FINDING THE RIGHT BALANCE FOR SOVEREIGN WEALTH FUND REGULATION: OPEN INVESTMENT VS. NATIONAL SECURITY

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I. INTRODUCTION

Definitions of the term "sovereign wealth fund" ("SWF") vary, but they all roughly describe "government investment vehicles funded by foreign exchange assets, which manage those assets separately from official reserves."[1] Most definitions distinguish SWFs from traditional government reserves. Governments typically invest traditional reserves for safety and liquidity while they accept more risk and invest in broader asset classes when investing through their SWFs.[2] In addition, other types of state-controlled investment entities exist and some are generally perceived to pose greater threats than others because these types tend to invest more aggressively.[3] While this paper focuses on

[1] *Do Sovereign Wealth Funds Make the U.S. Economy Stronger or Pose National Security Risks?: Hearing Before the J. Econ. Comm.*, 110th Cong. (2008) [hereinafter *Do Sovereign Wealth Funds Make the U.S. Economy Stronger*] (statement of David McCormick, Undersecretary, International Affairs, Department of Treasury). *See also* Adrian Blundell-Wignall, Yu-Wei Hu & Juan Yermo, *Sovereign Wealth and Pension Fund Issues*, FINANCIAL MARKET TRENDS 117, 117 http://www.oecd.org/dataoecd/27/49/40196131.pdf (defining SWFs as "pools of assets owned and managed directly or indirectly by governments to achieve national objectives").

[2] *Foreign Government Investment in the U.S. Economy and Financial Sector: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. (2008) (statement of David McCormick, Undersecretary, International Affairs, Department of Treasury) ("In contrast to traditional reserves, which are typically invested for liquidity and safety, sovereign wealth funds seek a higher rate of return and may be invested in a wider range of asset classes. Sovereign wealth fund managers have a higher risk tolerance than their counterparts managing official reserves.").

[3] *See* Edward F. Greene & Brian A. Yeager, *Sovereign Wealth Funds—A Measured Assessment,* 1712 PLI/CORP 417, 429 (2009) (discussing five types of state-owned investing entities: central banks, stabilization funds, public pension funds, government investment companies, and state-owned enterprises). Greene and Yeager argue that state-owned enterprises,

SWFs, many of the concerns and policy responses are applicable to the other types of state investment entities, as well. Sometimes situations involving what are better described as "sovereign businesses"[4] are discussed because they illustrate the lesson regarding SWFs as well.

During 2007 and 2008, likely as a result of the marked rise in SWF investment in Western companies during the beginning of the Credit Crisis, the legal environment regarding SWF investment in the United States changed grossly both at the domestic level and at the international level. The U.S. Congress passed new legislation regarding foreign investment in the United States and the Treasury Department issued new regulations and guidance under it.[5] International organizations issued voluntary guidelines both for SWFs and for countries that receive investments from SWFs.[6] This Note discusses the national security concerns

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which are operating businesses such as the Chinese oil company China National Offshore Oil Company Ltd., may be the most problematic type of state-owned investing entity from the investee-country perspective, particularly when the acquirer and target are critical infrastructure companies because the acquisition may be interpreted as an attempt to gain political leverage. Although other types of state-owned entities, such as SWFs, generally have avoided controlling stakes in such sensitive industries as discussed *infra* in Part III, they certainly could attempt to purchase such interests. Thus, the concerns, at least theoretically, apply to SWFs as well.

[4] "Unlike the case of sovereign wealth funds, whose portfolio investment may be purely passive, a sovereign business is controlled by the government whose assets comprise a majority of its ownership." *Regulating Sovereign Investments, Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. (2008) [hereinafter *Regulating Sovereign Investments*] (statement of Ethiopis Tafara, Director, Office of International Affairs, U.S. Securities and Exchange Commission).

[5] *See* 50 U.S.C.A. app. § 2170 (West 2008); 31 C.F.R. § 800.401(a) (2008); U.S. DEP'T OF TREASURY, COMM. ON FOREIGN INV. IN THE UNITED STATES, GUIDANCE CONCERNING THE NAT'L SEC. REV. CONDUCTED BY THE COMM. ON FOREIGN INV. IN THE UNITED STATES (2008) [hereinafter GUIDANCE CONCERNING NATIONAL SECURITY REVIEW], *available at* http://www.treas.gov/offices/international-affairs/cfius/docs/GuidanceFinal_12012008.pdf (pending publication in the Federal Register).

[6] *See* International Working Group of Sovereign Wealth Funds, SOVEREIGN WEALTH FUNDS, GENERALLY ACCEPTED PRACTICES AND

that arise as a result of SWF investment in the United States, as well as the importance of the United States promoting an open investment environment. Ultimately, the paper concludes that the new legal environment regarding SWFs balances well the need to protect national security with the need to promote open investment, but nevertheless argues that the United States should consider all measures which are reasonably practical and efficient and do not threaten U.S. national security in an effort to promote an open investment environment. This may include taking measures that do not have great immediate economic impact but do promote the image of the United States as open to foreign investment so that other countries in which Americans may want to invest will hopefully reciprocate. The paper finally offers a couple of possible suggestions that might further improve the balance.

Part II discusses how SWFs are not new institutions but have received increased attention recently for their massive growth and large investments in Western companies. Part III discusses the national security concerns that have arisen in response to the increased size and levels of investment by SWFs. Part IV argues that the United States needs to balance these concerns against the need for an investment environment open to foreign investment, including investment by SWFs. Part V reviews how the legal regimes governing SWF investment in the United States, both at the international level and at the domestic level, balance well these competing concerns. Finally, in Part VI, this Note discusses how even better balancing may be achievable.

PRINCIPLES, "SANTIAGO PRINCIPLES" (2008), http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf [hereinafter INTERNATIONAL WORKING GROUP]; *see also* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SOVEREIGN WEALTH FUNDS AND RECIPIENT COUNTRIES—WORKING TOGETHER TO MAINTAIN AND EXPAND FREEDOM OF INVESTMENT 1 (2008), http://www.oecd.org/dataoecd/0/23/41456730.pdf [hereinafter WORKING TOGETHER].

II. BACKGROUND

A. The Importance of SWFs

SWFs have existed for some time but have gained prominence just this decade. Kuwait established its SWF, the Kuwait Investment Authority, over fifty years ago but massive growth in the number and asset value of SWFs began in recent years.[7] The number of SWFs has doubled since 2000 from twenty to approximately forty and countries around the globe have established more than ten since 2005.[8] Estimates of the total combined value of SWFs worldwide range from $1.9 trillion to $3.9 trillion[9] and the asset value of SWFs is expected to rise markedly during the next decade.[10]

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[7] Thomas E. Crocker, *What Banks Need to Know About the Coming Debate over CFIUS, Foreign Direct Investment and Sovereign Wealth Funds*, 125 BANKING L.J. 457, 462 (2008) ("The Kuwait Investment Authority and its predecessors, for example, have existed since 1953. However, what is eye opening is the rapid increase in the number and asset size of SWFs in recent years.").

[8] *Id.*

[9] *Id.* ($1.9 and $2.9 trillion); HELMUT REISEN, HOW TO SPEND IT: COMMODITY AND NON-COMMODITY SOVEREIGN WEALTH FUNDS 6 (2008), http://www.oecd.org/dataoecd/41/3/41412391.pdf ($3 trillion); Sovereign Wealth Fund Institute, Fund Rankings (2008), http://www.swfinstitute.org/funds.php ($3.947 trillion).

[10] *Regulating Sovereign Investments, supra* note 4 (citing an investment bank forecast that the total value of sovereign wealth funds could increase five fold by the middle of second decade of the twenty-first century); Amy Kolz, *Nice Work . . . If You Can Get It,* LEGAL WK., Jan. 22, 2009, http://www.legalweek.com/Articles/1197071/Nice+work...+if+you+can+get+it.html ("[SWFs] could quadruple in size by the middle of the next decade, even with the global slowdown . . . ."). The total value of SWFs could, by 2015, surpass the economic output of the United States. Louis S. Freeman, *General Overview and Strategies in Representing Sellers,* 825 PLI/TAX 7, 891 (2008). The total value could surpass in the next decade the value of the New York Stock Exchange. Press Release, United States House of Representatives, Moran Unveils Sovereign Wealth Funds Task Force (Feb. 27, 2008), http://www.house.gov/apps/list/press/va08_moran/SWFs.shtml [hereinafter *Moran Unveils Sovereign Wealth Funds Task Force*]. CB Richard Ellis predicts that by 2015, SWFs will own 20% of the world's real estate. Alex Delmar-Morgan, *SWFs to Own 20% of Global*

However, while SWFs own large and growing amounts of assets, their total asset value of up to $4 trillion is still quite small compared to the total world market.[11]

B. SWF Investment in Western Companies During the Credit Crisis

As discussed in further detail in this section, SWFs invested heavily in Western companies as the Credit Crisis emerged but as the Crisis unfolded the SWFs lost great value on these investments. This led SWFs to resist investing in the West later in the Crisis. Also, as the Crisis deepened, governments began using their SWFs to fund their domestic economies, rather than to invest internationally, further decreasing investment in Western companies by SWFs.

SWFs attracted a fair amount of attention from scholars, politicians, the media and the public generally in late 2007 and into 2008 for the significant stakes the SWFs and other state-owned funds and businesses purchased in Western companies as the Credit Crisis emerged.[12] In total, SWFs

Property by 2015—Study, ARABIAN BUS., Dec. 15, 2008, *available at* http://www.arabianbusiness.com/541038-wealth-funds-to-own-20-of-global-property-by-2015---study.

[11] For comparison, insurance companies, as of 2007, held $18.5 trillion in assets, mutual funds held $19.3 trillion and pension funds held $21.6 trillion. *Asian Voices: Of Funds and Capital Flows,* STATESMAN, Dec. 30, 2007. The world market cap at its peak reached $62.5 trillion in October 2007 and was valued at $36.6 trillion in October 2008. Bespoke Investment Group, *World Equity Market Declines: -$25.9 Trillion,* SEEKING ALPHA, Oct. 8, 2008, http://seekingalpha.com/article/99256-world-equity-market-declines-25-9-trillion (defining the "world market cap" as "the value of stock worldwide"). The total value of all global financial assets as of February 2008 was $190 trillion and $62 trillion of that was managed by private institutional investors. *See Do Sovereign Wealth Funds Make the U.S. Economy Stronger, supra* note 1.

[12] SWFs directly invested $30 billion in U.S. financial firms ($17 billion in commercial banking) between August 2007 and April 2008. More than 90% of these funds came from the SWFs of four countries: the United Arab Emirates, Kuwait, Singapore and China. Peter Heyward, *Sovereign Wealth Fund Investment in US Financial Institutions: Too Much or Not Enough?,* 27 NO. 5 BANKING & FIN. SERVS. POL'Y REP. 19, 20 (2008).

invested almost $45 billion in Western companies between March 2007 and April 2008.[13] One may compile a very long list of investments made in Western companies by SWFs and state-owned businesses during the emergence of the Credit Crisis.[14] For example, the Government of Singapore Investment Corp. made the largest investment by an SWF ever when it invested $11.5 billion in UBS.[15] SWFs purchased Western real estate, as well.[16] For instance, shock rippled throughout America when the Abu Dhabi Investment Council, the sister fund to the Abu Dhabi Investment Authority,[17] purchased a majority stake in New York's iconic Chrysler Building in July 2008.[18]

As the Credit Crisis spread throughout the globe, SWFs suffered massive decreases in value and the countries that own them suffered economically, leading to a situation in which SWFs have nearly ceased investment in the West and may possibly divest some of their holdings. In total, the world's SWFs lost between 18% and 25% of their asset value in 2008.[19] The China Investment Corp. (CIC), which the

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[13] SOVEREIGN WEALTH FUND INSTITUTE, SUBPRIME REPORT—CASH INFUSION: SOVEREIGN WEALTH INFUSIONS FOR BANKS (2008), http://www.swfinstitute.org/research/subprimereport.php.

[14] *See id.* (listing multi-million and multi-billion dollar equity purchases by SWFs in Citigroup, Merill Lynch, Morgan Stanley, Barclays, Credit Suisse and UBS).

[15] Freeman, *supra* note 10, at 20.

[16] Delmar-Morgan, *supra* note 10 (stating that the real estate arm of the Kuwait Investment Authority paid $642 million for the Willis building, a large London office tower); *Qataris Give Shard the Kiss of Life,* EVENING STANDARD, Dec. 16, 2008, at 32 (discussing how the Qatar SWF provided the necessary funding for the construction of Shard of Glass, which will be London's largest office tower, when funding was otherwise in doubt in 2008).

[17] SOVEREIGN WEALTH FUND INSTITUTE, ABU DHABI INVESTMENT AUTHORITY (2008), http://www.swfinstitute.org/fund/adia.php.

[18] Borzou Daragahi, *For Cash-Laden Emirates, No Price Tag is Too Large*, L.A. TIMES, Oct. 6, 2008.

[19] Stanley Reed, *Sovereign Wealth Funds Take a Hit,* BUS. WK., Jan. 12, 2009, at 44. *See also* Natsuko Waki, *Sovereign Wealth Funds May be Net Sellers of World,* REUTERS, Dec. 15, 2008, *available at* http://www.reuters.com/article/reutersEdge/idUSTRE4BE2SC20081215

Chinese government established in 2007 at the emergence of the Credit Crisis, lost value, as of December 2008, on almost every one of its investments.[20] Other SWFs likewise recognized large losses on their investments.[21] These losses have made SWFs hesitant to invest further in the West.[22]

Also, governments began using their SWFs to rescue their ailing economies in late 2008. For example, the Norweigian government used its SWF to fund a $14.8 billion bank aid package and other stimulus packages,[23] and the Kuwait Investment Authority, along with other Kuwait government entities, invested in a fund to buy into the Kuwaiti bourse (stock exchange), the second largest Arab bourse, after the Kuwaiti bourse lost 30% of its value during 2008.[24] Geoeconomics Research Fellow Brad Setser predicts that in 2009, SWFs, particularly those owned by Middle Eastern

(discussing the estimate of Brad Setser, Fellow for Geoeconomics at the Council of Foreign Relations, that SWFs suffered "double-digit" losses during the Credit Crisis and Morgan Stanley's estimate that SWFs recognized up to 25% losses during 2008).

[20] Jimmy Wang, *Chinese Recruiters Look Abroad for Diversity and Expertise,* N.Y. TIMES, Dec. 26, 2008, at B1.

[21] *See* Philip Aldrick, *Sovereign Wealth Funds From Asia to Shun Western Institutions,* DAILY TEL., Dec. 14, 2008, *available at* http://www.telegraph.co.uk/finance/globalbusiness/3759326/Sovereign-wealth-funds-from-Asia-to-shun-Western-institutions.html (stating that China Development Bank and Singapore's Temasek lost a combined two billion British pounds in value on their investments they made in Barclays); Reed, *supra* note 19 (stating that Norway's SWF experienced its worst performance ever losing 7.7% in value during the third quarter of 2008 and that Dubai's SWF lost 35% in value on the $3.1 billion stake it purchased in NASDAQ as of mid-January 2009).

[22] *See* Aldrick, *supra* note 21 (discussing Chairman and Chief Executive of the CIC Lou Jiwei's statement that he "does not have the courage" to invest in the West any more and the belief of Jaspal Bindra, Chief Executive of Standard Chartered's Asian operations, that Asian funds are waiting to "bottom fish" before they invest in the West again).

[23] Paul Hannon, *Norway Unveils Bank Aid Package,* WALL ST. J., Feb. 9, 2009, *available at* http://online.wsj.com/article/SB123411883915260951.html.

[24] *Kuwait Bourse Fund May Start Next Week,* TRADEARABIA, Dec. 16, 2008, *available at* http://www.tradearabia.com/news/newsdetails.asp?Sn=OGN&artid=153756.

countries, could become net sellers of assets as they try to make their assets more liquid and shed foreign assets that have diminishing return profiles.[25] If the price of oil continues to approach the break-even point based on its cost of production in the Middle East, Gulf countries will not likely have the cash to cover the fiscal needs of their economies, much less to provide additional capital for their SWFs.[26] To support local equity markets and cover domestic needs, Gulf countries already are drawing on their foreign assets and will have to sell illiquid foreign assets to continue doing so.[27]

Nonetheless, SWFs remain major owners of Western assets. While the rate of investment in the West by SWFs has slowed, SWFs are likely to remain a permanent part of the world financial system.[28] This situation raises some national security concerns.

III. NATIONAL SECURITY CONCERNS

Many commentators have responded to the dramatic and highly-publicized growth in investments in Western companies by SWFs and other foreign government-owned companies by expressing concern about the national security implications of these investments.[29] Much of the concern regarding SWF investment in the United States arises not

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[25] Waki, *supra* note 19.

[26] *Id.*

[27] *Id.*

[28] *Sovereign Wealth Funds: New Challenges from a Changing Landscape: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade and Tech. of the H. Comm on Fin. Servs.*, 110th Cong. 9 (2008), *available at* http://www.petersoninstitute.org/publications/papers/truman0908.pdf (statement of Edwin M. Truman, Senior Fellow, Peterson Institute for International Economics) ("[T]he phenomenon of sovereign wealth funds is a permanent feature of our global economy and financial system.").

[29] *See Regulating Sovereign Investments*, *supra* note 4 ("When individuals with government power also possess enormous commercial power and exercise control over large amounts of investable assets, the risk of misuse of those assets . . . rises markedly.").

from specific threats but from fear of the unknown.[30] SWFs vary greatly regarding the information they disclose about themselves and their investments; some SWFs are very transparent, revealing their investment purpose, results, and holdings while others have practically no transparency.[31] Specific concerns generally fall into five categories: (1) concerns about leverage to conduct nefarious financial transactions for the SWF's government, (2) concerns about appropriation of strategic assets by the SWF's government, (3) concerns about economic security, (4) concerns about the leverage in diplomatic negotiations that governments may gain through the ownership positions their SWFs hold, and (5) concerns about access to critical infrastructure and sites

[30] *See* Editorial, *Who Will Come to the Rescue?,* N.Y. TIMES, Mar. 18, 2008, at A22 ("[M]any [SWFs] are secretive about their holdings, their objectives and the strategies by which their portfolios are managed . . . Secrecy does not mean that the governments will necessarily be bad actors, but it is a big mistake to do such serious business with an opaque counterparty."); *Do Sovereign Wealth Funds Make the U.S. Economy Stronger, supra* note 1 ("Protectionist sentiment could be partially based on a lack of information and understanding of sovereign wealth funds, in part due to limited transparency and clear communication on the part of the funds themselves."); Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism,* 60 STAN. L. REV. 1345, 1360 (2008) ("Judging from the terms of the public controversy provoked by SWFs, the principal though hardly sole danger comes from lack of transparency."); WILLIAM MIRACKY ET AL., MONITOR GROUP, ASSESSING THE RISKS, THE BEHAVIORS OF SOVEREIGN WEALTH FUNDS IN THE GLOBAL ECONOMY 1, 18 (2008), http://www.altassets.com/pdfs/Monitor_SWF_Report.pdf ("[T]he combination of sovereign ownership, large size and impressive growth prospects, appetite for risk and lack of transparency constitutes a perfect storm for political controversy."); Staff of the Joint Comm. on Taxation, *Economic and U.S. Income Tax Issues Raised by Sovereign Wealth Fund Investment in the United States,* 846 PLI/TAX 703, 736 (2008) ("The lack of transparency regarding SWF investment activities has given rise to a concern that the funds may pursue objectives that are not strictly commercial.").

[31] *See* Sovereign Wealth Fund Inst., Linaburg-Maduell Transparency Index (2008), http://www.swfinstitute.org/research/transpar encyindex.php [hereinafter Linaburg-Maduell] (rating the transparency of SWFs on a scale of 1 to 10).

vulnerable to national security threats.[32] However, while these are legitimate concerns about the possible future behavior of SWFs, no empirical evidence currently exists to indicate that governments actually are using their SWFs to conduct nefarious activities.[33]

SWFs invested in companies in the West as the Credit Crisis emerged and, as discussed *supra* in Part II.B, the value of these investments declined subsequently. Perhaps the funds simply made poor investment decisions, or perhaps the SWFs focused less on making their purchases as the market bottomed and focused more on making purchases that would provide long-term value even if in the short-term they lost value. But perhaps the SWFs made these investments in Western financial institutions because the value garnered from non-economic benefits balanced or outweighed the inopportune economic timing. For example, government ownership may provide the government with leverage at Western banks to keep the banks from denying them service on controversial or suspicious transactions.[34]

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[32] Many of these concerns arise regarding foreign investment in general. This may be why the United States currently generally regulates SWFs in a similar manner to how it regulates foreign investment in general as discussed *infra* in Part V.A.

[33] *See Paving The Way For Sovereign Wealth, Rep. Jim Moran on Why the U.S. Should Compete for Sovereign Wealth Fund Investment,* NAT'L. J., Dec. 10, 2008 [hereinafter *Paving the Way for Sovereign Wealth*] ("We have no evidence whatsoever that any of this money has been invested for any reasons other than commercial."); Paul Rose, *Sovereign Wealth Funds: Active or Passive Investors?*, 118 YALE L.J. POCKET PART 104, 104 (2008) ("There is no significant evidence that SWFs have or will use control of U.S. firms to implement governmental policy."); MIRACKY ET AL., *supra* note 30, at 4 ("[SWFs] do not appear to be active in ways that threaten the economic or national security of foreign countries where they invest."); Matthew A. Melone, *Should the United States Tax Sovereign Wealth Funds,* 26 B.U. INT'L L.J. 143, 169-70 (2008) ("[T]here is little evidence to date that would suggest sovereign wealth funds have actively sought to pursue a political agenda.").

[34] *Testimony of Alan Tonelson Research Fellow U.S. Business and Industry Council Educational Foundation before the U.S. China Economic and Security Review Commission Hearing on the Implications of Sovereign Wealth Fund Investments for National Security* 1, 3-4 (2008), *available at*

Some experts have expressed concern that foreign governments may use the large pools of assets managed by SWFs to secure strategic assets such as key natural resources or defense-related technology.[35] The attempted purchase of 3Com by Huawei Technologies illustrates these concerns. In September 2007, Huawei, the Chinese mainland's largest telecommunications equipment maker, and Bain Capital, a private equity firm, agreed to take Nasdaq-listed 3Com private.[36] Bain backed out of the deal in February 2008 because it expected the Committee on Foreign Investment in the United States ("CFIUS"), a Treasury Department entity discussed in more detail *infra* in Part V.A, to prohibit the transaction.[37] CFIUS had expressed concern about Huawei owning 3Com unit TippingPoint, which provides security hardware and software to United States government agencies.[38] Some U.S. legislators alleged that Huawei had a history of illicit exports and industrial espionage,[39] and certain members of Congress also voiced concerns about connections between Huawei and the Chinese

http://www.uscc.gov/hearings/2008hearings/written_testimonies/08_02_07_wrts/08_02_07_tonelson_statement.pdf [hereinafter *Testimony of Alan Tonelson*] ("U.S. officials need to consider the possibility of transferring funds to terrorist organizations through money-laundering schemes. . . . [B]anks and brokerages in financial distress will obviously experience great difficulties saying No to requests to handle controversial deposits, fund transfers, and clients."). Foreign governments illicitly using American banks to facilitate nefarious activities is not unprecedented. Evidence indicates Iran moved billions of dollars through U.S. banks to finance its nuclear program. Vikas Bajaj & John Eligon, *Iran Moved Billions via U.S. Banks,* N.Y TIMES, Jan. 10, 2009, at B1.

[35] Staff of the Joint Comm. on Taxation, *supra* note 30; Paul Rose, *Sovereigns as Shareholders,* 87 N.C. L. REV. 83, 94 (2008) ("Among these government interests might be the acquisition of sensitive technologies or expertise through the purchase of a controlling stake in a company, or the acquisition of a major supplier of a limited natural resource.").

[36] Bien Perez, *3Com Challenges Bain Reasons For Ending Merger With Huawei,* S. CHINA MORNING POST, Mar. 22, 2008, at 1.

[37] *Id.*

[38] *Id.*

[39] *Id.*

military.[40] Analogous concerns exist regarding SWF ownership of U.S. companies and these concerns are exacerbated due to the direct governmental ownership of SWFs.[41]

Other perceived threats to American national security focus on economic security. Government investment funds or government-owned businesses may have different, more complex motivations than private companies, which presumably focus only on economic incentives. For example, SWFs may consider foreign policy goals when making foreign investments, which may have a distorting effect on the market.[42] Also, some commentators have expressed concern that an SWF could employ the government's control over economic events and access to non-public information to the economic advantage of SWFs.[43] Compounding the issue,

[40] *New Rules for Foreign Investors in Key U.S. Assets,* IRISH TIMES, Apr. 23, 2008, at 21 (noting that the company claims no such connection exists although Huawei's founder, Ren Zhengfei, served as a soldier in the People's Liberation Army).

[41] Some believe that state-owned enterprise Aluminum Corporation of China ("Chinalco") strategically purchased a 9% stake in Rio Tinto plc in an overnight transaction for $14 billion (the largest investment ever by a Chinese company, whether private or public) in order to secure for China better access to iron ore. Greene & Yeager, *supra* note 3, at 429.

[42] Staff of the Joint Comm. on Taxation, *supra* note 30, at 736; *Do Sovereign Wealth Funds Make the U.S. Economy Stronger, supra* note 1 ("For example, through inefficient allocation of capital, perceived unfair competition with private firms, or the pursuit of broader strategic rather than strictly economic return-oriented investments, sovereign wealth funds could potentially distort markets."). For example, in early 2009, Russian state-owned company Gazprom cut off gas to Ukraine. Gazprom claimed it was because Ukraine and Gazprom were unable, as of the date of shut off, to reach an agreement regarding prices for 2009 and payments in arrears, *Ukraine Urged to Resume Gas Talks,* AUSTRALIAN, Jan. 5, 2009, at 11, but some have characterized Gazprom as a "political weapon of the Kremlin" and "an instrument of Russian foreign policy." Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas,* 32 FORDHAM INT'L L.J. 345, 410 (2009).

[43] *See Regulating Sovereign Investments, supra* note 4 ("Governments that control sovereign wealth funds and sovereign businesses, because they are governments, can in some cases control certain economic events,

some experts argue that the securities regulator in the country which owns the SWF might hesitate to cooperate with the SEC on an insider trading investigation of the SWF.[44] Even if SWFs do not actually take advantage of their governmental position, if retail investors believe they are at an informational disadvantage, this could cause them to lose confidence in the markets and could even theoretically cause a market collapse.[45]

Another economic security concern focuses on the impact on the U.S. economy if SWFs pulled out their investments in the United States. Certain individual SWFs could cause "significant turmoil" if the SWF quickly liquidated its positions in U.S. companies.[46] Even worse, if all the SWF countries rebalanced their portfolios all at once by moving from dollars to some other currency, this could theoretically destabilize the U.S. economy,[47] although such a scenario

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and they may have information advantages over private market participants."); Rose, *supra* note 35, at 97 ("Another concern with SWF size and influence is the potential for abuse of informational disparities. Sovereign wealth funds have particular informational advantages that may not be available to other investors, or, in some cases, even to company insiders.").

[44] Greene & Yeager, *supra* note 3, at 436 ("There is also a risk of insider trading, which could raise particularly difficult enforcement issues. If a senior, politically-influential figure in an SWF provided inside information that allowed a relative to trade ahead of the market, one could imagine the securities regulator in that country hesitating to cooperate with the SEC.").

[45] Christopher Cox, Chairman, SEC, Keynote Address and Robert R. Glauber Lecture at the John F. Kennedy School of Government, Harvard University: *The Role of Government in Markets* (Oct. 24, 2007), http://www.sec.gov/news/speech/2007/spch102407cc.htm ("If ordinary investors—an estimated 100 million retail customers who own more than $10 trillion in equities and stock funds in U.S. markets—come to believe that they are at an informational disadvantage, confidence in our capital markets could collapse, and along with it, the market itself.").

[46] Rose, *supra* note 35, at 97 ("Further, a SWF could cause significant turmoil if, for reasons of national exigency, the SWF must liquidate its positions.").

[47] *Moran Unveils Sovereign Wealth Funds Task Force, supra* note 10 (stating that if SWFs did rebalance, they would pull $526 billion out of the economy).

seems unlikely. It would require massive coordination in order for all the SWF countries to sell off the U.S. investments at once. Also, the SWFs would be inflicting harm upon themselves; as they sold off their stakes, the value would drop and they would receive a lower return. In addition, the economies of countries around the globe are dependent upon the U.S. economy, as demonstrated by the Credit Crisis, so the turmoil inflicted upon the U.S. economy would harm the economies of the SWFs' countries as well.

In addition, some experts have expressed concern that SWF countries may use their ownership stakes as leverage for diplomatic negotiations.[48] For example, the United States might hesitate to protect Taiwan against action by the Chinese mainland because, amongst other reasons, China owns large stakes in many important American companies.[49]

Finally, much concern has been expressed about access to critical infrastructure and to sites particularly vulnerable to national security threats. This concern is well-illustrated by

[48] 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:* 118 YALE L.J. POCKET PART 88, 89 (2008) ("[T]here are some who suggest that the United States will fall victim to the policy interests of states that invest for geostrategic goals rather than commercial gains. These concerns are not unreasonable; America conceivably could have been reluctant to confront Russia over, say, its recent invasion of Georgia if the Kremlin controlled large portions of Wall Street."). Government use of economic pressure to exact political concessions is certainly not unheard of; for instance, allegations have been made that China's State Administration of Foreign Exchange used its assets to extract concessions from Costa Rica. Jamil Anderlini, *Beijing Uses Forex Reserves to Target Taiwan,* FIN. TIMES, Sept. 11, 2008, http://www.ft.com/cms/s/0/22fe798e-802c-11dd-99a9-000077b07658,dwp_uuid=9c33700c-4c86-11da-89df-0000779e2340.html ("The secretive government agency that supervises China's foreign exchange reserves used its funds to help convince Costa Rica to sever ties with Taiwan and establish relations with Beijing last year, according to documents obtained by the Financial Times.").

[49] *Testimony of Alan Tonelson, supra* note 34, at 2 ("If, for example, the Chinese government held significant stakes in a large number of big American financial institutions, especially market-makers, and if our nation's current period of financial weakness persists, how willing would Washington be to stand up to Beijing in a Taiwan Straits crisis?").

the November 2005 agreement by United Arab Emirates government-owned company Dubai Ports World to purchase Peninsular and Oriental Stream Navigation Company. Through this purchase, Dubai Ports World planned to acquire contracts to provide terminal services at many U.S. ports.[50] The transaction underwent scrutiny by the Bush administration through CFIUS and ultimately CFIUS determined it posed no risk to national security.[51] Nevertheless, the transaction sparked a "political firestorm," in which many American politicians expressed concern about the national security implications of a UAE government-owned company running American ports.[52]

Yet, evidence suggests that SWF investment in "politically-sensitive industries," while existent, is somewhat limited. In fact, SWFs generally avoid high-profile investments which might attract unwanted political attention.[53] Of course, the seemingly benign behavior of SWFs to date does not necessarily mean that such behavior will continue. These national security concerns, though as yet unrealized, are still well-founded.

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[50] RANDALL JACKSON, SENIOR LEGAL RESEARCH ASSOCIATE, GEORGE MASON UNIVERSITY SCHOOL OF LAW CRITICAL INFRASTRUCTURE PROTECTION PROGRAM, CFIUS UPDATE—DUBAI PORTS WORLD (2006), http://cipp.gmu.edu/research/CFIUS-DPWorld.php.

[51] *Id.*

[52] Donald Urquhart, *Dubai Port Operator Allays S'pore Fears; It is Not Going After Anyone's Turf but is Creating an Additional Market, Says CEO,* BUS. TIMES, May 11, 2006. Dubai Ports World ultimately closed the deal contingent upon its agreement to divest the American holdings. *Id.*

[53] *See* MIRACKY ET AL., *supra* note 30, at 39-42. Investments in transportation, high technology, and defense and aerospace make up less than 1% of the total value of SWF deals and telecommunications account for only 2%. However, SWFs have invested more heavily in the energy and financial services sectors; investments in energy and financial services account for 11% and 46% of the total value of deals by SWFs, respectively. Benign explanations may exist for these investments; many of the energy transactions were conducted by Middle Eastern SWFs where much of the world's oil supplies are located and the heavy interest in financial services companies may be the result of economically opportunistic behavior during the Credit Crisis.

IV. THE IMPORTANCE OF PROMOTING AN OPEN INVESTMENT ENVIRONMENT

A number of legal parameters, discussed in greater detail *infra* in Part V, help to diminish the national security risk associated with SWF investment in American companies. These parameters attempt to protect national security while maintaining an open-investment environment. An oft-cited concern is that if the United States does not foster an open-investment environment, other countries will react in kind, restricting the ability of Americans to invest in foreign countries.[54] This is not an idle concern; some countries have already begun imposing foreign investment policies similar to those followed in the United States.[55]

If the United States adopted a policy hostile toward foreign investment, the domestic economy of the United States might suffer severe harm. As a net importer of goods and services, the United States pays for its goods and services using foreign capital, which finances either consumption or investment in the United States.[56] If U.S. savings rates remain low and the availability of foreign capital decreases because of American government-imposed restrictions on foreign investment, then total investment in the United States would decrease, thus stifling growth in

[54] *See* Staff of the Joint Comm. on Taxation, *supra* note 30, at 738 ("Restrictions could prompt U.S. trading partners to adopt their own protectionist policies. These protectionist policies would exacerbate economic and political harms.").

[55] *See* Bertrand Benoit, Tony Barber & George Parker, *Germany Plans For Own Cfius Deal Watchdog,* FIN. TIMES, Sept. 27, 2007, *available at* http://www.ft.com/cms/s/0/48128c56-6c82-11dc-a0cf-0000779fd2ac.html (discussing the German Chancellor's calls for a European Union national security review similar to the national security reviews the United States conducts through CFIUS); Nicholas Rummell, *China Establishes its Own Version of CFIUS,* FIN. WK., Aug. 4, 2008, *available at* http://www.chinaforum.com/pub/choh/news_briefs/2008/45_a_1.html (discussing China's efforts to set up its own version of CFIUS).

[56] *See* Staff of the Joint Comm. on Taxation, *supra* note 30, at 738.

U.S. productivity. Stifled growth in productivity would lead to lower living standards.[57]

To put it in more concrete terms, foreign-owned firms employ over five million Americans or 4.6% of the U.S. private sector workforce.[58] These five million jobs pay, on average, 25% higher compensation than jobs at United States-owned firms. In 2006, foreign-owned firms produced nearly 6% of the total output of the United States and spent 14% of the total spent in the United States on research and design.[59] Foreign-owned firms re-invested $71 billion (more than 50%) of their U.S. income back into the U.S. economy in 2006 and made 13% of U.S. tax payments, a disproportionately high amount given their income.[60] Thus, foreign investment is very important in the United States and the United States should carefully attempt to protect and foster an open-investment environment while protecting national security.

Sovereign wealth fund investment in particular may provide the United States with benefits in addition to those that foreign investment generally provides. First, quite simply, SWFs provide additional capital, which reduces the overall cost of capital.[61] Also, because typically they are not highly leveraged, do not have capital requirements, and do not have investors who may withdraw their investments, SWFs may be able to provide significant amounts of long-term, stable capital.[62] Moreover, as government entities, they have an interest in and responsibility for providing such stability for their constituents and thus have reason to do so.[63] The availability of long-term capital is particularly appealing as the United States has had trouble acquiring

[57] *Id.*

[58] *Do Sovereign Wealth Funds Make the U.S. Economy Stronger*, *supra* note 1.

[59] *Id.*

[60] *Id.*

[61] Gilson & Milhaupt, *supra* note 30, at 1360.

[62] *Do Sovereign Wealth Funds Make the U.S. Economy Stronger*, *supra* note 1.

[63] *Id.*

long-term investment capital.[64] Also, if foreign governments invest heavily in the United States, they have a direct stake in its continuing prosperity and thus SWFs may promote better political relations through stronger economic ties.[65]

Concern has also been expressed that without an open environment for SWF investment, the United States will continue its net loss on foreign trade. The United States helped SWFs earn their funds by purchasing oil and gas and inexpensively manufactured products.[66] If the United States does not receive SWF investment, SWFs will not reinvest in the United States the money the United States paid out for oil and gas and inexpensively manufactured products and instead SWFs will invest the funds in other countries, undermining the strength of the American economy.[67]

V. LEGAL PARAMETERS

Legal parameters, both at the national and international level, limit the national security risk associated with SWF investment. At the domestic level, under the Foreign Investment and National Security Act of 2007 (FINSA), the President may suspend or prohibit transactions in which a foreign person, including an SWF, takes a controlling interest in a U.S. company and the President determines the transaction poses a national security risk. At the international level, countries which own SWFs and countries

[64] *See Paving The Way For Sovereign Wealth*, *supra* note 33.

[65] *See* Plotkin, *supra* note 48, at 89 ("If governments in China, Russia, and the Middle East have large investments in the United States and the European Union (EU), then they also have a direct stake in the continuing prosperity of the West. Rather than politics interfering with business, engagement with SWFs can promote better political relations through stronger economic ties."); *see also* Rose, *supra* note 35, at 93 ("A large investment by CIC in U.S. media firms, for example, would perhaps incentivize China to protect intellectual property rights more effectively.").

[66] *See Paving The Way For Sovereign Wealth*, *supra* note 33.

[67] *Id.*

receiving funds from SWFs have agreed to voluntary international standards regarding SWF investment.[68]

[68] In addition, the SEC disclosure requirements may assist in identifying SWF transactions which may pose national security considerations. Form 3 under § 16(a) of the Securities Exchange Act requires officers, directors, and any beneficial owner holding 10% or more of an issuer's equity securities to disclose their ownership interests. The SEC also requires disclosure within two business days of any change in ownership of these securities by any of these individuals through Form 4. A beneficial owner of more than 5% of an issuer's equity must file either Form 13D (or 13G) under § 13(d) of the Exchange Act within ten days of the purchase. Under Form 13D, the owner must reveal the source and amount of funds used to purchase the shares. The owner also must announce whether it purchased the stake as part of an effort to gain control of the company. Institutional investment managers who exercise discretion over more than $100 million in U.S. exchange-traded equity securities (including those at SWFs) must file a Form 13F. In this form, the manager discloses the name of each reportable issuer in the portfolio as of the end of each calendar quarter along with the number of shares managed and their market value. Entities that aren't registered with the SEC may still have to file a Form 13F. *Regulating Sovereign Investments*, *supra* note 4.

The information disclosed in these forms may help to identify those transactions or investors which may pose national security concerns, either because an SWF purchased a significant stake in a U.S. company or because the SWF invests heavily in the United States. In particular, these filings may make the members of CFIUS aware of covered transactions which the parties did not voluntarily bring before it but the members of CFIUS would want to review. The usefulness of the SEC disclosure requirements for responding to national security concerns regarding SWF investment in the United States is not clear. The information provided by the SEC disclosure requirements may be available elsewhere. CFIUS in particular may have access to this information and much more through the analysis provided to it by the Director of National Intelligence as discussed *infra* in Part V.A. But if the transaction is not before CFIUS, the Director of National Intelligence will not provide CFIUS an analysis. Simply, the SEC requirements add an additional layer of protection that helps to ensure that transactions that may present national security considerations do not pass unnoticed by the appropriate authorities. Also, the transparency provided by the SEC disclosures provides the public with access to information regarding SWF investment which it might not otherwise have and allows the public to evaluate the national security implications and respond accordingly. Public activism regarding transactions the public perceives as threatening is illustrated by the attempted Dubai Ports World acquisition.

A. Committee on Foreign Investment in the United States

In response to the Dubai Ports World debacle described *supra* in Part III, Congress passed FINSA, which amended U.S. law regarding CFIUS and foreign acquisitions of U.S. companies.[69] Under FINSA, the President may prohibit or suspend any covered transaction (including completed transactions that occurred as long ago as 1988) in which a foreign person (including an SWF) takes a controlling interest in a U.S. company and the President determines the transaction poses a national security risk.[70] No one may review the President's decision to prohibit or suspend a transaction.[71] However, a party to any transaction may seek a safe harbor from divestment by filing a voluntary notice of the transaction with CFIUS.[72] The information provided to CFIUS is kept confidential.[73] Upon receiving the notice, assuming the party who submitted the notice met all the procedural requirements, CFIUS will determine whether the transaction is a covered transaction; if not, CFIUS will inform the parties in writing.[74] Otherwise, in the case of foreign government controlled transactions, CFIUS will investigate the transaction.[75] CFIUS may also review and investigate covered transactions that CFIUS or the President unilaterally chooses.[76] The Director of National Intelligence conducts an independent investigation of all covered transactions brought before CFIUS by engaging the appropriate intelligence agencies and provides CFIUS with an analysis of any threat to national security posed by any

[69] Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?*, 93 IOWA L. REV. 325, 327 (2007).

[70] 50 U.S.C.A. app. § 2170 (West 2008).

[71] § 2170(e) ("The actions of the President under paragraph (1) of subsection (d) . . . shall not be subject to judicial review.").

[72] 31 C.F.R. § 800.401(a) (2008).

[73] 50 U.S.C.A. app. § 2170(c) (West 2008).

[74] 31 C.F.R. § 800.403(c) (2008).

[75] 50 U.S.C.A. app. § 2170(b)(2) (West 2008).

[76] § 2170(b).

covered transaction.[77] During a review or investigation, CFIUS may take actions to mitigate any national security risks, such as imposing conditions upon the transaction.[78] Upon completion of an investigation, CFIUS will send a report to the President in any of the following three situations: (1) if CFIUS recommends that the President prohibit or suspend the transaction; (2) if CFIUS cannot reach a recommendation as to whether the President should prohibit or suspend the transaction; or (3) if CFIUS requests that the President make the determination regarding the transaction on his own, without recommendation from CFIUS.[79] If CFIUS instead decides to conclude all deliberative action regarding the transaction, an official at the Department of the Treasury will promptly inform the parties to the transaction in writing.[80] If a party has been informed by CFIUS that CFIUS has concluded deliberative action or that the transaction is not a "covered transaction," the party has received a "safe harbor" through which the President agrees not to exercise his power to suspend or prohibit the transaction.[81]

1. Transactions That Posed National Security Considerations

Neither the statute nor the regulations attempt to define the phrase "threatens to impair the national security of the United States." The statute provides a list of factors for the President to take into consideration "as appropriate" when evaluating covered transactions, but ultimately, the statute leaves such a determination to the discretion of the

[77] § 2170(b)(4).

[78] § 2170(l)(1)(A) ("The Committee or a lead agency may, on behalf of the Committee, negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction.").

[79] 31 C.F.R. § 800.506(b) (2008).

[80] § 800.506(d).

[81] § 800.601(a)(1)-(2).

President and CFIUS on a case-by-case basis.[82] For up to thirty days, CFIUS utilizes the analysis of the Director of National Security and conducts an initial review of all covered transactions brought before it to determine if the transaction presents any national security considerations.[83] CFIUS further investigates for up to an additional forty-five days certain transactions which fit in certain categories of transactions listed in the statute.[84] Foreign government-controlled transactions are one such category of transactions and therefore CFIUS investigates all covered transactions to which an SWF is party, unless the Secretary of the Treasury and the head of the lead agency determine together during the review of the transaction that the transaction will not impair U.S. national security.[85] The fact that CFIUS automatically subjects foreign government-controlled covered transactions to investigation has been criticized for being discriminatory. The Chinese Ministry of Commerce called the rule a protectionist measure "tinged with the color of politicizing economic issues" which impedes normal investment in the United States by Chinese state-owned businesses.[86] As already briefly discussed *supra* in Part IV, if other countries interpret U.S. actions as protectionist and discriminatory, they may respond likewise toward the United States, imposing increased costs on investment by Americans in other countries.

The statute requires CFIUS to provide guidance on the types of transactions that CFIUS has reviewed. In its guidance, CFIUS said that when analyzing whether a

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[82] § 2170(f).

[83] § 2170(b)(1)(A)(ii), (f).

[84] § 2170(b)(2)(B).

[85] § 2170(b)(2)(B), (D).

[86] *Comment From China Ministry of Commerce,* REGULATIONS.GOV, [hereinafter *China Ministry of Commerce*], http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TREAS-DO-2008-0001 (last visited Apr. 26, 2009) ("This discriminating provision apparently tilts towards investment protectionism and is tinged with the color of politicizing economic issues. It therefore stands as grave impediments [sic] for the normal course of investment in the U.S. by China's state-owned companies.").

national security consideration amounts to a national security risk,[87] it considers the national security factors listed in the statute as well as "all other national security factors that are relevant to a covered transaction it is reviewing."[88] It takes into consideration both whether the foreign person has the ability and whether the foreign person has the intention to exploit or cause harm. The national security risk is a function of the threat and vulnerability versus the potential consequences (i.e., the greater the potential harm, the less likely the threat has to be for the same overall national security risk).[89]

Although these are not the only types of national security considerations which could be implicated, the national security considerations implicated by transactions which have been reviewed by CFIUS to date have pertained to either (or both) the nature of the target company or the nature of the acquirer.[90] Importantly for this discussion of

[87] CFIUS defines "national security considerations" as "facts and circumstances, with respect to a transaction, that have potential national security implications and that therefore are relevant for CFIUS to analyze in determining whether a transaction threatens to impair U.S. national security, i.e., whether the transaction poses a 'national security risk.'" "National security considerations" are present when CFIUS or any member of CFIUS has unresolved questions about whether a transaction poses a "national security risk." Thus, if a transaction involves "national security considerations" this does not mean that action is required on the part of the President or CFIUS. It merely means that the situation requires further analysis to determine whether there is a national security risk requiring action. GUIDANCE CONCERNING NATIONAL SECURITY REVIEW, *supra* note 5, at 2 & n.1.

[88] *Id.* at 7.

[89] *Id.* at 8.

[90] *Id.* at 10-11. Target companies that have presented national security considerations when acquired by a foreign entity include: companies providing products or services to the government, companies in the energy sector, transportation companies, companies related to "critical infrastructure" ("systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security"), companies doing work related to defense/weapon technology (including semi-conductor technology with both defense and commercial uses) and companies providing security services (including data security and

SWFs, CFIUS said that when the nature of the acquirer was that of a foreign government controlled entity, it presented national security considerations.[91] When analyzing the national security considerations which arise in foreign government-controlled transactions, CFIUS considers factors strikingly similar to the best practices for SWFs set forth by the Generally Accepted Principles and Practices—Santiago Principles (GAPP), discussed in more detail *infra* in Part IV.B.[92] This Note analyzes why these considerations are important when it discusses the treatment of these considerations in the Santiago Principles.

2. "Covered Transactions"

a. Passive Investment

In addition to posing a national security risk, a transaction must be a "covered transaction" in order for CFIUS or the President to subject it to suspension, prohibition or mitigating conditions under FINSA.[93] The

encryption). *Id.* at 11-14. CFIUS also discussed in its guidance that in addition to foreign-government controlled transactions, the nature of the foreign person acquiring the U.S. company presented national security considerations when an the acquirer may have intended to terminate contracts between the U.S. company and the U.S. government for goods and services related to the national security. *Id.* at 14.

[91] *Id.*

[92] CFIUS considers the extent to which the foreign government-controlled entity's policies require investment based solely on commercial grounds. It also considers the independence of the government-controlled entity, which involves an analysis of the entity's ability to make decisions uninfluenced by the government. CFIUS takes into account the transparency of the entity and the disclosures made by it, as well. The degree to which the government-controlled person complies with the legal and regulatory requirements of the countries in which it invests also fall amongst the considerations of CFIUS. *Id.* at 16.

[93] 50 U.S.C.A. app. § 2170(d), (l)(1)(A) (West 2008) ("[T]he President may take such action for such time as the President considers appropriate to suspend or prohibit any *covered transaction* that threatens to impair the national security of the United States . . . . The Committee or a lead agency may, on behalf of the Committee, negotiate, enter into or impose,

statute defines a "covered transaction" as "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States."[94] The regulations state that if, after the transaction concludes, the foreign person holds less than 10% of the voting interest in a U.S. business and holds the stake "solely for the purpose of passive investment," then the transaction is not a covered transaction.[95] An acquisition is "solely for the purpose of passive investment" if "the person holding or acquiring such interests does not plan or intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with holding or acquiring such interests solely for the purpose of passive investment."[96]

Academics disagree on how passively SWFs should act as investors in U.S. companies. Professors Ronald Gilson and Curtis Milhaupt call for SWFs to act more passively by forgoing their corporate voting rights.[97] They argue for a corporate law regime in which the equity of a U.S. firm would lose its voting rights when acquired by a foreign government-controlled entity but those voting rights would be automatically restored when the equity is transferred to a non-state entity.[98] Gilson and Milhaupt believe that SWFs which invest solely on financial motives would still invest because such a measure would not increase the cost of their investment while SWFs which seek strategic benefits from their investment (including strategic benefits which harm

and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the *covered transaction*." (emphasis added)).

[94] § 2170(a)(3).

[95] 31 C.F.R. § 800.302(b) (2008).

[96] § 800.223.

[97] Gilson & Milhaupt, *supra* note 30, at 1352.

[98] *Id.*

U.S. national security) would find that equity ownership is not as effective a way of acquiring those strategic benefits.[99]

Assistant Professor Paul Rose, in contrast, argues that the level of passivity that the CFIUS regulations encourage SWFs to undertake—a noncontrolling minority stake—is the appropriate level.[100] He makes a number of arguments for why SWFs should not be expected or required to completely avoid activities that may affect firm behavior or decision-making.[101] First, such expectations or requirements would lead SWFs to invest in other countries.[102] Also, under a regime with these expectations or requirements, SWFs would not be able to employ their equity interests to make positive changes within the companies they own.[103] Gilson and Milhaupt appear to agree with Rose that certain government funds may have a positive impact on corporate

[99] *Id.* at 1352-53 ("Sovereign investors with purely financial motives will still invest; the proposal does not raise the cost of their investments. Sovereigns seeking strategic benefits from equity investments, however, will find SWFs to be a less attractive vehicle by which to achieve their ends.").

[100] Rose, *supra* note 35, at 126.

[101] *See id.*

[102] *Id.* ("[I]mposing passivity on SWFs might merely push SWFs to invest in other jurisdictions with lax regulatory standards or political impotence to protect themselves against opportunistic SWF activities.").

[103] *Id.* at 120-22 ("One disadvantage of passive investment is that the SWF may be unwilling to engage with management; as noted by the Financial Times, 'the reason the sovereign funds have been given the opportunity to invest in Wall Street's financial groups is precisely because of misjudgments by managements that were either ignorant of risks and contingent liabilities or tolerant of them.' However, because of the risk of political backlash, SWFs may not encourage needed reforms . . . . [A]n active role in governance (presumably by the professional managers of SWFs, who are typically drawn from the ranks of fiduciary institutional investor firms) may prove beneficial. Active minority shareholders are often of significant benefit to their portfolio companies. One such example is Nelson Peltz, who holds minority positions in, among many firms, Heinz and Wendy's. Peltz has pushed through a number of changes at both companies, and both companies appear to have benefited significantly as a result." (citations omitted)).

governance but argue ultimately that this cost of taking away the voting rights of SWFs is worth it.[104]

Both of Rose's arguments for not increasing the level of passivity expected for SWFs are persuasive. His argument that SWFs would simply invest in other countries is supported by some of the comments to the proposed CFIUS regulations left by organizations in countries with SWFs; certain comments indicated that increased regulation of SWFs and other foreign investors would lead to less investment in the United States by such parties.[105] Rose's other argument—that SWFs would be unable to make beneficial changes in the companies in which they invest—counters Gilson and Milhaupt's statement that firms seeking only financial returns would continue to invest. Certain SWFs may intend to use their non-controlling minority voting interest as persuasion to make positive changes in a company and increase the value of their equity, a financial goal. Such SWFs would be seeking only financial returns, but if they were to lose their voting rights as Gilson and Milhaupt call for, they may be dissuaded from investing, contrary to Gilson and Milhaupt's claims. Further restricting how actively SWFs may participate in the management of companies in which they invest may become necessary in the future in response to evidence that SWFs

[104] Gilson & Milhaupt, *supra* note 30, at 1368 (citing CalPERS as an example of a government investment fund which has had positive impacts on corporations through its voting rights).

[105] *See China Ministry of Commerce*, *supra* note 86 ("[T]he voluntary notice requirements and the new certification requirement are extremely burdensome and require a significant input of time and manpower for both the foreign investor and the U.S. business, which would drive up the cost of the proposed transaction or even worse, discourage the consummation of the transaction."); *Comment from New America Foundation—GSFI*, REGULATIONS.GOV, http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TREAS-DO-2008-0001 (last visited Apr. 26, 2009) ("Our concern emanates from a belief that domestic and foreign investors alike generally reward predictability and certainty, while shying away from uncertainty and the unquantifiable risk it presents. This is likely to negatively impact valuations or even the decision to pursue a given investment at all.").

are actually using their ownership interests for nefarious purposes. However, as discussed *supra* in Part III, there is no empirical evidence that SWFs are using their ownership stakes in a way that threatens U.S. national security and the concerns are at this time theoretical. Restricting the ability of SWFs to make positive impacts on U.S. companies and dissuading them from investing in the United States is not sensible in light of the current state of threats; the current legal regime sufficiently protects against the theoretical concerns that exist today.

b. Control

In addition to excluding passive investments, the regulations further clarify what is or is not a covered transaction by defining "control." "Control" is "the power, direct or indirect, whether or not exercised . . . to determine, direct, or decide important matters affecting an entity."[106] The regulations state that a party might (but does not necessarily) achieve that power through a number of listed mechanisms but the regulations also explicitly state that "other means, to determine, direct, or decide important matters that affect an entity" could provide sufficient power to constitute control.[107]

The definition of "control" has been criticized for being both not explicit enough and overly broad, leaving CFIUS with much discretion regarding what constitutes a covered transaction.[108] Experts have expressed concern about the

[106] 31 C.F.R. § 800.204(a) (2008).

[107] *Id.* (listing majority or dominant minority of voting interest in an entity, board representation, proxy voting, special shares, contractual arrangements, or formal or informal arrangements to act in concert as such mechanisms).

[108] *See China Ministry of Commerce, supra* note 86 ("In addition, the Regulations fails [sic] to lay out explicit definitions for such important legal concepts as 'national security', [sic] 'control' and 'critical infrastructure'. [sic] Such conceptual ambiguity and simple generalization will certainly empower the relevant enforcement agencies with extensive authority on interpretation, giving easy rise to arbitrariness in actual practice.").

possibility of parties abusing the CFIUS process in order to effect political goals rather than using it to protect national security. Rose argues that British Tire and Rubber's attempted acquisition of the Norton Company in a hostile takeover deal illustrates such concerns.[109] The acquisition would have harmed Norton Company employees so these employees gathered 8300 signatures on a petition and ran an advertisement against the takeover in the Wall Street Journal.[110] One hundred and nineteen members of Congress wrote the President asking him to investigate the national security implications of the transaction.[111] When a French company later outbid British Tire and Rubber in a plan more amenable to Norton Company, no one from Norton Company raised national security concerns despite a lack of any evidence that a British company taking over implicated any more national security concerns than a French company.[112]

Another complaint is that CFIUS could theoretically use this discretion to subject vast numbers of transactions to review. However, historically, it does not appear that CFIUS has actually used this discretion to subject large numbers of transactions to review.[113] Even if CFIUS does not abuse its

[109] *See* Rose, *supra* note 35, at 113.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Parties to transactions filed 1500 notices between 1988 and 2005 and CFIUS investigated only twenty-five of those transactions. Of the twenty-five transactions which CFIUS investigated, twelve transactions were withdrawn by the parties and thirteen were forwarded to the President for consideration. The President has blocked only one transaction. George Stephanov Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security,* 25 YALE J. ON REG. 125, 129 (2008). The number of transactions for which the parties file a notice to CFIUS represents a small fraction of all transactions. For example, in 2006, there were 10,000 mergers and acquisitions transactions in total and of those 1730 were cross-border transactions. Parties to cross border transactions filed only 113 notices before CFIUS, meaning that CFIUS was only notified of 6.5% of transactions. Crocker, *supra* note 7, at 458. But the behavior of CFIUS in the past is not necessarily indicative of CFIUS' behavior in the future because, for one reason, the CFIUS members

power, the lack of transparency poses a problem if foreign countries respond by acting in a similarly non-transparent manner. As discussed *infra* in Part IV.B, the United States has an interest in promoting transparency amongst SWFs. Norway, which owns one of the largest SWFs, argued that if host countries, such as the United States, expect such transparency, then host countries should likewise make their processes for regulating investment transparent.[114] Leaving the interpretation of vaguely-defined terms, such as "control," to a largely non-public review by CFIUS does not promote such transparency.

In order to provide more certainty and clarity regarding what might constitute control, the regulations provide a non-exhaustive list of matters which inherently constitute "important matters."[115] Thus, if the SWF has the ability to determine, direct, or decide these enumerated important matters, then its interest in the transaction constitutes "control" within the definition of a "covered transaction." Presumably, CFIUS considers control over these particular important matters as types of control likely to provide the foreign entity with leverage to effect a breach of U.S. national security. For example, CFIUS designates decisions regarding the appointment or dismissal of officers, senior managers, or employees with access to sensitive technology

change with each administration. Some empirical evidence indicates that the number of transactions CFIUS is notified about is increasing. CFIUS being notified about 113 transactions in 2006 represented a 74% increase over 2005 and numbers released during 2007 indicated that CFIUS was on track to receive notification of 150 transactions that year. Rose, *supra* note 35, at 118.

[114] *Comment from Royal Ministry of Finance (Norway)*, REGULATIONS.GOV, http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TREAS-DO-2008-0001 (last visited Apr. 26, 2009) ("In the international debate on Sovereign Wealth Funds, transparency has become a central issue to alleviate concerns about sovereign investments. But transparency has to run both ways. Recipient countries setting up screening processes to address legitimate national security concerns should exercise transparency with respect to how much screen decisions are made, by whom and under which criteria.").

[115] 31 C.F.R. § 800.204(a) (2008).

or classified U.S. government information as important matters.[116] This provision corresponds to the concern that foreign entities with power over persons with access to sensitive technology or classified U.S. government information (whether directly or through power over their superiors) might use that power to pressure such persons with access to expropriate technology to the foreign government, to provide the foreign government with sensitive information, or to put such information to use in a way that harms the United States.

The regulations also list specific powers, designed as minority shareholder protections, which alone are not sufficient to give a minority shareholder the requisite "control" necessary for the transaction to be considered a covered transaction.[117] One could imagine scenarios in which the foreign entity could employ the minority shareholder protections to threaten the national security of the United States but CFIUS nevertheless deems these powers insufficient on their own to constitute control. This reflects a judgment on the part of the U.S. government that the benefits of allowing foreign investors certain minority shareholder protections without subjection to either the costs and delays involved with the CFIUS review process or the risk of forced divestment outweighs the risk that a foreign entity might use the protections in a way that might harm the United States. For example, the regulations state that the right of a foreign investor to buy additional shares in order to maintain the investor's pro rata share in a company should the company issue more interests does not alone constitute "control" of the company.[118] This reflects a judgment that the benefits of allowing a foreign entity to protect its equity interest from dilution outweigh the risk that the foreign entity would somehow use the protection to harm the interests of the United States.

[116] § 800.204(a)(8), (9).

[117] § 800.204(c).

[118] § 800.204(c)(4).

In its comments regarding the proposed regulations, the Association of British Insurers expressed concern about the pressure imposed upon foreign investors to give up their rights to minority shareholder protections in order to ensure that CFIUS will not deem their interest in the American company a "controlling" interest and thus subject the transaction to CFIUS review.[119] The Association argued that giving up shareholder rights violates the principle of good governance and responsible engagement by shareholders, which the Association said benefits all shareholders.[120] Reflecting similar concerns, the Representative of German Industry and Trade called for the regulations to include more minority shareholder protections in the list of those which, alone, will not confer control to the minority shareholder.[121] The Representative argued that the minority shareholder protections explicitly listed in the regulations do not suffice because many states require certain minority shareholder protections and therefore a situation could arise in which a foreign person could not ensure it did not take a "controlling" interest without violating state law.[122] While additional minority shareholder protections would add certainty to the CFIUS process, this certainty would come at the cost of risking that the power conferred by minority shareholder protections could provide a way for the foreign entity to breach the national security of the United States. The disagreement regarding how many

[119] *Comment from ABI,* REGULATIONS.GOV, http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TREAS-DO-2008-0001 (last visited Apr. 26, 2009) ("[I]nvestors may, instead, elect to waive rights that they enjoy as share owners in order to avoid investigation.").

[120] *Id.* ("This will set back considerably the principle of good governance and responsible engagement by share owners which benefits all shareholders . . . . It is those rights which all shareholders enjoy by virtue of their ownership of shares and pro rata to their holdings that are of critical importance and which we emphasise should not be violated.").

[121] *Comment from Representative of German Industry & Trade (RGIT),* REGULATIONS.GOV, http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TREAS-DO-2008-0001 (last visited Apr. 26, 2009).

[122] *Id.*

and which minority shareholder protections CFIUS should exempt from conferring control arises as a result of disagreement about the proper balance of the competing interests of national security and open investment. For example, the ratio of Germany's interest in investing in the United States to Germany's interest in U.S. national security may differ from the ratio of the United States' interest in Germany investing in the United States to the United States' interest in U.S. national security. As discussed *infra* in Part VI, the United States must find its best balance when setting its policy regarding SWF investment, paying careful attention to the precedent it sets for other countries.

The Securities Industry and Financial Markets Association called for a presumption that negative covenants and provisions intended to protect minority investors from fundamental changes in the business without their consent do not constitute control,[123] but CFIUS would likely find such a presumption hard to apply. Whether or not a power conveyed to a minority shareholder falls within the minority shareholder protection exemptions in the regulations depends upon whether or not the transaction confers the powers listed; the intent of the parties conferring the power is irrelevant. But the Securities Industry and Financial Markets Association presumption requires an analysis of the intent of those conferring the power of the minority investor protection in order to trigger the presumption. Given that such intent might be not be obvious, that would make application of this presumption difficult. Also, the benefit of certainty would be limited because CFIUS could rebut the presumption.

[123] *Comment from Securities Industry and Financial Markets Association,* REGULATIONS.GOV, http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TREAS-DO-2008-0001 (last visited Apr. 26, 2009).

3. Mitigation Agreements and Conditions Upon Transactions

If CFIUS undertakes an investigation, the statute authorizes CFIUS to "take any necessary actions in connection with the transaction to protect the national security of the United States."[124] CFIUS or the lead agency on behalf of CFIUS may negotiate and enter into a mitigation agreement with or impose a condition upon any party to a covered transaction to mitigate any threat to national security arising as a result of the covered transaction.[125] The lead agency modifies, monitors, and enforces these agreements and conditions.[126]

4. Safe Harbor

If the President finds the situation calls for it, he may employ the authority conferred upon him by statute and authorize the Attorney General to seek appropriate relief, including retroactive divestment of transactions that occurred as long ago as 1988, in order to implement and enforce the statute,[127] but companies may seek protection from forced divestment through a "safe harbor" provision provided in the regulations. The regulations state that the President maintains all his authority, but that he will not

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[124] § 2170(b)(2)(A).

[125] § 2170(l)(1)(A) ("The Committee or a lead agency may, on behalf of the Committee, negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction.").

[126] § 2170(l)(3)(A) ("The lead agency shall negotiate, modify, monitor, and enforce, on behalf of the Committee, any agreement entered into or condition imposed under paragraph (1) with respect to a covered transaction, based on the expertise with and knowledge of the issues related to such transaction on the part of the designated department or agency.").

[127] § 2170(d)(3) ("The President may direct the Attorney General of the United States to seek appropriate relief, including divestment relief, in the district courts of the United States, in order to implement and enforce this subsection.").

exercise his authority in any of the following situations: (1) if CFIUS advised a party to the transaction in writing that it was not a covered transaction, (2) if CFIUS advised the parties in writing that CFIUS concluded all action regarding the transaction, or (3) if the President previously announced his decision not to exercise his authority with respect to the covered transaction.[128] But these regulations are subject to the limited situations in the statute which provide for initiating a new review of a covered transaction which CFIUS already reviewed or investigated. These situations arise when a party to the transaction submitted false or misleading material information or omitted material information or when a party to the transaction or the entity formed by the transaction materially breached a mitigation agreement or condition.[129]

Commentators on the proposed regulations and academics have expressed concern that the CFIUS process is overly cumbersome, making the cost of receiving safe harbor unreasonably high.[130] As already discussed *supra* in Part IV.A.2.b, certain commentators on the proposed regulations suggested foreign entities might limit their investment in the United States because of the increased costs of transacting business in the United States imposed by the CFIUS process.

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[128] 31 C.F.R. § 800.601(a) (2008).

[129] § 2170(b)(1)(D)(ii), (iii).

[130] *See* Rose, *supra* note 35, at 112 ("CFIUS . . . adds substantial transaction costs to any significant SWF transaction involving a U.S. entity. Aside from the added costs to the SWF and the issuer of legal advisors that help the parties navigate the CFIUS process, CFIUS also creates potentially costly delays if the transaction is reviewed. By requiring officials to affirmatively sign off on a decision not to investigate, FINSA creates pressure to investigate which will undoubtedly increase the average time for review of SWF deals."). *China Ministry of Commerce, supra* note 86 ("[T]he information that the companies are required to file up according to the Regulations are overly cumbersome and complicated, adding substantially to the cost borne by the parties to the M&A transactions.").

5. Limitations on the President's Power

FINSA provides the President with great powers but procedurally, the statute somewhat limits the President by setting out the CFIUS process just discussed. Substantively, the statute attempts to limit the President's authority to prohibit and suspend transactions to situations in which the President finds both: (1) that credible evidence exists indicating the foreign interest might actually take action that would impair national security and (2) that other provisions of law do not adequately protect against the national security threats.[131] But these limitations have questionable effectiveness because no one may review the President's findings regarding these limitations.[132] The statute also makes a weak attempt to limit the President's powers by listing factors for the President to consider when he is analyzing the national security threat posed. But the statute only calls for him to consider these factors "as appropriate" and he may consider any other factors he deems relevant.[133] Plus, his determination regarding these factors is non-reviewable[134] so these factors place at most feeble limits on the President's power.

The statute also imposes reporting obligations to Congress, to executive agencies and to the public upon CFIUS.[135] Given that Congress is well-informed regarding

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[131] § 2170(d)(4)(A), (B).

[132] § 2170(e) ("[T]he findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review.").

[133] § 2170(d)(5).

[134] § 2170(e).

[135] 50 U.S.C.A. app. § 2170 (West 2008) (mandating that as soon as practicable after the completion of a CFIUS investigation, unless CFIUS forwarded the matter to the President for decision, the CFIUS chairperson and the head of the lead agency must provide those specified members of Congress with a signed, written report and state that the members of CFIUS believe no unresolved national security concerns exist regarding the transaction. The report must include a description of the actions taken by CFIUS regarding the transaction and identify the determinative factors CFIUS considered. In addition, if any member of Congress requests a briefing regarding a covered transaction on which action has concluded or

these matters, presumably if the President greatly abused the power Congress conferred upon him, it would pass legislation removing the power.

6. Summary of CFIUS Process

In summary, the statute provides the President with great power. The President may prohibit or suspend any transaction (even those occurring as long ago as 1988) in which a foreign person takes a "controlling" interest (as defined by the President through CFIUS in the regulations) in an American company, if he determines that the transaction poses a threat to "national security," a term which the statute and regulations do not define. While the statute provides factors for the President's consideration, it effectively leaves it to his discretion whether to actually consider such factors and his decision is non-reviewable. The President may exercise his authority only when he believes both that the foreign entity would actually undertake actions that threaten national security and that other U.S. laws do not sufficiently protect against the threat, but no court may review his determination regarding these limitations either. Parties to a transaction willing to undertake the expense of a CFIUS review may protect themselves against divestment by utilizing the safe harbor provision of the regulations. The statute also places some check on the President's power by imposing reporting requirements to Congress upon CFIUS and placing procedural limits on his power.

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a briefing regarding a party's compliance with a mitigation agreement, CFIUS must promptly provide such a briefing on a classified basis. Also, the lead agency must report material modifications of mitigation agreements and conditions to Congress, the Director of National Intelligence, the Attorney General and any other federal department or any agency, which may have a material interest in such modifications. Finally, the CFIUS chair must annually transmit a report to the chairman and ranking member of the committee of jurisdiction in the Senate and House of Representatives regarding all of the reviews and investigations of covered transaction during the previous year. All appropriate portions of the report may be classified in order to ensure national security and privacy but a public version of the report must be made available to the public.).

B. International Standards

Recently developed international standards may help to protect against national security threats from SWFs. The International Working Group of Sovereign Wealth Funds ("IWG"), an organization of countries which have SWFs, established a voluntary set of best practices and principles for SWFs called the Generally Accepted Practices & Principles ("GAPP") or Santiago Principles. The Organisation for Economic Co-operation and Development ("OECD"), whose members are industrialized nations, set forth standards for countries receiving investment from SWFs as well.

1. Standards for SWFs

Twenty-three countries with SWFs, including the countries with the largest SWFs, belong to the IWG.[136] In October 2008, the IWG released its best practices, entitled "Generally Accepted Principles and Practices (GAPP)—Santiago Principles."[137] Many of the principles concern issues unrelated to the security of recipient countries but several of the principles are germane to a discussion of national security.

Some of the principles focus on ensuring that the SWF runs independently of the government which owns it. The sixth principle calls for the SWF to put in place a governance framework which establishes a clear and effective division of roles in order to facilitate accountability and operational independence in the management of the SWF.[138] The ninth principle calls for the operational management of the SWF to implement the strategies of the SWF in an independent

[136] INTERNATIONAL WORKING GROUP, *supra* note 6, at 1 & n.2 (member nations include Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Islamic Republic of Iran, Ireland, Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad and Tobago, the United Arab Emirates, and the United States).

[137] *Id.*

[138] *Id.* at 7 (Principle 6).

manner and in accordance with clearly defined responsibilities.[139] The SWF should also publicly disclose its governance framework and objectives as well as the methods by which the SWF maintains its independence.[140] The Santiago Principles do not specify exactly what the structure of the SWF should be. In one sense, this is a positive measure because it does not assume that one form is best for all situations,[141] but by leaving the design of the structure to the SWF's devices, the risk is run that the SWF will not choose a form that effectively promotes independence. But at the very least, the disclosure of structure requirements will clarify lines and scope of authority within the SWF for regulators in recipient countries.[142] This independence the IWG strives to ensure with the Santiago Principles, if achieved, would help to limit the risk that the SWF makes investment decisions on the basis of the government-owner's non-economic goals, including those that might threaten U.S. national security. For example, without a strong independent structure for the SWF, members of the government might push the employees of the SWF to use the SWF to invest in a U.S. company from which it wishes to expropriate defense technology to the foreign government even if officially the SWF invests only on economic considerations. Undertaking these measures may help the SWF meet another Santiago Principle as well: SWFs should focus on maximizing risk-adjusted financial returns.[143] Minimizing government influences by maximizing SWF independence would allow the SWF to focus its investing on financial returns.

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[139] *Id.* at 7-8 (Principle 9).

[140] *Id.* at 8 (Principle 16).

[141] *See* Rose, *supra* note 35, at 138 (noting that governance structures should be viewed as a means rather than an end).

[142] *Id.* at 139.

[143] INTERNATIONAL WORKING GROUP, *supra* note 6, at 8. (Principle 19) (But note, Subprinciple 19.1 states that "If investment decisions are subject to *other than* economic and financial considerations, these should be clearly set out in the investment policy and be publicly disclosed.").

The principles also call for SWFs to make significant disclosures, thus increasing the "transparency" of the SWF. The SWF should publicly disclose all relevant financial information[144] and prepare an annual report, accompanied by financial statements, which are prepared and audited annually in accordance with international or national auditing standards.[145] The financial statements would provide a degree of proof that the SWF actually followed its purported objectives and investment goals. The auditing requirement increases the reliability of the statements. This would improve the ability of host countries to detect nefarious behavior on the part of SWFs and respond accordingly. The increased detection ability of host countries may deter SWFs from taking measures which would harm the host country, out of fear of the response of the host country should the host country detect the harmful behavior.

However, this principle might have a negative effect if SWFs do not act in economically sound ways for fear that host countries might interpret their actions as threatening and respond with protectionist measures. Also, the level of disclosure called for by the principles is limited. They call for less disclosure than the most transparent SWFs currently reveal.[146] For example, the Santiago Principles call for disclosure of general asset allocation but not disclosure of individual asset allocation.[147] The choice not to call for more detailed disclosures probably reflects concerns of many SWFs colorfully articulated by Lou Jiwei, the President of CIC: "[I]t will be a gradual process. Transparency is really a tough issue. If we are transparent on everything, the wolves will eat us up."[148] As already stated, the Santiago Principles

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[144] *Id.* (Principle 17).

[145] *Id.* (Principles 11 and 12).

[146] Rose, *supra* note 35, at 144 ("[T]he Santiago Principles also fall well short of the disclosures offered by very transparent SWFs such as Norway's.").

[147] *Id.*

[148] Martin Arnold, *China Fund Chief Warns on National Security*, FIN. TIMES, Dec. 11, 2007, *available at* http://www.ft.com/cms/s/0/710ec334-a78a-11dc-a25a-0000779fd2ac.html.

are voluntary and, as represented by Jiwei's comments, there are some indications that the IWG members might resist the transparency practices called for by them.

According to the Santiago Principles, the SWF should define professional and ethical standards within its organization and make them known to the members of the SWF's governing body, management and staff.[149] The principles do not specify the substance of those professional and ethical standards but presumably those standards should at least include the Santiago Principles, which call for compliance with all the applicable laws of the host country.[150] United States law probably covers many of the circumstances in which an SWF might threaten national security and therefore, under the Principles, an SWF's ethical and professional standards would likely forbid many actions that would threaten a host country's national security.

Of course, these standards are only effective if the people who run the SWFs actually follow them. The Principles, therefore, also call for SWFs to develop an accountability framework for their operations. The SWF should clearly define such framework in its relevant legislation, charter, other constitutive documents or management agreement.[151] Such framework, if effective, would provide host countries with some assurance that if an agent of an SWF strayed from the SWFs' stated ethical standards and goals, the SWF has a procedure in place for detecting and punishing such conduct. Such procedures should help deter such conduct from occurring.

In theory, these Principles as a whole, if implemented, would likely have a positive impact on the global economy, but this remains very theoretical. The Santiago Principles do not bind IWG members. Rather, IWG members either have implemented or intend to implement the Principles on a voluntary basis, with implementation subject to home

[149] INTERNATIONAL WORKING GROUP, *supra* note 6, at 8 (Principle 13).

[150] *Id.* (Principle 15).

[151] *Id.* (Principle 10).

country laws, regulations, requirements and obligations.[152] The impact of the Santiago Principles will depend on whether and to what extent SWFs actually implement them. At least one scholar has argued that given the current weak financial environment, recipient countries are not likely to insist upon the monitoring and enforcement that would make the Principles effective[153] but perhaps SWFs will try to alleviate protectionist concerns which may be particularly likely to arise in this time of financial weakness by abiding by the Santiago Principles, at least to some extent. Nevertheless, at this point, the United States certainly cannot rely on the voluntary compliance of SWFs to protect its national security and must continue under its domestic legal regime, discussed *supra* in Part IV.A.

Aaditya Mattoo, an economist at the World Bank, and Arvind Subramanian, a fellow at the Peterson Institute for International Economics, call for a multilateral agreement on SWFs through the World Trade Organization ("WTO"). They believe the WTO would be well-suited for SWF regulation because it has a dispute resolution mechanism in place.[154] If such multilateral agreement could be reached through the WTO with its dispute resolution mechanism, the agreement might prove more effective than the voluntary Santiago Principles.

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[152] *Id.* at 7.

[153] *Testimony of Alan Tonelson*, *supra* note 34, at 4 ("But given the financial weakness of the United States nowadays, and given the leverage consequently enjoyed by capital-rich SWF governments, it's difficult for the time being envisioning Washington—or any combination of recipient-country governments—standing their ground on these questions, much less successfully insisting on the kinds of monitoring and enforcement that would give the Codes some semblance of teeth.").

[154] Aaditya Mattoo & Arvind Subramanian, CURRENCY UNDERVALUATION AND SOVEREIGN WEALTH FUNDS: A NEW ROLE FOR THE WORLD TRADE ORGANIZATION (2008), *available at* http://www.iie.com/publications/wp/wp08-2.pdf.

2. Standards for Recipient Countries

Recipient countries likewise agreed to a set of principles regarding their policies governing investment in their countries by SWFs. During June 2008, ministers representing thirty-three recipient countries adopted a declaration to express their commitment to preserve and expand an open international investment environment for SWFs and endorsed guidelines developed by the OECD Investment Committee to ensure that host countries do not disguise protectionism as measures taken to safeguard national security.[155] As discussed throughout this Note, the United States has an interest in SWFs adopting the Santiago Principles and acting as transparently as possible. As also previously discussed, the United States is hard pressed to argue that SWFs should adopt such measures if it does not take reciprocal measures itself. Therefore, it is highly important that the United States abide by these OECD guidelines, the parallel guidelines to the Santiago Principles. For the most part, the United States CFIUS process abides closely with the OECD guidelines although in minor ways, as discussed in this section, it does not.

One focus of the guidelines is on non-discrimination. The guidelines call for recipient countries to avoid discrimination by treating similarly situated investors in similar fashions, unless such treatment is not possible, and then they call for host countries to protect national security by responding to individual threatening situations, rather than by imposing broad discriminatory restrictions on foreign investment.[156] CFIUS may subject transactions to which a foreign investor is party to review while CFIUS may not subject to review similar transactions to which only American investors are party.[157] However, rather than banning certain types of

[155] WORKING TOGETHER, *supra* note 6, at 1.

[156] *Id.* at 4.

[157] *See* § 2170(a)(3) (A "covered transaction" is "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, *by or with any foreign person* which could result in foreign control of any

investments by foreign entities across the board, CFIUS reviews individual transactions that pose national security considerations to determine if they may threaten national security.[158] Reviewing transactions individually is important because, as discussed briefly *supra* in Part I and *infra* in Part V.B, state-owned entities vary in form, in level of transparency, and in the relationship between the United States and its government-owner. Individual review allows CFIUS to consider all of these factors rather than imposing broad bans on certain foreign investment. Of course, if CFIUS reviewed all transactions or all of certain types of transactions, including those by American investors, the system would discriminate less but costs would increase greatly.

Another focus of the guidelines is transparency. While recognizing the need to maintain the confidentiality of sensitive information, the guidelines call for recipient countries to make regulatory objectives and processes as transparent as possible by codifying their laws and making them easily accessible to the public,[159] which the United States does.[160] The OECD guidelines also call for the government to make its evaluation criteria available to the public.[161] While the statute, regulations, and CFIUS guidelines provide certain information on the criteria used to evaluate SWF investment in the United States, nothing limits CFIUS to this criteria. Also, no judicial review mechanism exists through which courts could ascertain that CFIUS and the President actually followed the criteria

person engaged in interstate commerce in the United States." (emphasis added)).

[158] § 2170.

[159] WORKING TOGETHER, *supra* note 6, at 4.

[160] *See* U.S. Department of the Treasury, *Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons*, http://www.treas.gov/offices/international-affairs/cfius/docs/finalregs_111408%20.pdf (last visited Apr. 26, 2009) (providing public access to the CFIUS regulations); FINSA, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h556enr.txt.pdf (last visited Apr. 26, 2009) (providing public access to FINSA).

[161] WORKING TOGETHER, *supra* note 6, at 4.

provided in the statute, regulations and guidelines.[162] The guidelines also call for the government of the recipient country to notify interested parties if it plans to change its investment policies and to consult with interested parties regarding those changes.[163] The American notice and comment process for the CFIUS regulations exemplifies such notice and consultation. Similarly, when Congress amended the statute, it heard the opinions of affected parties.[164] The President has issued executive orders regarding the CFIUS process, as well.[165] There is less direct evidence of consultation when the President issued the orders but presumably he took into account the stances of affected parties. According to the guidelines, the government should adequately disclose investment policy actions while protecting commercially sensitive classified information.[166] The guidelines specifically refer to reporting to a parliament as a way of making adequate disclosure.[167] The U.S. CFIUS process provides protection for classified information[168] and requires CFIUS to provide reports both to Congress and the public;[169] thus, the U.S. process meets this guideline.

A third focus of the guidelines is "regulatory proportionality"—the principle that recipient countries should not impose restrictions or conditions on investments

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[162] § 2170(d), (e) (prohibiting judicial review regarding the President's findings that there is credible evidence of a national security threat and that no other area of law effectively mitigates the threat).

[163] WORKING TOGETHER, *supra* note 6, at 4.

[164] *See Foreign Ownership of Infrastructure: Hearing Before the Subcomm. on Transportation Security and Infrastructure Protection, H. Comm. on Homeland Security,* 110th Cong. (2007) (statement of David Marchick, Covington and Burling LLP); *CFIUS One Year Later: Hearing Before the H. Comm. on Financial Services,* 110th Cong. (2007) (statement of Robert S. Nichols, President and Chief Operating Officer, The Financial Services Forum).

[165] *See* Ex. Ord. No. 13286, 68 F.R. 10629 (2003); Ex. Ord. No. 13456, 73 F.R. 4677 (2008).

[166] WORKING TOGETHER, *supra* note 6, at 4.

[167] *Id.*

[168] § 2170(c).

[169] § 2170(m).

that are greater than necessary to protect national security.[170] The guidelines call for recipient countries not to undertake protective measures if other existing laws, regulations, or policies adequately and appropriately address national security risks.[171] FINSA requires the President to find that no other laws adequately protect against the national security risk before prohibiting or suspending a transaction and, therefore, it seems the CFIUS process meets this guideline.[172] If they must undertake measures, the guidelines state that recipient countries should tailor the measures to the specific risks posed by the investment proposals.[173] The CFIUS process examines each transaction individually, tailoring its response to the specific risks involved in the transaction.[174] CFIUS may employ a mitigation agreement to negate the national security threat while allowing the transaction to proceed,[175] and thus the U.S. system meets the guideline calling for measures to be taken to avoid prohibiting transactions as a whole.[176] Overall, the CFIUS process mostly follows the principle of regulatory proportionality, although, as discussed *infra* in Part VI, slight changes in U.S. policy regarding SWF investment might achieve a better balance.

The OECD guidelines also discuss accountability. They call for the person responsible for restrictive investment policies to be accountable to the country's citizens.[177] Congress passed FINSA and its predecessor Exon-Florio, and the President signed them into law. Both Congress and the President, of course, are accountable to the citizens of the United States via elections. But the guidelines state that administrative or judicial review can enhance

[170] WORKING TOGETHER, *supra* note 6, at 4.

[171] *Id.* at 5.

[172] § 2170(d)(4)(B).

[173] WORKING TOGETHER, *supra* note 6, at 4.

[174] § 2170.

[175] § 2170(l).

[176] WORKING TOGETHER, *supra* note 6, at 4.

[177] *Id.* at 5.

accountability,[178] and no one may judicially review a presidential decision to prohibit or suspend a transaction under FINSA.[179] However, the guidelines also recognize a number of situations in which reviewing decisions might not be desirable such as situations in which the country's constitution limits review and situations in which review procedures are costly and time-consuming.[180] The guidelines call for the ultimate authority for making important decisions regarding SWF investment to fall with someone at a high political level.[181] The President ultimately makes the decisions regarding whether to prohibit or suspend transactions under FINSA,[182] so obviously the United States meets this guideline.

The countries that agreed to the OECD guidelines also agreed to participate in the OECD notification and peer review process. Angel Gurria, the OECD Secretary-General, described the process: "[t]hrough 'peer pressure' policy practitioners from different countries pool information, draw on data and analysis provided by the Secretariat and have an in-depth conversation about whether and how each participant is observing OECD principles."[183] The OECD produces a report for each country based on the general consensus of the countries participating in the discussion on that country's performance in a particular subject area.[184] In theory, countries that fall behind others regarding their policies on SWF investment will feel embarrassed and "peer pressured" to improve. The OECD believes that peer

[178] *Id.*

[179] § 2170(e).

[180] WORKING TOGETHER, *supra* note 6, at 5.

[181] *Id.*

[182] § 2170(e).

[183] Angel Gurria, Sec'y Gen., Org. for Econ. Co-operation and Dev., Keeping Markets Open for Sovereign Wealth Fund Investment, Remarks During a Briefing with the U.S. Council for International Business, (Oct. 13, 2008), *available at* http://www.oecd.org/document/9/0,3343,en_2649_34887_41492169_1_1_1_1,00.html.

[184] *See* Fabrizio Pagini, *Peer Review: A Tool for Global Co-operation and Change,* OECD OBSERVER, http://www.oecdobserver.org/news/fullstory.php/aid/881/Peer_review.html (last visited Apr. 26, 2009).

pressure may arise in a variety of ways: through formal recommendations, informal dialogue, and public scrutiny and comparisons.[185] Given how publicly United States compliance with the OECD guidelines will be scrutinized, the United States should continue to strive to comply with the OECD guidelines in order to encourage reciprocal behavior on the part of SWFs.[186]

VI. SUGGESTIONS FOR IMPROVEMENT

Managing the competing interests of open investment and protection of national security requires balancing. While the current legal parameters regarding SWF investment in the United States balance these opposite concerns fairly well, in order to achieve the best balance, the United States should focus on making its investment environment as open as reasonably practical, taking into consideration efficiency and

[185] OECD, Peer Pressure: A Related Concept, http://www.oecd.org/document/53/0,3343,en_21571361_37949547_37996182_1_1_1_1,00.html (last visited Apr. 26, 2009). The OECD has utilized these peer pressure techniques since 1961. OECD, *Peer Review in Economic Surveys: The Role of the EDRC*, http://www.oecd.org/document/23/0,3343,en_21571361_37949547_37970135_1_1_1_1,00.html (last visited Apr. 26, 2009), and has used the method to affect policy regarding economic development, environmental performance and regulatory reform. OECD, *Examples of Peer Reviews*, http://www.oecd.org/document/8/0,3343,en_21571361_37949547_37970056_1_1_1_1,00.html (last visited Apr. 26, 2009). Other organizations, including the European Union, the International Monetary Fund, and the World Trade Organization have adopted the OECD peer review methods as well. *See* Pagini, *supra* note 184.

[186] *Comment from Emergency Committee for American Trade (ECAT)*, REGULATIONS.GOV, http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TREAS-DO-2008-0001 (last visited Apr. 26, 2009) ("The importance of setting a positive example is increasingly important, as we have recently seen several other countries propose or administer review processes that are over-extensive and not national-security based. As the United States continues to work with the Organization for Economic Cooperation and Development (OECD) in its efforts to set forth best practices for investment-recipient countries, the United States' own implementation of these regulations can serve as a powerful reinforcement of how OECD members and other governments can implement similar review processes.").

national security concerns. As explained *supra* in Part IV.B.1, the United States has an interest in SWFs implementing the voluntary Santiago Principles. As illustrated by Norway's comment discussed *supra* in Part IV.A.2.b, the persuasiveness of the United States argument that SWFs should act in an independent, transparent manner suffers when the U.S. legal processes regarding SWFs are not as open and transparent as possible. Also, the United States, whose citizens regularly invest in foreign countries, has an interest in foreign countries providing an open investment environment as well. Other countries may not welcome U.S. investment if the United States does not do its own part to promote open investment. Even small changes, which would have a negligible impact on investment into the United States,[187] may be worthwhile if they help promote the image of the U.S. investment environment as open to foreigners and thus encourage reciprocal behavior on the part of other countries.

A. Safe Harbor Industry

The United States should consider a number of ways to tweak its current policy regarding SWF investment in order to come as close as possible to the perfect balance. It should evaluate whether there exists any lines of business which consistently pose few national security problems and explicitly exempt transactions in those industries from CFIUS reviews.[188] Commentators have suggested this to CFIUS in the comments to the proposed regulations,[189] but presumably CFIUS has not implemented such safe harbor industry provisions because the members of CFIUS want to

[187] One might argue that the United States is hard-pressed, in this time when capital is in short-supply, to discourage the infusion of even relatively small amounts of capital.

[188] An example of such an industry might be fashion retailing.

[189] *China Ministry of Commerce, supra* note 86, at 2 ("While we understand that 'national security' cannot be defined so that it only encompasses certain industries or is limited in scope, one suggestion advanced would be the presentation of certain 'safe harbor' industries or businesses.")

leave open the possibility that CFIUS can review any transaction—even those in seemingly safe industries—should an unexpected national security consideration arise. Under the current regime, parties to a covered transaction in an industry with little connection to national security could simply not bring the transaction before CFIUS. Assuming the transaction indeed implicated no national security considerations, the parties need not worry about divestment later because the transaction would not provide a basis for such an action. But this requires the parties to determine that CFIUS would not detect any related national security risks. Even a very tiny risk of forced divestment in the future could marginally increase the cost. In addition, parties to transactions might miscalculate the risk that the President would force divestment of the transaction in the future. Such a decision would not be subject to review. Parties from countries where government officials often abuse power may be especially prone to miscalculate the risk. But parties to all business transactions must calculate risk, and parties to covered transactions simply must calculate the risk of CFIUS divestment just like they calculate other risks. The stronger argument for industry safe harbor exemptions is that they provide an example for the rest of the world about how the United States makes every effort to promote an open investment environment. The costs of such an example could be minimal, given that CFIUS would provide safe harbor industry status only for transactions in lines of businesses with very low national security risks.

B. Exempt SWFs

The United States should also consider providing exemptions from the CFIUS process for the SWFs of certain countries in exchange for the SWF abiding by measures similar to the Santiago Principles. In its guidance, CFIUS said that it considers both the intent and ability of a foreign person to breach U.S. national security. Consideration of ability would vary from transaction to transaction, but intention or desire to harm remains more consistent across

transactions. No national security risk exists if the acquiring country would not choose to harm even if it had the opportunity. Of course, the United States could never be certain that any acquiring country would not harm. But, even if there exists only an extremely small likelihood of malicious intent, the small risk may well be worth the cost. These exemptions would be subject to immediate termination in order to respond to new information or changes in geopolitics as well as to indications that the SWF is omitting or falsifying material information required by the agreement. In addition to the open investment benefits, providing exemptions from CFIUS investigations for certain SWFs might also better protect the United States than would reviewing each transaction, because the United States may receive broader information about the SWF and all its investments. Receiving such an exemption would only be cost-efficient for SWFs if the SWF intended to invest an amount in the United States such that it would cost less to comply with the exemption requirements than it would to repeatedly undergo the CFIUS process, unless compliance with the requirements to receive exempt status provided the SWF other benefits, such as eased investment in countries other than the United States.

Norway's SWF appears to be a strong candidate for such an exemption.[190] Norway does not have any ongoing conflicts with the United States that might motivate it to harm the United States if given the opportunity.[191] In a transparency

[190] This Note's discussion of Norway as a strong candidate does not imply that other SWFs might not be suitable for "Exempt SWF" status. Some countries may complain that the "Exempt SWF" provision is discriminatory since the United States would provide exempt status on a case-by-case basis. But the United States must stress that all SWFs are eligible for exempt status so long as a wholistic review on a case by case basis revealed they had appropriate attributes, which would include a lack of political conflict between the United States and the government owner of the SWF and a high level of disclosure on the part of the SWF.

[191] *See* Central Intelligence Agency, *The World Factbook: Norway*, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/no.html#Issues (listing under the International Disputes sections issues

index for SWFs developed by he Sovereign Wealth Fund Institute, Norway's SWF is the only SWF with assets of more than $100 billion in assets which received a ten out of ten. The index lists ten scoring categories, each of which an SWF might publicly disclose.[192] For each disclosure, it receives a point. Norway provides all the information called for in the factors. Since Norway already makes much information about its SWF public, it likely would not be very costly for Norway to comply with the requirements to receive an exemption.

Norway's SWF is regularly noted not only for its transparency, but also for its ethical investment.[193] Norway

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between Norway and Russia and not listing any conflicts between the United States and Norway).

[192] *See* Linaburg-Maduell, *supra* note 31 (Factors: Fund provides history including reason for creation, origins of wealth, and government ownership structure; Fund provides up-to-date independently audited annual reports; Fund provides ownership percentage of company holdings, and geographic location of holdings; Fund provides total portfolio market value, returns, and management compensation; Fund provides guidelines in reference to ethical standards, investments policies, and enforcer guidelines; Fund provides clear strategies and objectives; If applicable, the fund clearly identifies subsidiaries and contact information; If applicable, the fund identifies external managers; Fund manages its own web site; Fund provides main office location and address and contact information such as telephone and fax.).

[193] Larry Cata Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element of Private Choice Law*, 82 TUL. L. REV. 1801, 1852 (2008) (stating that Norway's SWF "has become a model for transparency and ethical management among SWFs"); SOVEREIGN WEALTH FUND INST., GOVERNMENT PENSION FUND—GLOBAL (2008), http://www.swfinstitute.org/fund/norway.php [hereinafter GOVERNMENT PENSION FUND] (discussing Norway's SWF's high level of transparency and ethical requirements); Steve Schifferes, *Lifting the Lid on Sovereign Wealth Funds,* BBC NEWS, June 3, 2008, http://news.bbc.co.uk/2/hi/business/7430641.stm (discussing Norway's SWF's ethical requirements); Delia Velculescu, *Norway's Oil Fund Shows the Way for Wealth Funds,* IMF SURVEY MAGAZINE, July 9, 2008, http://www.imf.org/external/pubs/ft/survey/so/2008/POL070908A.htm ("The Norwegian Oil Fund . . . is often cited as an exemplary sovereign wealth fund (SWF). This uniquely positions the fund as a model for and potentially important contributor to the new set of voluntary principles being developed for SWFs.").

requires its SWF to follow ethical guidelines based on the sector and company behavior, and its Council of Ethics monitors the SWF for compliance.[194] The guidelines are strictly imposed as evidenced by this partial list of companies in which Norway's SWF will not invest because of ethical concerns: Airbus, Boeing, Wal-Mart, Honeywell, Lockheed, and Raytheon.[195] Effecting a breach of U.S. national security would almost certainly violate these guidelines, and given the SWF's strict adherence to them, it seems unlikely such a breach would occur.

But concerns about providing an exemption for Norway may arise. Norway's ethical system is somewhat at odds with Santiago Principle 19. Principle 19 states that an SWF should "aim to maximize risk-adjusted financial returns . . . based on economic and financial grounds."[196] This principle reflects the concern discussed *supra* in Part III that investments influenced by noneconomic considerations, including ethical considerations such as Norway's, may distort the efficiency of the markets. But the IWG hedged on that broad principle in two ways which allow the Norwegian SWF's system to better fit within it. Principle 19 says the SWF should "aim to maximize risk-adjusted financial returns *in a manner consistent with its investment policy*, and based on economic and financial grounds."[197] This language seems to indicate that SWF investments should be based on economic and financial returns but that it may take into account other considerations, consistent with its

[194] GOVERNMENT PENSION FUND, *supra* note 193. The ethical guidelines state that Norway's SWF should not invest in companies if it would present an unacceptable risk of contributing to human rights violations (including murder and torture), violations of individual rights in war or conflict, gross corruption, or "other particularly serious violations of fundamental ethical norms." STYRER, RAD OG UTVALG, ETHICAL GUIDELINES, NORWEGIAN GOVERNMENT PENSION FUND—GLOBAL (2005) [hereinafter ETHICAL GUIDELINES], http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277 (available in English).

[195] GOVERNMENT PENSION FUND, *supra* note 193.

[196] INTERNATIONAL WORKING GROUP, *supra* note 6, at 8.

[197] *Id.* (emphasis added).

investment policy. Norway's guidelines call for its SWF to maximize financial returns so long as the financial opportunity fits within its ethical constraints,[198] so Norway's SWF appears to be attempting to maximize financial returns in a manner consistent with its own ethical investment policy. Subprinciple 19.1 calls for the SWF to disclose its other considerations,[199] which Norway does by making its ethical guidelines available via the Internet.[200] Also, while a country's compliance with the Santiago Principles should have some influence on the determination of whether or not to provide an SWF an exemption, the ultimate analysis should be based upon independent standards set by the United States. In fact, an analysis regarding whether to provide Norway's SWF with exempt status might reveal that the increased national security benefits from dealing with an "ethical" SWF outweigh any negative consequences that arise from considering factors other than economic factors when investing. Again, ultimately, the United States simply must find its best balance.

VII. CONCLUSION

The United States has interests both in protecting national security and in promoting an open investment environment. Measures taken in pursuit of each of these interests often conflict, and therefore the legal parameters must attempt to balance these interests. The current legal parameters, both national and international, balance these interests well, but the United States should consider additional measures which might balance these interests better. The United States should consider all reasonably practical and efficient measures to promote an open

[198] ETHICAL GUIDELINES, *supra* note 194 ("The financial wealth must be managed so as to generate a sound return in the long term, which is contingent on sustainable development in the economic, environmental and social sense.").

[199] INTERNATIONAL WORKING GROUP, *supra* note 6, at 8.

[200] *See* ETHICAL GUIDELINES, *supra* note 194.

investment environment so long as the measures do not present an opportunity to breach the national security of the United States. The United States has an interest in promoting open investment in the United States, not just because of the impact foreign investment into the United States has on its economy, but also because of the precedent it sets for other countries in which Americans invest.