of the European Communities, *A Common European Approach to Sovereign Wealth Funds*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, COM(2008) 115 final (27 February 2008), online: Commission of the European Communities <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0115:FIN:EN:PDF>. The Council of the EU shared the Commission's view in a meeting held in March 2008. See Council of the European Union, *Presidency Conclusions*, 7652/1/08 (20 May 2008), online: Council of the European Union <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/99410.pdf> at para. 36. The European Parliament shared those same views. See *European Parliament Resolution of 9 July 2008 on Sovereign Wealth Funds*, European Parliament, online: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0355+0+DOC+XML+V0//EN&language=EN>. For a comment on the EU regulatory framework for SWFs, see Philippe GUGLER and Julien CHAISSE, *Sovereign Wealth Funds in the European Union—General Trust Despite Concerns*, Swiss National Centre of Competence in Research, NCCR Trade Regulation Working Paper No. 2009/04, 2009.

6. For a comparative study on national responses, see Matthew SAXON, "It's Just Business, or Is It?: How Business and Politics Collide with Sovereign Wealth Funds" (2009) 32 Hastings International and Comparative Law Review 693.

7. See *Sovereign Wealth Funds; Generally Accepted Principles and Practices; "Santiago Principles"* (October 2008), online: International Working Group of Sovereign Wealth Funds <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> [Santiago Principles].

8. See Anna GELPERN, *Sovereign Wealth and Hybrid Governance in International Finance*, National University of Singapore-Asian Society of International Law Working Paper 2009/2, 2009, at 13 and 24.

https://doi.org/10.1017/S2044251310000123 Published online by Cambridge University Press

movement of investments and without aggravating the countries with SWFs, who claim that their funds' behaviour responds to nothing but economic purposes.

Despite being only just over a year old, the GAPP have drawn significant attention. Some commentators have considered the Santiago Principles to be "deficient in a number of respects"[9] or similar to a "Band-Aid over a gaping wound".[10] Other observers have raised implementation and enforcement concerns.[11] But what are the features of the Santiago Principles as a model of global administration? Can they be effective for the aforementioned purposes? Do they strengthen the accountability of the funds, as has been frequently claimed?

This article aims to answer these questions, by framing the Santiago Principles in a broader context and by taking into account (and contrasting the Santiago Principles with) two more general trends, both well known to legal scholars, especially within global administrative law (GAL):[12] the spread of global financial standards and the increased call for transparency in global governance.

On the one hand, the Santiago Principles are global standards, i.e. a set of rules, compliance with which is voluntary. The use of international standards is not an exception, tailored on the specificity of SWFs, but must be understood within a general move towards this kind of regulation. Through a comparison with other types of global financial standards, features specific to the Santiago Principles can be pointed out and the model of regulation they enact can be explored. Moreover, this comparison helps to identify the most powerful incentives for fostering compliance with standards: in this sense, it looks critical for assessing the Santiago Principles' likely outcome and to suggest solutions to strengthen their effectiveness.

On the other hand, the content of the Santiago Principles is based largely on transparency and disclosure requirements, following the opinion—common to policy-makers as well as to many economists—that transparency is a key instrument in global financial regulation, necessary to ensure the accountability of the funds. Yet, in order to assess how far these standards go in achieving such a goal, it must be clear who the global regulators should be accountable to and what they should be

9. Rose, *supra* note 4 at 147.

10. Anthony WONG, "Sovereign Wealth Funds and the Problem of Asymmetric Information: The Santiago Principles and International Regulations" (2009) 34 Brooklyn Journal of International Law 1081 at 1106.

11. For a fuller discussion of the point, see below, section III.C.

12. Among the first sets of papers about GAL there are three journal symposia. See Benedict KINGSBURY, Nico KRISCH, and Richard B. STEWART, "The Emergence of Global Administrative Law" (2005) 68 Law and Contemporary Problems 15 [Emergence of GAL]; Benedict KINGSBURY and Nico KRISCH, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 European Journal of International Law 1 [Global Governance and GAL]; Benedict KINGSBURY, Nico KRISCH, and Richard B. STEWART, eds. (2005) 37 New York University Journal of International Law and Politics 1. Subsequent publications include sets of papers from conferences convened by the New York University School of Law Institute for International Law and Justice (IILJ) and its partner institutions: a substantial series of working papers and extensive bibliographies as well as links to papers from other scholars around the world can be found on the website. See website of the Global Administrative Law Project, online: IILJ <www.iilj.org/GAL>. See Istituto di Ricerche Sulla Pubblica Amministrazione (IRPA), *What is Global Administrative Law (GAL)?*, online: IRPA <http://www.irpa.eu/index.asp?idA=161>. See also S. CASSESE, B. CAROTTI, L. CASINI, M. MACCHIA, E. MACDONALD and M. SAVINO, eds., *Global Administrative Law: Cases, Materials, Issues*, 2nd ed. (New York: IILJ, NYU, 2008). This point is fully discussed below, in section III.B.

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accountable for. In other words, what type of accountability do the Santiago Principles provide for, if any at all?

The article is divided into four parts. In part I, the variety of existing SWFs and the problems involved in their regulation are discussed. In part II, a general overview of the drafting and the content of the Santiago Principles is provided. In part III, the Santiago Principles are framed in the context of the general spread of global financial standards. In this way, the differences between the Santiago Principles and other types of global standards can be pointed out and the possible application of the different incentives which can foster the implementation of standards to the area of SWFs is taken into account. Part IV focuses more specifically on the kind of transparency the Santiago Principles set forth, examining the requirements of the GAPP, the potential of transparency—as a general principle of GAL—within this specific sector and the type of accountability which is being pursued. The article ends with a concluding section.

I. SWFS: AN OVERVIEW

A. *History*

"Sovereign wealth funds"—as has been pointed out—is a new label for an old phenomenon.[13] The term "sovereign wealth funds" was coined in 2005, but such entities have existed since the 1950s, when the Kuwait Investment Authority was created, with the purpose of reinvesting surpluses from oil revenues.[14] SWFs increased later on, mainly in two waves. First during the oil boom of the 1970s, when funds such as Singapore's Temasek Holdings and the Abu Dhabi Investment Authority were established.[15] The most remarkable increase, though, is still taking place, as half of the funds have been created in the last decade.[16] Significantly, between 2007 and 2009, China, Russia, France, Saudi Arabia, and Brazil created SWFs,[17] while press reports suggest that India is considering following the same path.[18]

The definition of SWFs, though, has been highly disputed in recent years.[19] For the purposes of this article, the definition included in the Santiago Principles, according

13. Simon JOHNSON, "The Rise of Sovereign Wealth Funds" (September 2007) 44 Finance and Development, online: Finance and Development <http://www.imf.org/external/pubs/ft/fandd/2007/09/straight.htm>.

14. Andrew Rozanov is widely credited for being the first person to use this term. See Andrew ROZANOV, "Who Holds the Wealth of Nations?" (2005) 15 Central Banking Journal 4.

15. Bryan J. BALIN, "Sovereign Wealth Funds: A Critical Analysis" (2009), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477725>, at 2.

16. Daniel W. DREZNER, "Sovereign Wealth Funds and the (In)security of Global Finance" (2008) 62 Journal of International Affairs 115 at 116.

17. China Investment Corporation (CIC) was established in 2007. The Russian National Welfare Fund, the French Strategic Investment Fund, and the Saudi Arabia Public Investment Fund date back to 2008, while the newest fund is the Sovereign Fund of Brazil. See Sovereign Wealth Fund Institute, *Sovereign Wealth Fund Rankings*, online: SWFI <http://www.swfinstitute.org/funds.php>.

18. See Liz MAK, "India Considers Launching Sovereign Wealth Fund" *BusinessWeek* (16 April 2008), online: BusinessWeek <http://www.businessweek.com/globalbiz/content/apr2008/gb20080416_065494.htm>.

19. In February 2008, just a few months before the release of the Santiago Principles, the IMF listed as many as eight selected definitions of SWFs. See IMF, Monetary and Capital Markets and Policy Development and Review Departments, *Sovereign Wealth Funds—A Work Agenda* (2008), online: IMF

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to which SWFs are "special purpose investment funds or arrangements, owned by the general government … created for macroeconomic purposes … to achieve financial objectives"[20] will be referred to. Estimates concerning the number of SWFs vary (largely because of the lack of consent on a common definition):[21] a review prepared by the International Monetary Fund (IMF) in 2008 lists around thirty funds, while the Sovereign Wealth Funds Institute (a private organization which aims at studying such entities) currently names as many as fifty funds.[22]

Together with the increase in the number of such entities, there has also been an improvement in their size. While the global capital market has doubled between 2003 and 2008, in the same period asset holdings of SWFs have tripled,[23] growing at an annual rate of twenty-four percent.[24] The total amount of foreign assets in SWFs is estimated to be between US$2 to 3 trillion.[25] Notwithstanding the losses some SWFs have suffered during the financial turmoil (estimated as twenty-seven percent of the value of their assets for Gulf foreign-reserve funds),[26] recent analysis concluded that SWFs will continue to grow in the future.[27] To put these data in perspective, it must be considered that the size of their assets currently amounts to more than those managed by hedge funds, but much less than pension funds and central bank foreign reserve holdings.[28] Hence, they are currently the world's fastest growing institutional investors and their role is expected to increase further.[29]

B. *Features and Ownership Patterns*

SWFs differ hugely from each other, so that it has been said that there is no such thing as a "typical" SWF.[30] There are several reasons for this.

<http://www.swfinstitute.org/research/imfswfreport.pdf> at 37–8. Yet, as the Santiago Principles incorporated a commonly shared definition, disputes on the matter between scholars and practitioners in the field are likely to diminish.

20. Santiago Principles, *supra* note 7 at appendix 1, para. 2.
21. Andrew ROZANOV, *What is "Sovereign Wealth" Anyway?* (National University of Singapore-Asian Society of International Law Working Paper 2009/1).
22. The SWF Institute is an organization designed to study SWFs and their impact on global economics and financial markets. See Sovereign Wealth Fund Institute, *About Us*, online: SWFI <http://www.swfinstitute.org/aboutus.php>. The consequences on the number of SWFs, according to the chosen definition, have been explored by Andrew Rozanov. See Rozanov, *supra* note 21 at 6–15.
23. Edwin TRUMAN, "Prepared Statement of Edwin Truman, PhD, Senior Fellow, Peterson Institute for International Economics" in United States House of Representatives, Committee on Foreign Affairs, *The Rise of Sovereign Wealth Funds: Impacts on US Foreign Policy and Economic Interests*, 2nd Sess., Serial No. 110-190 (21 May 2008), 20 at 21.
24. Drezner, *supra* note 16 at 116.
25. See IMF, *supra* note 19 at 6.
26. Brad SETSER and Rachel ZIEMBA, *GCC Sovereign Funds—Reversal of Fortune* (Council on Foreign Relations, Working Paper, 2009) at 2.
27. Steffen KERN, "Sovereign Wealth Funds—State Investments During the Financial Crisis", online: Deutsche Bank Research <http://www.dbresearch.com/PROD/DBR_INTERNET_DE-PROD/PROD0000000000244283.PDF>.
28. Kern, *ibid.*, at 5 and 10. See also Joshua AIZENMAN and Reuven GLICK, *Sovereign Wealth Funds: Stylized Facts About Their Determinants and Governance* (National Bureau of Economic Research, NBER Working Paper 14562, 2008), online: NBER <http://www.nber.org/papers/w14562>, at 2.
29. The most recent data are in Kern, *supra* note 27, and Aizenman and Glick, *supra* note 28.
30. Rozanov, *supra* note 21 at 6.

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First, they vary steadily in size, with the top six funds (the Abu Dhabi Investment Authority, Norway's Government Pension Fund-Global (GPFG), Saudi Arabia's Public Investment Fund, China Investment Corporation, Singapore's Government Investment Corporation (GIC), and the Kuwait Investment Authority) counting for roughly three-quarters of SWFs' total resources.[31]

Second, SWFs are typically grouped, on the basis of the source of their assets, in "commodity" funds (established for the purpose of reinvesting the surpluses of oil, gas, or other natural resource revenues) and "non-commodity" funds (created on the basis of high current account surpluses).[32] In 2008, the IMF estimated that two-thirds of total assets were concentrated in the oil and gas exporting countries.[33]

Not only the origin of the surplus, but also the very objectives and economic strategies of the SWFs vary. From this perspective, the main distinction is the one between *stabilization* funds, where the primary objective is to insulate the budget and the economy against commodity price swings, and *savings* funds for future generations.[34] Anyhow, it must be pointed out that there might be a mixture of motivations, which may be multiple or overlapping.[35] Moreover, these objectives can change over time: for example, a shift in the funds' investment strategy, from primarily conservative debt instruments to higher risk/reward equity investments, has been observed. Between 2006 and 2007, SWFs made remarkable investments in companies in the US and Europe;[36] later on, in the unfolding of the subprime crisis, SWFs came to the rescue of banking institutions such as Merrill Lynch,[37] ending up in playing a stabilizing role in the global financial system.[38] Currently, SWFs (especially from Asia and the Middle East) hold

31. Aizenman and Glick, *supra* note 28 at 6. For the most recent ranking of the SWFs, see SWFI, *supra* note 17.

32. For example, Asian countries, such as China and Korea, "benefit from the low-exchange rate of their currency, making their goods attractive for export". 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" (2008), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1308542>, at 4. The existence of such a surplus is thus a precondition for the creation of an SWF: that is why the idea of establishing European SWFs, while many European countries—such as the UK, Italy, Spain, and most countries of Central and Eastern Europe—are running large account deficits, seems unfeasible to many commentators. See Kavaljit SINGH, *Europe Doesn't Need Sovereign Wealth Funds* (2008), online: VOX <http://www.voxeu.org/index.php?q=node/2585>.

33. See IMF, *supra* note 19 at 7.

34. The IMF draws an even more precise distinction, between five types of SWFs: "(i) *stabilization funds*, where the primary objective is to insulate the budget and the economy against commodity … price swings; (ii) *savings funds* for future generations, which aim to convert nonrenewable assets into a more diversified portfolio of assets … ; (iii) *reserve investment corporations*, whose assets are often still counted as reserve assets; (iv) *development funds*, which typically help fund socio-economic projects or promote industrial policies that might raise a country's potential output growth; and (v) *contingent pension reserve funds*, which provide (from sources other than individual pension contributions) for contingent unspecified pension liabilities on the government's balance sheet." *Ibid*., at 5.

35. See Edwin M. TRUMAN, "Sovereign Wealth Funds: The Need for Greater Transparency and Accountability" (2007) PB07-6 Policy Brief of the Peterson Institute for International Economics, online: Peterson Institute for International Economics <http://www.iie.com/publications/interstitial.cfm?ResearchID=783> at 4. See also IMF, *ibid*., at 5–6.

36. Katharina PISTOR, "Sovereign Wealth Funds, Banks and Governments in the Global Crisis: Towards a New Governance of Global Finance?" (2009) 10 European Business Organization Law Review 333 at 336.

37. George S. ALLAYANNIS, "The Case of Sovereign Wealth Funds: A New (Old) Force in Capital Markets" (2009), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418910>.

38. Tao SUN and Heiko HESSE, *Sovereign Wealth Funds and Financial Stability* (2009), online: VOX <http://www.voxeu.org/index.php?q=node/3360>.

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significant shares in Western companies, and especially financial ones.[39] Thus, capital flows are taking place from East to West. Such a tendency has been described in various ways (as "state capitalism as opposed to market capitalism"[40] or "new mercantilism"[41]); whatever the ideological underpinnings, the significance of such trends (contrary to the traditional West-East or North-South model of capital transactions) cannot be denied.[42]

Also SWFs' legal status, governance patterns, and transparency are highly differentiated.[43] As for the legal status, some SWFs have a distinct legal personality (such as Singapore's Temasek Holdings and the Kuwait Investment Corporation) while others do not (for example, the GPFG is established as a deposit account at the Norwegian Central Bank).[44] Also the governance structure—and, more specifically, the respective roles of the government and the funds' managers—varies steadily. In some cases, the powers of the government with regards to SWFs are clearly spelled out, while in other cases they are more ambiguous.[45]

Moreover—and particularly relevant for purposes of this article—SWFs present different levels of transparency. According to a review published shortly before the drafting of the Santiago Principles, while some funds have put in place extensive disclosure practices for a long time (such as the Alaska Permanent Fund and the GPFG),[46] a third of the funds provide no information at all on their investment

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39. Kern, *supra* note 27 at 26 (Chinese CIC holds a 9.9% share in Morgan Stanley; Singapore holds 11.1% in Citigroup, 9.9% in Merrill Lynch, and 9% in UBS; the South Korean KIC 7.4% in Merrill Lynch; Abu Dhabi's ADIA 4.9% in Citigroup; and Kuwait KIA 6% in Citigroup and 5.7% in Merrill Lynch). It is apparent that financial firms dominate the list of recent SWF deals. See Balin, *supra* note 15 at 7.

40. Ronald J. GILSON and Curtis J. MILHAUPT, "Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism" (2008) 60 Stanford Law Review 1345 at 1346.

41. *Ibid*.

42. See Katharina PISTOR, *Global Network Finance—Reassessing Linkages Between Sovereign Wealth Funds and Western Banks*, American Law & Economics Association Annual Meetings, Working Paper 54, 2008, at 8.

43. See Joshua AIZENMAN and Reuven GLICK, *Sovereign Wealth Funds, Governance, and Reserve Accumulation* (2009), online: VOX <http://www.voxeu.org/index.php?q=node/2799>.

44. About the variety of different legal status of SWFs, see de Meester, *supra* note 32 at 4. About the Norwegian GPFG, see Anita M. HALVORSSEN, *The Norwegian Sovereign Wealth Fund Addresses the Interrelated Challenges of Climate Change and Sustainable Development—A Model for Regulating Other Sovereign Wealth Funds (SWF)*, National University of Singapore-Asian Society of International Law Working Paper 2009/7.

45. For example, the Norwegian Ministry of Finance is responsible for GPFG's investment strategy, but the operational management has been delegated to the Norwegian Central Bank and is being carried on by the Norges Bank Investment Management (NBIM), strictly separated from the Central Bank itself. See Halvorssen, *ibid*., at 18–19. A similar division of competences (but with a slightly stronger role of the government) takes place with regard to Singapore's GIC and Temasek Holdings: the daily activity falls within the competence of the management of the funds, but the financial statements and proposed budgets must be submitted to the President for approval. See Yvonne LEE, *Overlapping Regimes of Governance and Regulation: A Case Study of Singapore "Sovereign Wealth Funds"*, National University of Singapore-Asian Society of International Law Working Paper 2009/8, at 31. In other cases (such as Brunei, Oman, Qatar, Sudan, and Abu Dhabi), the role of the government is not defined at all. See Edwin M. TRUMAN, "A Blueprint for Sovereign Wealth Fund Best Practices" (2008) PB08-3 Policy Brief of the Peterson Institute for International Economics, online: Peterson Institute for International Economics <http://www.petersoninstitute.org/publications/interstitial.cfm?ResearchID=902>, at 9 and 19.

46. According to the aforementioned review, the top ranking SWFs from the point of view of transparency at the time were the Alaska Permanent Fund and Norway's GPFG, which have provided extensive

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strategy and some of them do not make public even the size of their investment activities.[47] Thus, the recently approved Santiago Principles are addressing highly differentiated institutions, and this point must be kept in mind when analysing their likely impact.

Lastly, it must be pointed out that the common claim according to which SWFs are established by non-Western and often non-democratic governments does not apply to all the funds.[48]

C. *Criticisms*

Despite the fact that SWFs are not new, criticisms about them have only begun in recent years. The growing debate is due not only to the rapid growth in the number and size of the SWFs, but also to their aforementioned massive capital infusion into financial institutions in the wake of the subprime mortgage crisis and to the shift in their investment strategy from primarily conservative debt instruments to higher risk/reward equity investments.

Criticisms address political, economical, and regulatory risks.[49] As Paul Rose puts it:

> [A]re SWFs benign, long-term investors that will add stability to global capital markets? Or do SWFs represent a new kind of state capitalism that threatens our national security by allowing our political rivals access to and control of our firms and technologies?[50]

First, fears have been raised in the US and Europe that these funds—most of which are based in the Middle East and Asia—will use their economic power to pursue political goals.[51] Being owned by a sovereign entity, SWFs might be used for purposes such as the acquisition of sensitive technologies or of limited natural resources.[52] Second, other observers consider the risk for systemic instability to be the core problem.[53] Lastly, the lack of transparency of SWFs, and the strictly connected

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information on their investment strategies and investment returns (even through the publication of quarterly reports) for a long time; see Truman, *supra* note 45 at 20.

47. *Ibid*., at 11. The review was conducted by Edwin M. Truman and Doug Dowson in April 2008, just a few months before the Santiago Principles were drafted (and as the drafting process was about to start).

48. Represented geographical areas are very diverse: there are advanced economies such as Norway and the United States (with the Alaska Permanent Reserve Fund); Islamic countries such as Saudi Arabia, Kuwait, and Iran; Asian and Pacific countries (such as Australia, China, Korea, and Singapore, which hold more than half of these assets); together with small insular states such as Trinidad and Tobago or huge ones such as Russia. See Johnson, *supra* note 13. However, some have pointed out that industrial countries hold more than 40 percent of SWF international assets (with the US leading with US$800bn in SWF international assets). See Truman, *supra* note 45.

49. More sophisticated distinctions have been suggested. "The risks associated with SWFs can be usefully broken into three core areas: the risk of financial contagion; the exercise of soft political power; and national security considerations." Justin O'BRIEN, "Barriers to Entry: Foreign Direct Investment and the Regulation of Sovereign Wealth Funds" (2008) 42 International Lawyer 1231 at 1237. Anthony Wong names the following concerns: lack of transparency, economic protectionism, market distortions, conflicts of interest, strategic positioning, and national security. See Wong, *supra* note 10 at 1090–8.

50. Rose, *supra* note 4 at 111–12.

51. Epstein and Rose, *supra* note 2 at 116.

52. Rose, *supra* note 4 at 111–12. See also Cooke, *supra* note 4 at 736–40.

53. de Meester, *supra* note 32 at 5.

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problem of asymmetric information,[54] has been said to constitute a "regulatory challenge".[55]

The assessment of such risks, though, proves tricky, as there is no evidence of SWFs having pursued political goals in the past[56] and some estimate even the systemic risk to be hypothetical.[57] On the other hand, the lack of transparency and the problem of asymmetric information cannot be denied, even though their respective evaluation varies across observers.[58]

The debate is far from settled. Some scholars have argued that the current domestic legal framework is well suited to address the most common concerns (e.g. those related to national security and transparency) and that, in any case, the most dangerous risk lies in the threat of protectionism.[59] Other scholars have focused mainly on the need for an attentive, proper balance between open investment and national security.[60] From a broader perspective, some legal scholars and political scientists have investigated the implications of SWFs' growth for systemic conceptions and for the features of global financial governance, such as the blurring of the public-private divide[61] and the shift of the distribution of power from advanced industrialized states towards emerging countries.[62]

The suggested solutions vary widely. Still, even among those who draw primarily on a domestic legal response, a call for an international solution is common.[63] International regulation, while not preventing domestic regulators from imposing disclosure requirements or other forms of protection on SWFs, is best suited to create a level playing field, preventing a race to the bottom and overregulation due to nationalist and protectionist pressures.[64] This makes the assessment of the potential impact and systematic implications of the Santiago Principles—the most relevant initiative which has been taken at the international level in this regard—even more crucial. The analysis will now turn to the drafting process of the Santiago Principles and will provide an overview of their content.

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54. Wong, *supra* note 10 at 1098. Moreover, there is potential for abuse of informational disparities, such as the risk that the government would use information gained through national intelligence services in market activities, to the disadvantage of private investors. See Rose, *supra* note 4 at 115–16.

55. Rose, *supra* note 4 at 114.

56. Brendan J. REED, "Sovereign Wealth Funds: The New Barbarians at the Gate? An Analysis of the Legal and Business Implications of their Ascendancy" (2009) 4 Virginia Law and Business Review 97 at 104–5. See also Epstein and Rose, *supra* note 2 at 116, and Gugler and Chaisse, *supra* note 5 at 44.

57. O'Brien, *supra* note 49 at 1237.

58. Opinions about the likely impact of the SWFs' transparency are in section IV.

59. From the US perspective, see Reed, *supra* note 56. See also Epstein and Rose, *supra* note 2.

60. Cooke, *supra* note 4. See also Mark E. PLOTKIN, "Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together to Make the United States More Secure" (2008) 118 Yale Law Journal Pocket Part 88, online: YLJ Online <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/foreign-direct-investment-by-sovereign-wealth-funds-/>.

61. See Larry CATÁ BACKER, "Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience" (2009) 19 Transnational Law and Contemporary Problems 3. See also Pistor, *supra* note 42.

62. Drezner, *supra* note 16 at 115. See also Gelpern, *supra* note 8.

63. Rose, *supra* note 4 at 145.

64. Wong, *supra* note 10 at 1098–102. About the shortcomings of national approaches to SWF regulation, see Catá Backer, *supra* note 61 at 181. See also de Meester, *supra* note 32 at 18.

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II. THE SANTIAGO PRINCIPLES: DRAFTING PROCESS, INSTITUTIONAL ARCHITECTURE, STRUCTURE AND CONTENT

A. *The Drafting Process*

The Santiago Principles have been elaborated by the International Working Group of SWFs (IWG), comprising representatives from twenty-five IMF member countries owning an SWF,[65] while the IMF itself acted as a secretariat. As the Santiago Principles were published in October 2008, only six months after the establishment of the IWG,[66] the drafting process appears to have been extremely quick and smooth.[67]

Yet it must be recalled that the process which lead to the establishment of the IWG dates back to 2007 and that the G7 took the first step.[68] Both the US[69] and the EU[70] explicitly supported this international effort. That is why some scholars consider the Santiago Principles to be the product of Western countries' influence.[71] Later on, though, the drive by the US and the EU stirred resentment among some

65. IWG member countries 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 and Tobago, the United Arab Emirates, the US, and Vietnam. Saudi Arabia, the OECD, and the World Bank participate as permanent observers.

66. See International Monetary Fund, Press Release No. 08/97, "International Working Group of Sovereign Wealth Funds is Established to Facilitate Work on Voluntary Principles" (1 May 2008), online: IMF <http://www.imf.org/external/np/sec/pr/2008/pr0897.htm>.

67. See International Monetary Fund, "Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund" (11 October 2008), online: IMF <http://www.imf.org/external/np/cm/2008/101108a.htm>, at para. 8.

68. As is well documented in the academic literature, the identification of best practices for the funds, in such areas as institutional structure, risk management, transparency, and accountability, was first suggested by the G7 Finance Ministers, which invited both the IMF and the OECD to take the lead during their meeting on 19 October 2007. See G7/8 Finance Ministers Meeting, "Statement of G7 Finance Ministers and Central Bank Governors" (19 October 2007), online: G8 Information Centre <http://www.g7.utoronto.ca/finance/fm071019.htm>. The following day, the International Monetary and Financial Committee of the Board of Governors of the IMF published a Communiqué which shared the view of the G7 about SWFs. See International Monetary Fund, "Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund" (20 October 2007), online: IMF <http://www.imf.org/external/np/cm/2007/102007a.htm>.

69. The subject of SWFs has been discussed during several public hearings. See United States Senate, Committee on Banking, Housing, and Urban Affairs, "Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the U.S.: Assessing the Economic and National Security Implications" (14 November 2007). See also United States Senate, Financial Services Subcommittee on Domestic and International Monetary Policy, Trade and Technology, and the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, "Foreign Government Investment in the U.S. Economy and Financial Sector" (5 March 2008). The work of the IMF has been endorsed by the US Treasury Department: Treasury Secretary Henry Paulson met representatives from the governments of Singapore and Abu Dhabi in March 2008. On that occasion, common support for the initiatives under way at the IMF and OECD to develop best practices for SWFs was expressed and agreement on a common set of principles was reached. See US Treasury, Press Release, "Treasury Reaches Agreement on Principles for Sovereign Wealth Fund Investment with Singapore and Abu Dhabi" (20 March 2008), online: US Treasury <http://ustreas.gov/press/releases/hp881.htm>. See also Robert M. KIMMITT, "Public Footprints in Private Markets" (2008) 87 Foreign Affairs 119. According to Rose, the US Treasury officials informally suggested a framework for best practices on 19 March 2008, and reached agreement with Abu Dhabi and Singapore on this basis. See Rose, *supra* note 4 at 151–2.

70. The Communication about SWFs, of February 2008, called for an international approach and explicitly supported the then ongoing Santiago process. See Commission of the European Communities, *supra* note 5 at 6.

71. Reed, *supra* note 56 at 118.

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of the countries owning SWFs, particularly in China and some in the Persian Gulf.[72] The IMF was perfectly aware of this attitude and clearly signalled that a one-sided approach could be counter-productive.[73] The establishment of the IWG, in May 2008,[74] can thus be seen as an institutional answer addressing SWFs' concerns and as a shift from a standard-setting process in which Western countries took the lead towards a drafting process in which the SWFs played a central role.

The IWG met three times, while one subgroup carried on the technical drafting work.[75] As mentioned above, the Santiago Principles were published a few months after the establishment of the group: thus, notwithstanding the premises, they can be considered the result of a co-operative work between SWFs, with inputs coming from advanced countries.[76]

B. *The Institutional Architecture: The International Forum of SWFs (IFSWF)*

The IWG was a temporary group, created for a specific task, and the IMF, as mentioned above, acted as a secretariat. Before examining the content of the Santiago Principles, account must be given of a pivotal structural improvement. In April 2009, a couple of days after the G20 Summit in London, the IFSWF was established.[77]

The purpose of the IFSWF—according to the Kuwait Declaration—is to exchange opinions between SWFs on issues of common interest and to share views on the application of the Santiago Principles "including operational and technical matters".[78] Together with the tasks of maintaining a stable global financial system and investing on the basis of economic and financial risk, two aspects that are more interesting for the purposes of the present article are the following: the IFSWF supports compliance

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72. In May 2008, United Arab Emirates' Central Bank Governor Sultan bin Nasser Al Suwaidi (who, according to an IMF statement, was speaking on behalf of other Arab Central Bank governors, from Bahrain, Egypt, Kuwait, Iraq, Lebanon, Libya, Oman, Syria, and Yemen) criticized the IMF initiative, saying it lacked sufficient experience on the issue of SWFs. See "Suwaidi Critical of IMF Attempt to Monitor SWF Investments in West" *Emirates Business* (9 May 2008), online: Emirates Business <http://www.business24-7.ae/Articles/2008/5/Pages/05092008_a08c25e733b442e78cefedaeb74ce408.aspx>. On the Chinese criticism and on the significance of both statements for the development of the Santiago process, see Gugler and Chaisse, *supra* note 5 at 42.

73. The IMF Deputy Managing Director, John Lipsky, declared that "[i]f there were a sense that somehow 'best practices' were decided by someone else and dictated to the funds, that could be extremely counterproductive". Bob DAVIS, "US Pushes Sovereign Funds to Open to Outside Scrutiny" *The Wall Street Journal* (26 February 2008), online: Financial News <http://www.efinancialnews.com/privateequity/content/2349895739/licensing@efinancialnews.com>.

74. See International Monetary Fund, Press Release No. 08/97, "International Working Group of Sovereign Wealth Funds is Established to Facilitate Work on Voluntary Principles" (1 May 2008), online: IMF <http://www.imf.org/external/np/sec/pr/2008/pr0897.htm>.

75. See Santiago Principles, *supra* note 7 at 1.

76. "The IWG also benefited from input from a number of recipient countries—Australia, Brazil, Canada, France, Germany, India, Italy, Japan, South Africa, Spain, the United Kingdom, and the United States—as well as from the European Commission, the OECD and the World Bank." Santiago Principles, *supra* note 7 at 2.

77. See International Working Group of Sovereign Wealth Funds, Press Release No. 09/01, "Working Group Announces Creation of International Forum of Sovereign Wealth Funds" (6 April 2009), online: IWG <http://www.iwg-swf.org/pr/swfpr0901.htm>.

78. International Working Group of Sovereign Wealth Funds, "'Kuwait Declaration': Establishment of the International Forum of Sovereign Wealth Funds" (6 April 2009), online: IWG <http://www.iwg-swf.org/mis/kuwaitdec.htm>.

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with all disclosure requirements in the countries in which SWFs invest and the establishment of a transparent and sound governance structure that provides for adequate accountability.

The structure of the IFSWF is as follows. Three subcommittees have already been established, which will work on (i) experiences in the application of Santiago Principles to date, (ii) investment and risk management practices, (iii) international investment environment, and recipient country relationships. The IFSWF shall have a secretariat, but the IMF is initially undertaking this role.

As for its legal status, the Kuwait Declaration clearly states that the IFSWF shall not be a formal supranational authority and that its work shall not carry any legal force.

C. *Structure and Content*

The Generally Accepted Principles and Practices, the so-called "Santiago Principles", are a set of twenty-four practices and principles. Their objectives are clearly stated in the introduction to the document:

> [T]o help maintain a stable global financial system and a free flow of capital and investment … to comply with all the applicable regulatory and disclosure requirements in which they invest … to invest on the basis of economic and financial risk … to have in place a transparent and sound governance [system] that provides for adequate … accountability.[79]

The document is divided into three parts. While the last one gives a definition of an SWF and lists the IWG members, the first part enumerates the twenty-four principles and the second one provides a short explanation of each of them. The twenty-four principles are grouped into three key areas: (i) legal framework, objectives, and co-ordination with macroeconomic policies (five principles), (ii) institutional framework and governance structure (twelve principles), and (iii) investment and risk management framework (seven principles). In some cases, subprinciples are set forth.

"The policy purpose of the SWF should be clearly defined and publicly disclosed."[80] "The governance framework … should be sound and establish a clear and effective division of roles and responsibilities".[81] Thus, the GAPP do not provide for an ideal type governance structure (which could have proved problematic, given the great variety across SWFs), recognizing the funds' autonomy in determining their internal patterns, given that the operational management is conducted on an independent basis.[82] Also "the accountability framework for the SWF's operations should be clearly defined in the relevant legislation, charter, or other constitutive document".[83] The institutional framework set forth in the GAPP requires SWFs' operations to be audited in accordance with international or national standards (such as the International

79. Santiago Principles, *supra note* 7 at 4.
80. *Ibid.*, at GAPP 2 Principle.
81. *Ibid.*, at GAPP 6 Principle.
82. See Rose, *supra* note 4 at 138, and Cooke, *supra* note 4 at 766–8.
83. Santiago Principles, *supra* note 7 at GAPP 10 Principle.

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Standards on Auditing (ISA) of the International Federation of Accountants (IFAC)) and to define professional and ethical standards.[84] Also, the investment and risk management framework clearly takes into account concerns over the potential political purpose of the funds and their impact for financial stability. "SWF's investment policy should be consistent with its defined objectives … and be based on sound … management principles."[85] As for the problem of asymmetric information, "SWFs should not … take advantage of privileged information by the broader government in competing with private entities".[86] Many of the most significant provisions of the GAPP refer to disclosure requirements, and will be discussed in the following pages.[87]

III. GLOBAL STANDARDS FOR SWFS

A. *Global Financial Standards and Global Administration*

As mentioned above, a clearer understanding of the features and potential impact of the Santiago Principles can profit from their framing within the general trend towards the setting of international financial standards.

International standards have been developed for a long time. The Basel Committee for Banking Supervision (BCBS), which sets the standards for banking supervision, was established by the G10 central bank governors in 1974.[88] Yet what has been called a form of "explosion" of global standards took place during the 1990s,[89] and has been matched by a growing literature on the subject.[90] Following the Asian financial crisis,

84. *Ibid*., at GAPP 12 and 13 Principles.

85. *Ibid*., at GAPP 18 Principle.

86. *Ibid*., at GAPP 20 Principle.

87. See below, section IV.A.

88. About BCBS's origin and structure, see Duncan R. WOOD, *Governing Global Banking: The Basel Committee and the Politics of Financial Globalization* (Aldershot: Ashgate Publishing, 2005).

89. See John J. KIRTON and Michael J. TREBILCOCK, "Introduction: Hard Choices and Soft Law in Sustainable Global Governance" in John J. KIRTON and Michael J. TREBILCOCK, eds., *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot: Ashgate Publishing, 2004), 3 at 4–5.

90. Political scientists have pointed out that there is a political struggle behind the technical appearance of standards. See Walter MATTLI and Tim BÜTHE, "Setting International Standards: Technological Rationality or Primacy of Power?" (2004) 56 World Politics 1. Among the recent political sciences studies about international standards, see the essays in "Governance and International Standards Setting" special issue edited by Walter MATTLI in (2001) 8 Journal of European Public Policy 345. See Judith GOLDSTEIN, Miles KAHLER, Robert O. KEOHANE and Anne-Marie SLAUGHTER, eds., *Legalization and World Politics* (Cambridge, MA: MIT Press, 2001). See also Nils BRUNSSON and Bengt JACOBSSON, eds., *A World of Standards* (Oxford: Oxford University Press, 2002). See also Dieter KERWER, "Rules that Many Use: Standards and Global Regulation" (2005) 18 Governance 611. Legal scholars started studying this subject as well, with a systematic analysis for technical standards. See Harm SCHEPEL, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart, 2005). Examining more specific aspects in other sectors, see Sabino CASSESE, "Global Standards for National Administrative Procedure" (2005) 68 Law and Contemporary Problems 109 (examining global administrative law issues connected with standards). About the different types of international standards, see Herbert V. MORAIS, "The Quest for International Standards: Global Governance vs. Sovereignty" (2002) 50 University of Kansas Law Review 779. See Steve CHARNOVITZ, "International Standards and the WTO", George Washington University Law School, Legal Studies Research Paper No. 133, 2005, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=694346>. For international standards in the financial services sector, see Robert P. DELONIS, "International Financial Standards and Codes: Mandatory Regulation Without

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international financial standards were intended to become the architrave of a "new international financial architecture", together with the establishment of two new institutions (the G20 and the Financial Stability Forum (FSF)).[91]

Financial standard setters are traceable to different types of global administration (following the models elaborated within GAL studies: see section IV).[92] To start with, international organizations such as the IMF, the World Bank, and the Organization for Economic Cooperation and Development (OECD) establish standards for monetary and fiscal transparency, insolvency, and corporate governance, respectively. In the second place, transnational regulatory networks such as BCBS, the International Organization of Securities Commissioners (IOSCO), and the International Association of Insurance Supervisors (IAIS) develop rules for banking, securities, and insurance supervision, respectively.[93] Third, some private organizations, such as the International Accounting Standards Board (IASB) and the International Auditing and Assurance Standards Board (IAASB), one of the IFAC's technical committees, draft global standards for accounting and auditing, and are therefore examples of private global governance. Fourth, financial standard-setting bodies also include some hybrid organisms (corresponding to the hybrid intergovernmental-private administration) amongst their number. One such example is the FSF, now Financial Stability Board (FSB),[94] which brings together not only the transnational regulatory networks for banking, securities, and insurance supervision (BCBS, IOSCO, and IAIS, respectively), but also intergovernmental

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Representation" (2004) 36 New York University Journal of International Law and Politics 563; and David ZARING, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations" (1998) 33 Texas International Law Journal 281. Economists started studying the impact of international standards on trade, especially of technical standards, as they can work as powerful non-tariff barriers to trade. See Knut BLIND, *The Economics of Standards: Theory, Evidence, Policy* (Cheltenham: Edward Elgar Publishing, 2004).

91. After the Asian financial crisis, the stress on the emergence of a new international financial architecture is particularly frequent. See Barry EICHENGREEN, *Toward a New Financial Architecture: A Practical Post-Asia Agenda* (Washington DC: Institute for International Economics, 1999); Ben THIRKELL-WHITE, *The IMF and the Politics of Financial Globalization: From the Asian Crisis to a New Financial Architecture?* (New York: Palgrave MacMillan, 2005); José Antonio OCAMPO, "Reforming the International Financial Architecture: Consensus and Divergence" in Deepak NAYYAR, ed., *Governing Globalization: Issues and Institutions* (Oxford: Oxford University Press, 2002), 287; Daniel K. TARULLO, "Rules, Discretion, and Authority in International Financial Reform" (2001) 4 Journal of International Economic Law 613; Miles KAHLER, "The New International Financial Architecture and its Limits" in Gregory W. NOBLE and John RAVENHILL, eds., *The Asian Financial Crisis and the Architecture of Global Finance* (Cambridge: Cambridge University Press, 2000), 235.

92. About the different types of global regulators, Kingsbury, Krisch, and Stewart divide the models of global administration into five types (administration by formal international organizations; administration based on collective action by transnational networks of governmental officials; distributed administration; hybrid intergovernmental/private administration; and administration by private institutions with regulatory functions). See Kingsbury, Krisch, and Stewart, *supra* note 12 at 20.

93. For a broad discussion about transnational regulatory networks, their role, and significance, see Anne-Marie SLAUGHTER, *A New World Order* (Princeton: Princeton University Press, 2004).

94. Along with the establishment of G20, the founding of the FSF in 1999 upon G7's initiative is part of a wider process of rethinking international financial architecture after the Asian financial crisis of 1997–1998. See Randall D. GERMAIN, "Global Financial Governance and the Problem of Inclusion" (2001) 7 Global Governance 411, and Tony PORTER, "The Democratic Deficit in the Institutional Arrangements for Regulating Global Finance" (2001) 7 Global Governance 427. The Financial Stability Board (FSB) was established after the G20 London Summit in April 2009. See FSB, Press Release No. 14/2009, "Financial Stability Forum Re-established as the Financial Stability Board" (2 April 2009), online: FSB <http://www.financialstabilityboard.org/press/pr_090402b.pdf>.

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international organizations (the IMF, the World Bank, the OECD, and the Financial Action Task Force on Money Laundering—FATF—belong to it[95]), the Bank for International Settlements (BIS), together with its committees (the Committee on Payment and Settlement Systems (CPSS) and the Committee on the Global Financial System (CGFS)), the European Central Bank (ECB), and national administrative authorities, such as central banks, supervisory authorities, and treasury departments.[96]

There is no agreement about the definition of international standards. The object of standards may vary, as the most relevant international financial standards—as listed in the FSB's "Compendium of Standards"—concern banking, securities and insurance regulation, accounting and auditing, monetary and financial policy transparency, fiscal transparency and data dissemination, insolvency, and corporate governance.[97] Typically, the content of standards is deemed to be quite broad[98] (global standards set principles, and thus leave enough space to states' autonomy)[99] and compliance with international standards is considered to be voluntary (national authorities may choose to implement global rules, or not, according to the standard-setting bodies' expertise[100] and capacity of persuasion).[101] Yet, while on the one hand different degrees of specificity can be found (some standards set quite specific rules[102]), on the other hand there are a number of incentives which can foster the implementation of standards, so that, according to some observers, standards "have gradually made the transition from 'soft law' to 'hard law'".[103]

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95. Founded by the G7.

96. Domestic authorities from the G7 countries and Australia, the Netherlands, Hong Kong, and Singapore were admitted from the very constitution of the FSF, while, after its transformation into the FSB, its membership has also been enhanced, and authorities from all the G20 countries are admitted. See Financial Stability Forum, Press Release No. 10/2009, "Financial Stability Forum Decides to Broaden Its Membership" (12 March 2009), online: FSB <http://www.financialstabilityboard.org/press/pr_090312b.pdf>.

97. See Financial Stability Board, *12 Key Standards for Sound Financial Systems*, online: FSB <http://www.financialstabilityboard.org/cos/key_standards.htm>.

98. The criterion of specificity is taken into account, together with those of *obligation* and *delegation*, in order to distinguish between hard and soft law. See Kenneth W. ABBOTT, Robert O. KEOHANE, Andrew MORAVCSIK, Anne-Marie SLAUGHTER and Duncan SNIDAL, "The Concept of Legalization" (2000) 54 International Organization 401.

99. See Kenneth W. ABBOTT and Duncan SNIDAL, "Hard and Soft Law in International Governance" (2000) 54 International Organization 421 at 436–40. See Dinah SHELTON, "Introduction: Law, Non-Law and the Problem of 'Soft Law'" in Dinah SHELTON, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal Systems* (Oxford: Oxford University Press, 1999), 1 at 14.

100. Dieter Kerwer accepts the definition of a *standard* as "any rule based on expertise that can be adopted voluntarily"; Kerwer, *supra* note 90. The fact that they may be based on competences of a technical nature, however, does not exclude the possibility that such rules have important political consequences. In this sense, see generally Mattli and Büthe, *supra* note 90. See also Porter, *supra* note 94 at 428.

101. Slaughter, *supra* note 93 at 213.

102. Ulrika MÖRTH, "Introduction" in Ulrika MÖRTH, ed., *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham: Edward Elgar Publishing, 2004), 6. See Nils BRUNSSON and Bengt JACOBSSON, "The Contemporary Expansion of Standardization" in Nils BRUNSSON and Bengt JACOBSSON, *A World of Standards* (Oxford: Oxford University Press, 2000), 1 at 4–6.

103. Morais, *supra* note 90 at 781. For a similar point of view, see Delonis, *supra* note 90 at 563 (claiming some of the international organizations' methods to improve implementation of global financial standards "make their adoption essentially mandatory"). For an opposite view, identifying standards as soft law, see Mario GIOVANOLI, *Reflections on International Financial Standards as "Soft Law"* (London: London Institute of International Banking, Finance, and Development Law, 2002) at 5.

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When framing the Santiago Principles within the wider context briefly outlined above, two core questions arise. On the one hand, what do the Santiago Principles have in common with other global financial standards and what is specific to them (i.e. what type of global regulation do the Santiago Principles entail)? On the other hand, what does the experience in other areas of global financial regulation teach us about the implementation of the Santiago Principles? Which incentives seem to be more effective for this purpose and how can their likely effectiveness be strengthened?

When (tentatively) answering the last question, recent developments must be kept in mind. With the global financial crisis of 2008–2009, the move towards international financial standards has been increasingly criticized, so that some scholars have argued that this might even be the end of global financial standards.[104] In some cases (Basel II and the International Financial Reporting Standards (IAS/IFRS) are a case in point) the very content of previously widely accepted financial standards has been questioned.[105] In other cases, though, the failure of global standards might lie not in their not being burdensome enough, but in a merely formal compliance which turned out to be a lack of implementation (for example, it is questionable whether the failure of the IOSCO Code of Conduct for Credit Rating Agencies (CRAs) falls in the first or in the second hypothesis).[106] Thus, when assessing the possible output of the standards recently established with regard to SWFs, the limits of existing global standards, which emerged dramatically in the current financial turmoil, must be taken into account, as these limits might suggest the use of different types of incentives in order to foster reliable compliance.

B. *The Santiago Principles' Model of Regulation*

When contrasting the Santiago Principles with other examples of international financial standards, the first point to bear in mind is the possibility of framing them within the aforementioned models or types of global regulators (international administration, transnational administration, private administration, and hybrid administration); second, we must examine whether the global standards for SWFs have a broad or more specific content.

Even though elaborated under the aegis of an international organization such as the IMF, the Santiago Principles fall short of being an example of truly international regulation. As mentioned above, the drafting of the principles has been conducted by the IWG, the composition of which merely reflects the number of SWFs. As the funds, being investment vehicles owned by governments, are themselves hybrid entities, this can be said to be a case of hybrid, private-public regulation.[107]

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104. See Layna MOSLEY, "An End to Global Standards and Codes?" (2009) 15 Global Governance 9.

105. The debate about Basel II and IAS is huge, and remarks and criticisms vary greatly across the different authors. They go far beyond the scope of this article. For a general analysis of their connection with the crisis, see especially "Report of the High-Level Group on Financial Supervision in the EU" (2009) at para. 224. For an overview of the different opinions, see VOX, online: VOX <http://www.voxeu.org/>.

106. The FSF (now FSB) recommended the IOSCO to complete the revision of the Code, its adoption by the agencies, and the monitoring of such adoption by the competent domestic authorities. See Financial Stability Forum, "Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience" (7 April 2008), online: FSB <http://www.financialstabilityboard.org/publications/r_0804.pdf> at 34, recommendations IV.1 and IV.2.

107. See also section III.B.

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Moreover, the involvement of an international organization such as the IMF—which, in this case, played a role significantly different from its institutional, well-known tasks, working as a broker and a facilitator[108]—further strengthens the hybrid nature of the Santiago Principles.

Lastly, the recent creation of the IFSWF, in which the same SWFs which participated in the IWG and all those which meet the Santiago Principles take part, and which aims at interpreting core issues concerning the application of the Santiago Principles, seems to point in the same direction and determines the transition of a temporary model of global administration towards a permanent one.

Even though the Santiago Principles' model of administration fits easily into the aforementioned taxonomy, there are two significant differences. First, the various international financial standard setters, highly differentiated from one another because of their intergovernmental, transnational, hybrid, or private nature, co-ordinate with one another within the FSF, now reshaped and strengthened as the FSB. The IFSWF, in contrast, does not take part in the latter. Second, even if the composition of the other global standards setters vary widely (for example, while the IOSCO has a universal membership, the BCBS groups a limited number of domestic authorities), a tendency towards a stronger representation of the G20 countries can be registered (the BCBS membership has been enlarged in order to mirror the G20 one—previously only G10 national authorities took part in it—and so has the IOSCO's most important subcommittee (the Technical Committee)).[109] The IFSWF contrasts this trend, as countries that do not have a place in that club enjoy strong representation.

As for the model of administration, the Santiago Principles (and the IFSWF) seem to correspond to the hybrid type. Yet, they stand alone within the numerous and highly differentiated financial standard setters for two reasons. On the one hand, precisely when a stronger consistency in global financial regulation is pursued through the reorganization of the FSB, the IFSWF—not being part of the Board—and its standards do not participate in this attempt of fostering co-ordination. On the other hand, the drafting of the Principles in the IWG looks innovative because of the central involvement of states that do not commonly take part in global financial governance, and this innovative step seems to find a permanent arrangement with the establishment of the IFSWF.

Having examined the model of administration the Santiago Principles correspond to, I will now analyse which type of rules they set forth. As mentioned above, different degrees of specificity can be found within financial standards, and this variety affects the standards' capacity to constrain states' regulatory autonomy. For example, the FSB classifies standards by their specificity into simple "principles", "practices", and "methodologies". Whereas "principles" are set out in a general way and therefore allow a greater degree of flexibility in implementation, "practices" are more specific and "methodologies" or "guidelines"

108. Gelpern, *supra* note 8 at 28.

109. Central bank governors and heads of supervision from Argentina, Indonesia, Saudi Arabia, South Africa, and Turkey, together with Hong Kong and Singapore are now members of the Committee. See BCBS, Press Release, "Basel Committee Broadens its Membership" (10 June 2009), online: BCBS <http://www.bis.org/press/p090610.htm>. See also IOSCO, Press Release, "IOSCO Technical Committee invites Brazil, China and India to join its membership" (19 February 2009), online: IOSCO <www.iasplus.com/iosco/0902technicalcommittee.pdf>.

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provide detailed guidance on requirements to be met for effective implementation, thereby allowing an objective evaluation on the level of observance.[110]

Notwithstanding their name, the Santiago Principles can be placed somewhere in the middle in the aforementioned typology. First, even though most of the GAPP have a very broad formulation, some of them set more specific requirements (for example, the provisions requiring the SWFs to publish an annual report and to adopt professional and ethical codes of conduct for their management and staff). Second, as mentioned above, the second part of the document provides an explanation of each principle. Because of this explanation, we could say that the Santiago Principles constitute the generally accepted principles for SWFs and, at the same time, provide guidance or methodology for their practical implementation.[111]

Hence not all the GAPP are broadly shaped, and a first guidance for their implementation is already in place. Yet the capacity of the standard to influence the addressees' behaviour depends only in part on the actual phrasing of the standards themselves (the more precise, the higher the compliance): in contrast, appropriate incentives play a crucial role. I will now turn to this problem.

C. *Hard vs. Soft Law and the Incentives for Implementation*

The Santiago Principles are explicitly defined as a voluntary set of practices "that the members of the IWG support and either have implemented or aspire to implement".[112] Many commentators have claimed that this is a crucial point and that the Santiago Principles should become mandatory, notwithstanding that the means of achieving this result is seldom suggested.[113]

As mentioned above, all international standards are first elaborated as voluntary; because of a number of incentives, though, they are later perceived as mandatory, so that some observers have considered them to have become hard law. Yet the financial crisis has clearly shown that compliance can be merely formal, and patterns previously considered as effective have been questioned. The debate on the implementation of the Santiago Principles cannot ignore such a context.

As a starting point, it must be recalled that the mere opposition between hard and soft law, in examining the implementation of standards, seems misleading. In the global legal order, it is the very distinction between mandatory and voluntary rules which has blurred. As Abbott and Snidal put it, there are several deviations from hard law and the choice between it and soft law is not a binary one.[114] Moreover, Slaughter reminds us that soft law can have a "hard impact".[115]

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110. See FSB, *supra* note 97.

111. See above, section II.C.

112. Santiago Principles, *supra* note 7 at 5.

113. Reed, *supra* note 56 at 111–22 (claiming that "the voluntary nature of the twenty-four Santiago Principles exacerbate their unenforceability", but finding both the IMF and the WTO ill-suited to enforce them). See Jason BUHI, "Negocio de China: Building Upon the Santiago Principles to Form an Effective International Approach to Sovereign Wealth Fund Regulation" (2009) 39 Hong Kong Law Journal 197 at 206 and 216.

114. Abbott and Snidal, *supra* note 99 at 422. See also Shelton, *supra* note 99 at 10 and Mörth, *supra* note 102 at 5.

115. Slaughter, *supra* note 93 at 224.

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Instead of aiming at defining standards as hard or soft law, the debate has thus focused on the factors and mechanisms fostering compliance with global standards.[116] A number of institutional mechanisms can be mentioned.[117] First, standards drafted as voluntary can turn out to be mandatory because of their formal incorporation into a piece of legislation (one such example is the incorporation of Basel II in the Capital Requirement Directive (CRD)).[118] A second institutional tool (which, as the previous one, makes standards mandatory) is the endorsement of the standards (this is the technique the EU uses for international accounting standards).[119] Third, the reference to standards within different regulatory regimes can lend greater legal force to the former (which has been named "regime borrowing"):[120] one such example is the Technical Barriers to Trade (TBT) obligation for World Trade Organization (WTO) members to use "international standards" as a basis for their technical regulations.[121]

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116. Dinah Shelton spells out the openness of the standard-setting procedure, the content of the standard (the more precise the content, the more probable its implementation, as there will be no uncertainty over which is the required behaviour; in contrast, the higher the implementation costs, the lower the compliance), the institutional context (if there are assessment mechanisms), and the existence of follow-up procedures as driving incentives. See Shelton, *supra* note 99 at 13. According to Jonathan Charney, the existence of links between a given standard and other soft-law or hard-law rules, the transparency of the rule, the existence of interest groups supporting the implementation, the formal acceptance by the community, and the foreseeable consequences in case of non-compliance can also have an impact on compliance. See Jonathan L. CHARNEY, "Commentary: Compliance with International Soft Law" in Shelton, *supra* note 99 at 117–18.

117. According to the Financial Stability Forum (FSF), now Financial Stability Board (FSB), there are institutional and market incentives which can enhance compliance with international financial standards. See "Final Report of the Follow-Up Group on Incentives to Foster Implementation of Standards" (Financial Stability Forum, 2001), online: FSB <http://www.financialstabilityboard.org/publications/r_0109a.pdf?noframes=1>. Subsequently, the same distinction has been used by scholars of international financial law and economists. See Giovanoli, *supra* note 103 at 20. See also Jonathan WARD, *The New Basel Accord and Developing Countries: Problems and Alternatives*, Cambridge University Working Paper No. 4, 2002, online: Cambridge University <http://www.g24.org/ward0403.pdf>, at 32.

118. See *Directive of the European Parliament and of the Council of 14 June 2006 Relating to the Taking up and Pursuit of the Business of Credit Institutions*, European Union [2006] O.J.L. 177/1. See also *Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the Capital Adequacy of Investment Firms and Credit Institutions*, European Union [2006] O.J.L. 177/201.

119. See *Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards*, European Union [2002] O.J.L. 243/1 [IAS Regulation]. This Regulation has required all publicly traded EU companies to prepare their consolidated accounts using IAS/IFRS, as *endorsed* in the EU, since 2005. According to IAS Regulation, when deciding on the applicability of IAS/IFRS, the European Commission—assisted by a set of committees—must evaluate if the international standards correspond to the criteria set out in the Regulation itself: in particular, IAS/IFRS can be endorsed only if they are conducive to the European public good, and if they meet the criteria of understandability, relevance, reliability, and comparability required of the financial information needed for making economic decisions and assessing the stewardship of management. In this way, global accounting standards, first established by private entities, gain binding force through European recognition.

120. See David W. LEEBRON, "Linkages" (2002) 96 American Journal of International Law 5.

121. See *Agreement on Technical Barriers to Trade*, 12 April 1979, 1186 U.N.T.S. 276, 18 I.L.M. 1079 (entered into force 1 January 1980), art. 2.4 ("Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations"). For a fuller discussion of the point, see Robert L. HOWSE, "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards'" in Christian JOERGES and Ernst-Ulrich PETERSMANN, eds., *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Portland: Hart Publishing, 2006), 383. Another case is the SPS reference to the Codex Alimentarius Commission standards. See *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, 1867 U.N.T.S. 493, 33 I.L.M. 1125 (entered into force 1 January 1995), art. 3.1 ("To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise

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In the fourth place, assessment procedures—such as the Reports on the Observance of Standards and Codes (ROSCs), prepared by the IMF's or the World Bank's staff, as part of the Financial Sector Assessment Program (FSAP)—can foster the implementation of standards. Despite international financial institutions' stress upon the relevance of ROSCs and the FSAP, their effectiveness has been recently questioned.[122] In any case, the external assessment programmes run by the IMF and the World Bank must be distinguished from the other instruments that the same parties can use to push states to implement particular global standards (the IMF can include standards and codes compliance as a part of loan conditionality—i.e. conditions which can be imposed on a state that borrows Fund resources—and it often does this).[123]

In addition, or as an alternative, to institutional mechanisms, the implementation of global standards is also influenced by market incentives. For example, a stronger credit risk may be perceived in cases where observance of global standards is poor, whereas borrowing costs can be lower where the implementation of global rules is more advanced.[124] Some data show that market operators' awareness of global standards has markedly increased over the last few years and that they have been using the data resulting from the ROSCs for their financial choices.[125] Private sector involvement affects the implementation of global financial standards for another reason as well. There have been some private initiatives directed at providing information on the extent to which global rules have been implemented. The "e-Standards Forum" is a private entity that carries out a genuine monitoring of global financial standards. It summarizes the data on each country's compliance on its website.[126]

Are there incentives which can foster the implementation of global standards for SWFs, and should there be? This issue must be examined taking into account several

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provided for in this Agreement, and in particular in paragraph 3"). About SPS reference to other international organizations' activity, see Terence P. STEWART and David S. JOHANSON, "The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics" (1998) 26 Syracuse Journal of International Law and Commerce 27.

122. The G20 Washington Communiqué, asking for all G20 states to complete an FSAP, implicitly recognizes the limits of this tool. See G20, "Declaration—Summit on Financial Markets and the World Economy" (15 November 2008), online: G20 <http://www.g20.org/Documents/g20_summit_declaration.pdf> at 2. On the one hand, the compilation of a ROSC is voluntary, as the report's publication depends on the state's consent (yet in the past it has been claimed that a state's refusal to publish an ROSC may negatively affect market operators' judgements). See Financial Stability Forum, *supra* note 117 at 9. On the other hand, it has recently been pointed out that some states (for example, the US) were powerful enough to ignore these programmes. See Wendy DOBSON, "Delivering Change. Together" in Barry EICHENGREEN and Richard BALDWIN, eds., *What G20 Leaders Must Do to Stabilise Our Economy and Fix the Financial System* (London: Centre for Economic Policy Research and VoxEU.org, 2008), 45 at 46.

123. For a close examination of the cases in which some of the Key Standards have been included in loan packages, see Ward, *supra* note 117 at 33, and Delonis, *supra* note 90 at 596.

124. See Financial Stability Forum, *supra* note 117 at para. 20.

125. See the World Bank and International Monetary Fund Report, "International Standards: Strengthening Surveillance, Domestic Institutions, and International Markets" (The World Bank and International Monetary Fund, March 2003), online: World Bank <http://www.worldbank.org/ifa/intlstandards.pdf> at 12ff., Appendix II.

126. See *eStandardsForum*, online: <http://estandardsforum.org/>. PricewaterhouseCoopers also publishes an Opacity Index in relation to thirty-five states on its website. See Financial Stability Forum, *supra* note 117 at para. 23.

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factors. On the one hand, states participating in the IWG seem to have placed significant stress on the voluntary nature of the Santiago Principles; without such an explicit recognition, the document was unlikely to be approved. On the other hand, though, as mentioned at the beginning, one of the main purposes of the Santiago Principles is a pre-emptive one, against increasing protectionist initiatives at the national level. Recent trends seem to show that the implementation issue might prove crucial in this regard. The core role CRAs played in the global crisis has raised criticism on the voluntary, soft-law approach previously agreed upon. The IOSCO Code of Conduct Fundamentals, even in the revised version approved in 2008, has been considered insufficient to address these concerns; consequently, a hard-law approach has been followed at the national level, leading, for example, to the EC Regulation on CRAs, which provides for a registration model.[127] Notwithstanding apparent differences between CRAs and SWFs (the core role the former played in the crisis, in addition to their different structures and functions), this example shows that national governments might decide to rule sectors in which global standards exist and were previously considered as sufficient, if they evaluate their implementation as being unsatisfactory.

As mentioned above, the Santiago Principles represent an attempt to square the circle between Western countries' concerns and the unwillingness of SWF countries to be pushed to regulate an activity they perceive as being entirely economic. The implementation of the Santiago Principles lies at the heart of this conundrum. On the one hand, SWFs stick to the voluntary character of the Santiago Principles, as a precondition for their approval; on the other hand, the lack of implementation could fail to address advanced countries' concerns and could lead national governments to adopt mandatory regulations on their own, following the same path taken in the area of CRAs.

Institutional incentives such as incorporation or endorsement could be used, but could be troublesome. As countries owning SWFs stated very clearly that they intend the Santiago Principles to be voluntary, pieces of legislation incorporating the GAPP could be passed only within Western countries. In May 2008, a representative in the US Congress suggested SWFs "investing in the US should be encouraged to adopt the 'best practices' put forward by the IMF"[128] (even though the IWG had already been constituted at the time, the reference was to the IMF). Such "encouragement" could take place as a formal incorporation of the GAPP, compliance with which could be a precondition for investment. Yet this scenario is likely to be met by resentment in countries owning SWFs, which could move their investments elsewhere.[129] In turn,

127. See Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 162009 on credit rating agencies. For a first comment, see Fabian AMTENBRINK and Jakob DE HAAN, "Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies" (2009) 46 Common Market Law Review 1915.

128. United States House of Representatives, Committee on Foreign Affairs, "The Rise of Sovereign Wealth Funds: Impacts on U.S. Foreign Policy and Economic Interests", 2nd Sess., Serial No. 110-190 (21 May 2008) at 4.

129. SWFs have stated this purpose very clearly. See Saxon, *supra* note 6 at 697. See also O'Brien, *supra* note 49 at 1243.

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such a result would not be welcome in Western countries, which benefit from SWF investments, in particular following the global financial crisis.[130]

Some proposals suggest that SWFs should be regulated within the WTO. They seem to point to the drafting of a new accord having this purpose[131] (or to the application of the General Agreement on Trade in Services to the case in point[132]), more than suggesting the use of a reference to soft standards within a WTO agreement, as a mechanism of "regime borrowing" on the TBT model illustrated above.[133] Yet, after the drafting of the Santiago Principles, a new initiative by the WTO would be perceived by SWF countries as being in competition with the GAPP and it is unlikely that they would support it in the multilateral decision-making process.[134]

The use of the GAPP for the purposes of the IMF's and World Bank's assessment procedures seems unlikely as well. Even though the drafting of the Santiago Principles has been promoted from the very beginning by the G7 and the IMF, recent data show that ROSCs and the FSAP are much more effective over countries in need of international financial institutions' financial support, which is not the case for SWF countries.[135]

Market incentives and self-assessment procedures seem better tailored to apply to the case in point. On the one hand, market operators can take into account compliance with the Santiago Principles for their investment choices. On the other hand, self-assessment procedures are mentioned within the Santiago Principles: GAPP 24 suggests that each SWF should review its own existing arrangements, through self-assessment procedures, and should publicly disclose the result of this kind of assessment. Disclosure of self-assessments could reinforce market incentives and, at the same time, it could lead to peer review—mutual evaluation between the SWFs.

Even though market incentives and self-assessment procedures can prove to have a "hard" impact, recent data suggest being cautious in drawing conclusions. Reports assessing countries' compliance with the Core Principles for Effective Banking Supervision, for example, certificated a high degree of compliance in countries like the United Kingdom (UK), shortly before the spread of the financial turmoil.[136] CRAs claim to have been fully compliant with the IOSCO Code of Conduct, and external

130. See Epstein and Rose, *supra* note 2 at 113.

131. See Aaditya MATTOO and Arvind SUBRAMANIAN, "Currency Undervaluation and Sovereign Wealth Funds: A New Role for the World Trade Organization" (Peterson Institute for International Economics Working Paper No. 08-2, 2008), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086476>. See also Cooke, *supra* note 4 at 770.

132. See de Meester, *supra* note 32 at 22–8.

133. About the type of reference to international standards which can be found in the GATS and its difference from the TBT and SPS one, see Maurizia DE BELLIS and Elisabetta MORLINO, "Harmonisation and Mutual Recognition in the General Agreement on Trade in Services" in Stefano BATTINI and Giulio VESPERINI, eds., *Global and European Constraints Upon National Right to Regulate: The Service Sector* (2008), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099844>.

134. For a similar point, see Rose, *supra* note 4 at 130–1. For a different, more arguable critique, suggesting the WTO Dispute Settlement Body may not be well equipped to deal with SWFs, see Reed, *supra* note 56 at 122.

135. See Dobson, *supra* note 122 at 46.

136. See International Monetary Fund Report, "Implementation of the Basel Core Principles for Effective Banking Supervision: Experience with Assessments and Implications for Future Work" (2008), online: IMF <http://www.imf.org/external/np/pp/eng/2008/090208.pdf> at 17.

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reports support this statement.[137] These are controversial cases, where distinguishing between lack of implementation and ineffectiveness of compliance measurement proves tricky.

Thus the feasibility of further incentives to foster compliance should be explored. A proposal to set an independent audit committee (composed of individuals appointed from an equal number of members form SWFs and recipient countries, and one from the IMF) has been set forth.[138] Yet, this scenario—like the one suggesting a stronger involvement of the WTO—is unlikely to be welcome in SWF countries. In contrast, the same aim could be pursued by broadening the mandate of the recently established IFSWF, in order for it to focus more specifically on the assessment of its members' compliance with the Santiago Principles. In this way, a solution of the previously mentioned conundrum would be pursued: on the one hand, compliance would be enhanced, so that Western countries' concerns could be met; on the other hand, the management of this mechanism would rest entirely within SWFs.

D. *The Santiago Principles as Global Standards for SWFs*

The analysis has shown the Santiago Principles fall into one of the models of global administration; more specifically, they are an example of the hybrid, public-private, type. The recent establishment of the IFSWF goes in the same direction. Yet, contrary to the other main global financial standards, the Santiago Principles are not part of the FSB's Compendium of Standards and the IFSWF does not connect with the Board.

Moreover, comparison with other types of global financial standards makes clear that the Santiago Principles have the potential to be an effective regulatory tool: on the one hand, their content provides for some degree of guidance on implementation; on the other hand, even though institutional incentives commonly used to foster the implementation of other global financial standards cannot be applied to the case in point, without running the risk of encountering serious opposition by the SWF home states, the mandate of the IFSWF could be broadened so that it could focus on checking the level of compliance of its members.

In order to assess the potential impact of the Santiago Principles, though, not only must their institutional arrangement and the incentives for their implementation be taken into account, but also their substantive content, which, as mentioned above, draws extensively upon transparency provisions. This article will now turn to these issues.

IV. TRANSPARENCY, ACCOUNTABILITY, AND SWFS

A. *SWFs and the Quest for Transparency*

Some observers claim that SWFs might be used for political, rather than economic purposes, and that they might affect financial stability; the lack of transparency of the funds magnifies such worries (see above, Section I.C). For instance, even though hedge

137. See Committee of European Securities Regulators, "CESR's Report to the European Commission on the Compliance of Credit Rating Agencies with the IOSCO Code" (2006), online: CESR <http://ec.europa.eu/internal_market/securities/docs/agencies/report_en.pdf> at para. 15.

138. Wong, *supra* note 10 at 1108–9.

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funds are as secretive as SWFs (or even more so), recipient countries consider the opaqueness of the latter to be much more alarming. Some commentators suggest this might not be because SWFs are not transparent about their investment strategies, but because they are government owned.[139] Even observers who do not share these concerns and who focus primarily on the need to maintain an open investment environment consider the lack of transparency of the funds as a crucial problem.[140] On the one hand, transparency is strictly connected with the problem of asymmetry of information.[141] On the other hand, transparency is considered to be a key element in order to build trust between Western countries and SWFs.[142] Moreover, scholars[143] and institutions[144] share the view that transparency is not an end per se, but a means of fostering the accountability of the funds. Hence, the Santiago Principles' focus on increased transparency in the SWFs seems, at least prima facie, to point in the right direction.

The quest for transparency, as the increased use of global standards, is a general tendency. Both transparency and accountability have multiple facets and have been used within different contexts and disciplines.[145, 146] Therefore, a closer analysis of the disclosure provisions in the GAPP appears to be necessary, in order to verify the type of accountability they tend to and their potential for reaching their aim.

Moreover, transparency for SWFs can also have shortcomings, in the form of economic costs.[147] Bader Al-Sa'ad, manager of the Kuwait Investment Authority, declared that: "We are concerned about what they mean when they call for transparency. Do we have to announce every investment before we make it?"[148] Some analysts have recently claimed that growing pressure for disclosure could force SWFs to shift investment strategies: in order to prove to their domestic audiences that they are successful even in the short term, they might reduce or cut risky, long-term investments.[149] Hence, the disclosure provisions in the GAPP need to be carefully examined not only with a view to arguing whether they

139. *Ibid*., at 1090.

140. Gugler and Chaisse, *supra* note 5 at 45.

141. Wong, *supra* note 10 at 1092.

142. Saxon, *supra* note 6 at 709–10

143. Truman, *supra* note 45 at 10.

144. *A Common European Approach to Sovereign Wealth Funds*, *supra* note 5.

145. About the ambiguity of the term "accountability", see Julia BLACK, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, New York: New York University School of Law, IILJ Working Paper 2007/12, 2007, at 21. See also Edward WEISBRAND and Alnoor EBRAHIM, "Introduction: Forging Global Accountabilities" in Alnoor EBRAHIM and Edward WEISBRAND, eds., *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge: Cambridge University Press, 2007), 1 at 1; Debra P. STEGER, "Introduction to the Mini-Symposium on Transparency in the WTO" (2008) 11 Journal of International Economic Law 705. See also Daniel KAUFMAN and Ana BELLVER, "Transparenting Transparency: Initial Empirics and Policy Applications" (2005), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=808664> at 4 (stating that there is no commonly agreed definition of transparency).

146. See "Full Disclosure" *The Economist* (20 February 2009), online: CFO <http://www.cfo.com/article.cfm/13168616/c_2984368/?f=archives>.

147. Rozanov, *supra* note 21 at 12–14.

148. Rose, *supra* note 4 at 141.

149. Natsuko WAKI, "Push for Open SWFs Risks Investment Shift" *Reuters* (15 September 2009), online: Reuters (UK) <http://uk.reuters.com/article/idUKLNE58E03M20090915>.

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provide effectively for transparency and accountability, but also to question whether these requirements are too burdensome for the funds in this respect.

This article will first look at the different meanings transparency can have in global governance and at its potential as a general principle of GAL; second, it will turn to a careful analysis of the provisions of the GAPP; third, it will conclude with the type of accountability the GAPP provide for.

B. *Transparency as a General Principle of GAL*

A call for greater transparency and other forms of public information provision in order to promote accountability has become a common claim in global governance literature.[150] Transparency provisions can be found in many international treaties, even if they do not apply in the same way to all the actors involved. For example, the WTO agreements set forth transparency requirements for their member states and for other international standards setters, even though WTO institutions seem to follow a rather opaque decision-making process.[151] Moreover, this general principle is increasingly shaping global standards setters' current practices. One such example is the BCBS: from a tradition of secrecy, it has recently moved to an extensive use of notice and comment procedures.[152]

Transparency has also become a general principle of GAL.[153] The GAL research project suggests that much global governance may be understood as administration,[154] as many of the global international institutions and regimes execute functions that "national public lawyers would regard as having an administrative character".[155] More specifically, GAL has been defined as:

> … comprising the mechanisms, principles, practices, and supportive social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision and legality, and by providing effective review of the rules and decisions they make …[156]

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150. For an overview, see Ronald B. MITCHELL, "Sources of Transparency: Information Systems in International Regimes" (1998) 42 International Studies Quarterly 109 at 111.

151. See Steve CHARNOVITZ, "Transparency and Participation in the World Trade Organization" (2004) 56 Rutgers Law Review 927. See also Richard B. STEWART and Michelle Ratton SANCHEZ BADIN, *The World Trade Organization and Global Administrative Law*, New York: New York University School of Law, Public Law Research Paper No. 09-71, 2009. See also Stefano BATTINI and Giulio VESPERINI, "Introduction" in Stefano BATTINI and Giulio VESPERINI, eds., *Global and European Constraints Upon National Right to Regulate: The Service Sector* (2008), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099844>, 1 at 2.

152. See Michael S. BARR and Geoffrey P. MILLER, "Global Administrative Law: The View from Basel" (2006) 17 European Journal of International Law 15.

153. See Carlos Iván FUENTES, *Transparency as a Global Goal: Towards a Unity of Principles in Global Administrative Law* (2008), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134122>.

154. See Benedict KINGSBURY, Nico KRISCH, Richard B. STEWART, and Jonathan B. WIENER, *Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, (2005) 68 Law and Contemporary Problems 1 at 2.

155. Kingsbury, Krisch, and Stewart, Emergence of GAL, *supra* note 12 at 17. See also Sabino CASSESE, "Administrative Law Without the State? The Challenge of Global Regulation" (2005) 37 New York University Journal of International Law and Politics 663 at 671

156. Kingsbury, Krisch, and Stewart, *supra* note 12 at 17.

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that are applicable to the five types or models of global administrations discussed above (Section III.A): intergovernmental administration; transnational regulatory networks; distributed administration (i.e. regulatory decisions of national governments where these are part of or constrained by an international intergovernmental regime); and hybrid public-private or private transnational bodies.

Moreover, despite being the product of observation, the notion of GAL can have relevant normative implications. By framing global governance as administration, it is possible to further apply administrative law principles, procedures, and review mechanisms to decision-making and regulatory rule-making by global bodies and, in this way, try new ways of fulfilling their accountability gap.[157]

On the one hand, as discussed above (Section III.A), global financial standards setters can be considered to correspond to the different models of global administration. As pointed out when examining their drafting process and their model of regulation, the Santiago Principles, given the composition of the IWG (and now of the IFSWF), can be framed as a case of hybrid public-private regulation. On the other hand, principles that closely mirror domestic administrative law traditions, such as transparency and participation, lie at the heart of GAL: hence, the GAL point of view seems to be well suited to analysing the scope and potential of transparency for SWFs. Yet it must be pointed out that transparency, both in the domestic context and GAL, has a complex meaning: it is conceived not only as disclosure of information, but it is usually deeply intertwined with participation requirements.[158] It is precisely this link that leads to the enhanced accountability of national and global regulators. Transparency for SFWs, in contrast, as will now be shown, seems to have a narrower meaning.

C. *The Transparency Requirements in the GAPP: Too Much or Not Enough?*

Transparency obligations can be found in each of the three main areas around which the GAPP are grouped: general legal framework, governance structure, and risk management.

As for the first one, disclosure requirements concern the SWFs' legal basis and structure,[159] their policy purpose,[160] and their general approach to funding, withdrawal, and spending operations[161] (also the source of funding should be disclosed).[162]

Second, the governance framework, as well as the manner in which the SWFs are operationally independent from their owners, should also be publicly disclosed.[163] More specifically, professional and ethical standards for the members of the SWF's governing body, management, and staff should be clearly defined and made known.[164] Moreover,

157. *Ibid*., at 27–9.
158. Steger, *supra* note 145.
159. Santiago Principles, *supra* note 7 at GAPP 1.2 Subprinciple.
160. *Ibid*., GAPP 2 Principle.
161. *Ibid*., GAPP 4 Principle.
162. *Ibid*., GAPP 4.1 Subprinciple.
163. *Ibid*., GAPP 16 Principle.
164. *Ibid*., GAPP 13 Principle.

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financial statements and operations should be made public. According to GAPP 11, the main instrument for this type of disclosure should be an annual report, prepared in a timely way and in accordance with recognized international or national accounting standards.[165] The disclosure provisions set forth in the GAPP do not substitute for those coming from national legislation: GAPP 15 recalls that SWF activities in host countries should be conducted in compliance with all applicable regulatory and disclosure requirements of those countries.[166]

Third, some provisions set forth a transparency obligation concerning the investment policy of the funds. As a general rule, according to GAPP 17 every "[r]elevant financial information regarding the SWF should be publicly disclosed to demonstrate its economic and financial orientation, so as to contribute to stability in international financial markets and enhance trust in recipient countries".[167] A general description of the investment policy of the fund should be disclosed,[168] together with its approach to risk management.[169] Deeply connected to Western concerns that SWFs' conduct could respond to political considerations, the GAPP 19.1 Subprinciple requires "investment decisions … subject to other than economic and financial considerations … [to be] clearly set out in the investment policy and be publicly disclosed".[170] Moreover, the fund's approach to the voting securities of listed entities should be publicly disclosed.[171]

Opinions concerning the transparency requirements set forth in the Santiago Principles vary significantly. While some commentators consider them to be insufficient, as even less demanding than current best practices (such as the ones of the Norwegian Fund, the GPFG),[172] others suggest these provisions should be carefully analysed, as excessive disclosure requirements can also be problematic.[173] A profitable assessment of the aforementioned provisions can be conducted through a comparison with the transparency requirements at first suggested in an EU Communication (US documents are much less detailed on the point) and with the scoreboard provided by some scholars. On the one hand, the EU Communication *A Common Approach to Sovereign Wealth Funds* asked for the following transparency practices to be included in the code:

> [A]nnual disclosure of investment positions and asset allocation … [e]xercise of ownership rights; [d]isclosure of the use of leverage and of the currency composition; [s]ize and source of an entity's resources; [d]isclosure of the home country regulation and oversight governing the SWF.[174]

165. *Ibid*., GAPP 11 Principle.
166. *Ibid*., GAPP 15 Principle.
167. *Ibid*., GAPP 17 Principle.
168. *Ibid*., GAPP 18.3 Subprinciple.
169. *Ibid*., GAPP 22.2 Subprinciple.
170. *Ibid*., GAPP 19.1 Subprinciple.
171. *Ibid*., GAPP 21 Principle.
172. Rose, *supra* note 4 at 144, and Cooke, *supra* note 4 at 768.
173. Wong, *supra* note 10 at 1105–6.
174. Commission of the European Communities, *supra* note 5 at 11.

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On the other hand, the index suggested by Edwin Truman in 2008 measured SWFs' existing transparency practices (other areas taken into account concerned the funds' structure and governance),[175] taking into account the following elements: publication of the categories and benchmarks of the assets in which the fund invests; disclosure of the overall size and return of their investment activity; the existence of annual or quarterly reports; if the funds were audited (and, in that case, if the auditors were independent and their evaluation was published).[176]

The Santiago Principles appear to be broadly consistent with the EU's suggestions (as mentioned above, they provide for the publication of an annual report about financial statements and operations; disclosure about how the funds exercise their voting rights and of the source of funding is also called for)[177] and to take into account the main elements used in Truman's scoreboard (according to GAPP 18, the investment policy should normally define permissible asset classes; moreover, an SWF's operations and financial statements should be audited annually and information on accounting policies should be an integral part of the financial statements[178]). At the same time, the level of detail and specificity is lower. In some cases, there is a clear option for a less demanding requirement: for example, according to the Santiago Principles, SWFs should publish an annual report, not a quarterly one. Yet this contrast should not necessarily be criticized: as Truman recalls, objections against quarterly reports include their promoting "too much focus on short-term returns"[179] in the SWFs.

The most significant difference from what international institutions and legal scholars have suggested in the past is that the Santiago Principles call for disclosure of general asset allocation and do not mention individual investment positions.[180] This is a highly controversial point. It has been argued that providing the public with a detailed list of every company in which the funds invest (and the size of their investment) would be extremely costly for the SWFs.[181] Different solutions to find a proper balance have been suggested. According to Andrew Rozanov, SWFs could make some types of information available only to international organizations and national regulators in recipient countries on a confidential basis, and not to the general public.[182] An alternative solution could be requiring disclosure of individual investments only when SWFs invest in a particular list of companies (considered to be extremely relevant for national security or economy).[183]

The analysis has shown that the GAPP transparency provisions seem to be in line with the key elements international institutions and legal scholars have been suggesting in the past years. Yet some provisions need to find a clearer explanation

175. Truman, *supra* note 45 at 6.
176. *Ibid*., at 11.
177. Santiago Principles, *supra* note 7 at GAPP 4.1 Subprinciple and GAPP 21 Principle.
178. *Ibid*., GAPP 12 Principle.
179. Truman, *supra* note 45 at 12.
180. Rose, *supra* note 4 at 144; and Cooke, *supra* note 4 at 768.
181. Wong, *supra* note 10 at 1105.
182. Rozanov, *supra* note 21 at 21.
183. Wong, *supra* note 10 at 1106.

https://doi.org/10.1017/S2044251310000123 Published online by Cambridge University Press

and to be better specified: in this way, the implementation of the commonly shared disclosure requirements could be enhanced,[184] while the most problematic ones, such as disclosure of individual assets, could be specifically addressed in order to find a better tailored solution (like the two mentioned above: by giving some pieces of information only to domestic regulators, instead of the general public; or disclosing information only about a specific list of companies) and to avoid excessive but unnecessary economic costs for the funds. This specification could be easily provided by the recently established IFSWF, which could publish guidelines for this purpose.[185]

A first assessment of the transparency provisions in the GAPP—the one conducted using the international institutions' and legal scholars' documents as a benchmark—is thus a positive one. They seem to be a step in the right direction, even though some further specifications seem necessary in order for them to be both effective and not unnecessarily burdensome. Yet, as mentioned above, transparency is generally linked to accountability, and such a link is mentioned in the Santiago Principles. Thus the analysis would be incomplete without an examination of this connection. What type of accountability do the transparency provisions in the Santiago Principles—requesting SWFs to provide public information concerning their legal basis, structure and governance patterns, policy, and financing decisions—try to enact? The last part of this article will look at this issue.

D. *Accountability and SWFs*

The concept of accountability is perhaps even more ambiguous than the definition of transparency. For the purposes of this study, a core, principal-agent theory-based concept can be used, according to which accountability is "a particular type of relationship between different actors in which one gives account and another has the power or authority to impose consequences as a result".[186] The term "consequences" is being used in a neutral sense, as the possibility of formal sanctions is not necessary for an accountability relation to exist.[187] Thus, saying that SWFs have to be accountable entails the following questions: To whom do the funds have to render account to, and for what? Are there consequences if the fund deviates from its obligations?

There are four groups who can be affected by a government's decision concerning the management of its international investments: first, the citizens of an SWF home country, who have an interest in how their own government manages the collective assets of their country; second, the government itself might have its own distinct policy interest (according to the degree of independence of the fund's management); third, financial market participants in general; and fourth, the authorities and the citizens of the host country in which the investments are made.[188]

184. Precision is among the factors which can enhance compliance with international standards. See Shelton, *supra* note 99.

185. For a similar proposal, see Wong, *supra* note 10 at 1108.

186. Black, *supra* note 145 at 21. See also John FEREJOHN, *Accountability in a Global Context*, New York University, IILJ Working Paper 2007/05, at 2.

187. See Mark BOVENS, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 European Law Journal 447 at 457.

188. Truman, *supra* note 45 at 6.

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According to the stakeholder involved, there can be different types of accountability. A variety of taxonomies has been suggested.[189] For the purposes of this study, the typology of mechanisms first used by Ruth W. Grant and Robert O. Keohane will be adapted.[190]

With regard to the citizens of the SWF country, there is a case of *internal political* accountability, the consequences of which obviously vary according to the type of political regime in place. In democratic countries, for instance, citizens could sanction their government's decision on foreign investments through the political process. Also, the elements being taken into account in the political process vary according to the different domestic context: the Norwegian GPFG, for instance, decided not to invest in companies violating fundamental rights after a wide political debate,[191] but not all citizens might be concerned with such issues at the same level.[192] On the other hand, it has been argued that undemocratic countries' SWFs' reluctance to disclose the size of their assets might be related to the fact that their citizens, being aware of their countries' resources, might mobilize politically to gain access to them.[193] Thus, the lack of democratic elections does not mean that there would not be a place for political consequences of a different kind.[194]

When taking into account the second group of possible stakeholders—the government of the SWF country—the possibility of a sanction is even stronger, as the government could remove the fund's management from office, if it is dissatisfied with the result of its management or if it disagrees with its investment policy: in this sense, *hierarchical* accountability is in place.[195] Yet it must be pointed out that the functioning of this type of sanction will depend on the implementation of GAPP 6, according to which there should be a clear and effective division of roles and responsibilities between the governing body and the management, while currently legal and structural patterns, as discussed above, vary remarkably and such a clear separation is often lacking (see above, Section I.B).

Accountability patterns concerning the other two groups appear weaker. With regard to the third group—financial market participants—there is a *market* accountability mechanism: CRAs can assess the funds' investment policies, while investors can take into account both the funds' policies and the CRAs' ratings of the funds in their decisions.

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189. Gelpern, *supra* note 8 at 15–16 (distinguishing between *public internal accountability* (with regard to the citizens and governments of the SWF countries); *private internal accountability* (referring to SWFs' duties to narrower constituencies, such as shareholders, derived from their charters); *public external accountability* (implying a duty of state-owned funds to adhere to international norms); *private external accountability* (referring to SWFs' duties as creditors and shareholders under host country laws)). In this article, the reference to external/internal accountability is used for different purposes.

190. See Ruth W. GRANT and Robert O. KEOHANE, "Accountability and Abuses of Power in World Politics" (2005) 99 American Political Science Review 29 at 35–7. See also Simon CHESTERMAN, "Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law" (2008) 14 Global Governance 39 at 44–5 (using the same typology).

191. Halvorssen, *supra* note 44 at 20–1.

192. Rose, *supra* note 4 at 145.

193. Truman, *supra* note 45 at 11.

194. For a fuller discussion of the point, see Drezner, *supra* note 16 at 21.

195. See the typology first suggested by Grant and Keohane, *supra* note 190 at 36.

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The most problematic case is the one concerning the last group: citizens and governments of the host countries. In this case, *public reputational* accountability is in place,[196] as governments of the host countries can take the reputation of the funds—resulting from their annual reports, investment policies, and institutional patterns such as the independence of the management of the funds from the government—together with the impact such reputation has on their citizens and public opinion, into account in their decisions: for instance, in order to take protectionist decisions.

Even though the Santiago Principles explicitly mention accountability in only a few provisions, all the transparency requirements examined above, concerning the source and size of the funding, together with the funds' investment policy, can help the proper and effective functioning of the different accountability patterns.

On the one hand, the accountability framework for SWFs' operations is the object of GAPP 10, according to which it should be clearly defined in the relevant legislation, charter, or other constitutive documents. The commentary to this principle goes on to explain that the owner of the fund is accountable to the legislature or to the public; when SWFs are established as legal entities, the governing body is accountable to the owner and the management is accountable to the governing body. Thus, the Santiago Principles appear to take explicitly into consideration the functioning of the first two types of accountability: *internal political* and *hierarchical*.

On the other hand, though, the disclosure requirements concerning the funds' legal basis, institutional and governance structure, and investment policy help the functioning of all the four types of accountability patterns. Recognition of this could be seen in the commentary to GAPP 11, which links "with accountability reasons" the obligation to provide annual reports ensuring that information about investment is clear, fair, accurate, and comparable.[197] Moreover, the requirement to identify and disclose professional and ethical standards for the funds' staff and management[198] also seems to help build an accountability relation: when put in place, such standards could be used as a basis against which the funds' behaviour can be measured and assessed (providing an objective benchmark for public reputational accountability); in contrast, the lack of such standards could be negatively evaluated by host states and could be used as a basis to justify restrictive actions.

Hence, transparency requirements help to build accountability relations between the funds and four different types of stakeholders. Yet while the first two patterns, between the funds and the legislature or the general public on the one hand, and between the government and the management of the funds on the other hand, are explicitly recognized in the Santiago Principles, and their functioning can be easily regulated (and the GAPP 10 calls for a clear definition of them), the accountability relation between the funds and the host countries' citizens and authorities is not mentioned in the GAPP and appears to be more problematic. On the one hand, disclosure of information concerning

196. *Ibid*., at 37.
197. Santiago Principles, *supra* note 7 at 18.
198. *Ibid*., at GAPP 13 Principle.

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the governance structure and financing policy of the funds can help to build trust between them and Western countries. On the other hand, if this information is used to justify protectionist measures, it will lead to the opposite result.

From this point of view, a call for a better specification of the disclosure requirements must be reiterated. In the preceding section, though, such a call aimed at narrowing transparency obligations concerning individual investments (by giving information to domestic regulators, instead of to the general public; or giving information only about a specific list of companies), so that the economic costs connected with transparency could be reduced. From another point of view, though, disclosure should be enhanced. Clearer information about the funds' decision-making process could help authorities in host countries disentangle responsibilities, overcome the fear of a political use of the funds, and avoid restrictive reactions. In this respect, the GAPP 19.1, requiring investment decisions subject to other than economic and financial considerations to be disclosed, also proves crucial.

Transparency seems to be an extremely useful tool for fostering the accountability of the funds; yet, it is not enough per se, but needs to be matched with structural elements. For example, disclosure of information about the funds is a precondition to holding them accountable to the government and the citizens of the home country, but the imposition of the consequences varies, on the one hand, on the basis of the political regime, and on the other hand, on the governance and institutional structure of the funds. Thus, the efficacy of these provisions seems tightly connected to the implementation of the provisions of the GAPP calling for a clearer division of roles and responsibilities within the governance structure of the funds.

The accountability relation between the funds and the citizens and governments of the host countries, as mentioned above, appears to be the most controversial. Yet the goal of building trust between host countries and the funds and of avoiding protectionist actions could be facilitated if the institutional arrangement now capable of facilitating the understanding of the Santiago Principles—the IFSWF—was also perceived to participate in a co-operative effort. In contrast, as mentioned above, whereas all the global financial standards setters are currently part of the FSB,[199] the IFSWF is not connected with it. In a context in which the role of the more inclusive G20 and FSB is being strengthened, a proper link between the recently established IFSWF and the new international financial architecture should be established, so as to foster the overall legitimacy of the global regulatory regime for SWFs and to build co-operation between SWF countries and host countries. This is another example of structural reform which could match the procedural principle of transparency, so as to build accountability more effectively.

199. This brings together not only national administrative authorities (such as central banks, supervisory authorities, and treasury departments) in the G20 countries, but also banking, securities, and insurance transnational regulators (BCBS, IOSCO, and IAIS, respectively), intergovernmental international organizations (such as the IMF, the World Bank, and the OECD), and private standard-setting bodies, such as the IASB and the IAASB, one of the IFAC's technical committees, the BIS together with its committees (the CPSS and the CGFS), and the ECB. See Financial Stability Board, *Links to FSB Members*, online: FSB <http://www.financialstabilityboard.org/members/links.htm>.

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V. CONCLUDING REMARKS

This article has argued that a proper assessment of the Santiago Principles must take into account the features of other global financial standards, on the one hand, and the scope and depth of the transparency obligations that can be found within global regulatory regimes, on the other hand.

The comparison with other global financial standards has shown some key features of the Santiago Principles. International financial standards are drafted by different types of global regulators: international organizations, transnational administrations, hybrid public-private and entirely private regulators. As the Santiago Principles have been drafted by the IWG, which brings together SWFs (themselves having a hybrid structure, being investment vehicles owned by their governments), the Santiago Principles constitute a case of hybrid, public-private regulation. The recent establishment of the IFSWF seems to point in the same direction. Yet they stand alone within the numerous international financial standards for two reasons: on the one hand, they are innovative, because of the involvement in the standards-setting process of states who do not usually take part in other global financial networks; on the other hand, while the other main financial standards are grouped within the Compendium of the FSB, the Santiago Principles are not and the IFSWF does not connect with the FSB.

As for the content, it has been pointed out that international standards can be quite specific (despite the common opinion that they are very broad). The Santiago Principles seem to fall in the middle of this spectrum, as there is a specific explanation for each principle (which seems to take into account the experience of some transnational regulatory networks, which have been drafting appropriate methodologies to give guidance for the application of their own standards). This first guidance for compliance can help the implementation process.

The comparison with other global financial standards suggests the need to scrutinize attentively which incentives can be used to foster the implementation of the Santiago Principles. Some scholars have called for the Santiago Principles to become mandatory (even though the means through which this result should be achieved in the global legal order is seldom explained). Aside from the feasibility of this solution, it does not appear desirable: the incorporation of the Santiago Principles in a piece of national legislation might be perceived as a protectionist measure by SWFs, which could move their investments elsewhere. Also, other institutional incentives commonly used to foster the implementation of other global financial standards cannot be applied to the case in point: for instance, the WTO's or IMF's initiatives could be taken as an attempt to displace the funds' role in the management of this new regime. In contrast, in the area of SWFs, *market* incentives can apply. Moreover, GAPP 24 suggests that each SWF should conduct *self-assessment* procedures. A public disclosure of these self-assessments could, on the one hand, reinforce market incentives; on the other hand, it could lead to peer review between the SWFs. Yet, as the recent financial turmoil shows, compliance assessment can prove highly problematic, and recent developments show national authorities can pass binding regulation when global standards are perceived to be insufficient and compliance seems to be merely formal (the EU Regulation for CRAs is a case in point). These data suggest that putting in place some appropriate

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institutional incentives would be highly recommended. A balanced solution might be to broaden the mandate of the recently established IFSWF, which could focus on gathering and publishing all the information concerning self-assessments conducted by its own members, so as to foster peer review and public reputational accountability.

Thus, the Santiago Principles' model of regulation seems to be well placed to have an effective impact. Yet this result does not depend solely on their institutional arrangements, but on their content, which is based on transparency provisions.

The disclosure requirements in the GAPP concern the legal basis and governance structure of the funds, together with their financial policy, and seem consistent with the suggestions that international institutions and legal scholars have expressed in the past few years. Yet the transparency provisions that can be found in the Santiago Principles need to be better specified. As disclosure of individual investment decisions appears to be extremely costly for the funds, a better balance could be found by identifying more closely which information needs to be available to the general public (for example, preparing a list of companies, investments in which must be disclosed) or requiring that some information be available only to domestic regulators, on a confidential basis.

Transparency can help the functioning of the accountability relations of the funds with four relevant groups of stakeholders (the citizens of the home country; the governments of the home country, when a proper distinction from the management is in place; market participants; and the authorities and citizens of the host country). Yet different types of accountability are in place with regard to the different groups (internal political accountability; hierarchical accountability; market accountability; and public reputational accountability). Moreover, it must be pointed out that transparency is a useful instrument, but its effectiveness in enhancing accountability depends on the existence of other elements. In other global regulatory regimes, transparency is commonly matched with participation, mirroring domestic administrative law traditions. As far as SWFs are concerned, transparency identifies with disclosure of information and does not involve participation. That makes its efficacy even more dependent on it being coupled with structural arrangements. For instance, funds can be accountable to the public and to their own governments not only if information on their investment and structure is being disclosed (this being a precondition) but also upon the condition of a clear division of responsibilities within their governance structure.

The fourth type of accountability (involving the citizens and authorities of the host country) is the most problematic one and is not recognized within the Santiago Principles. Transparency can help to build trust between the funds and host countries. Here too, though, the institutional arrangements are critical. Host countries' authorities could justify protectionist measures on the basis of the information they have on the investment policy of the funds or on their lack of ethical standards; the funds could react, in turn, by moving their investments to other countries. In contrast, trust between the two parties could be built by connecting the corresponding networks of regulators. Currently, the G20 national authorities, together with all the global financial standards setters, are part of the FSB. It seems desirable to establish a proper link between the IFSWF and the Board, in order to facilitate co-operation between SWF countries and host countries.

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