Regulating the Sovereign Wealth Funds*

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This paper examines the new policy issues surrounding the rise of the "sovereign wealth funds" in global capital markets. A profound and newly significant incidence of globalization, the role of foreign governments as capital providers in nominally capitalistic, free-market economies is disrupting basic principals and assumptions regarding the role of private and public markets and their regulators. This paper examines the potential for appropriate regulatory schemes to channel these wealth pools in economically productive and apolitically-motivated directions, with the goal of permitting them to perform the functions for which they were established: the preservation and prudential investment of the vast wealth of nations. This regulatory analysis proceeds along three lines: (i) first, a model for corporate governance of a "typical" sovereign fund is proposed, based on the established models of private sector investment fund schemes; (ii) second, a review of host state models and current proposals for foreign investment regulation is undertaken, focusing on the special scrutiny given or proposed to be made available for investments by state-owned funds; and (iii) finally, an assessment is offered regarding international organizations' potential role as venues for cooperation and coordination of the newest and largest players in global capital markets. Though the sovereign wealth funds have made significant gains in establishing their credibility as welcome and responsible providers of global capital through their voluntary and independent actions, this paper concludes that both state-level regulatory accommodation and interna-

* The author gratefully acknowledges the support of Ewha Womans University for this article; this research was funded by the Ewha Womans University's "New Faculty Research Fund 2007." The author further wishes to thank the participants at the November 8, 2007 conference of the Asia-Europe Perspective Forum held at Ewha Womans University, LG Convention Center, for their reviews and contributions.

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tional cooperation through established economic organizations such as the OECD and IMF offer significant potential benefits to both the funds and the national markets (and target companies therein) if appropriately designed. At a minimum, national and international treatment of the special nature of the sovereign wealth funds may enable capital markets to remain relatively open by specifically addressing the sources of market participants' (and politicians') fears of abuse, thereby strengthening the structures that support the global free movement of capital and channel it to its highest and best use.

Keywords: Sovereign Wealth Fund, Global Capital, Foreign Investment, State-Owned Firm, State-Owned Fund, Protectionism, Corporate Governance

I. INTRODUCTION

A strange thing happened on the way to global free trade and open capital markets: the governments of export-led economies accumulated vast sums of foreign currency and budget surpluses, some of which they pooled into private-sector-style investment funds and authorized for foreign equity investments. The current size and growth trajectory of the funds under management in these government investment companies are so significant (both in relation to any given domestic economy and the global financial stock as a whole) that governments in the likely recipient nations for these investments consider the foreign sovereign funds as much a competitive threat as a liquidity promise. The year 2007 marked the emergence of the "sovereign wealth fund." Simultaneously with the substantial growth of the funds has come the re-direction of these funds from their historically low-risk assets and passive investment style to riskier investments under more active management—including the possibility of control-level holdings, either by the funds themselves or via other intermediaries which they fund. A wide array of legal and policy issues accompanies these funds due both to their huge new capacity and their investment directives.

This article analyzes the legal and financial policy implications of the emerging activities of the sovereign wealth funds. The analysis proceeds along three dimensions: (i) at home: analysis of the corporate governance requirements of the intended beneficiaries of the funds (citizens of the home state); (ii) abroad: discussion of the potential impact on funded companies, and a review of the implications for regulation of investments and funds in the recipient countries (under the foreign investment screening for national security implications, under competition law, and securities regulation for investment funds); and (iii) internationally: a look at the potential of existing international institutions to develop

"soft law" codes of conduct, or existing international legal structures to mediate the array of predictable investment disputes that will arise in relation to the vast volume of cross-border investment planned and begun by the sovereign wealth funds in the early twenty-first century.

II. BRIEF INTRODUCTION TO THE SOVEREIGN WEALTH FUNDS

The government/public investment funds may be grouped into a few types based on the source of the capital invested, the purpose of the fund (as required by law, revealed by government declaration or indicated by observable behavior) and the asset class and investment style(s) permitted or used for the fund or its third party managers. Some sovereign funds have specific, limited purposes to which the funds' earnings are dedicated, such as pension plans (prominent examples are Norway's Government Pension Fund¹ and California's CalPERS),² educational institutions (such as the U.S. State of Texas' Permanent University Fund (Cook 1998)),³ or stabilization of a currency (the primary purposes of the vast holdings of foreign currencies by the world's central banks (Jeanne 2007)) or stock markets (which is the express purpose and recent use of the National Stabilization Fund of Taiwan).⁴ Other funds have a more general purpose for the use of their income (so long as it is in the public interest) and require that the fund's corpus is permanently preserved (Alaska's Permanent Fund is an example (Alaska Permanent Fund Corporation 2006)).⁵ Still others are more permissive, allowing the fund's use to smooth consumption or government budgets over generations, especially where "petrodollars" represent the depletion of non-renewable natural resources (these include the Alberta Heritage Fund (Lyons 2007, 20; and McKinsey Global Institute 2007, 50).⁶ and all of the largest twenty sovereign wealth funds in terms of assets under management except for those of China, Singapore, Malaysia and Korea: the Abu Dhabi Investment Authority,⁷ Kuwait Investment Authority (Lyons 2007, 23; and McKinsey Global Institute 2007, 50),⁸ Russia's Stabilization Fund (Lyons 2007, 25; and McKinsey Global Institute 2007, 54),⁹ Qatar Investment Authority, Brunei Investment Agency,¹⁰ the National Fund of Kazakhstan,¹¹ and Istithmar (Dubai/UAE).¹² China's, Singapore's, Malaysia's and Korea's funds have general government purposes related to nation-building and raising national competitiveness, including domestic company restructuring and development of financial markets in the domestic economy (Lyons 2007). Chile's fund has the objective to "smooth government expenditure in social areas", similar to Oman's State General Reserve: "to fund budget shortfalls."¹³ Venezuela's National Development Fund has the official role "to manage and disburse funds for purchasing foreign debt, goods and services in foreign currency, and to maintain a reserve in case of disasters."¹⁴ Only the UAE's Dubai International Capital has the stated objective to produce

financial returns for the benefit of a select few citizens.¹⁵ Another significant category of government investment funds has had an altogether different purpose—to be used as a conduit in the privatization of government-owned industrial companies in transition economies (Baev 1995).

The mere diversity of the government-owned and-managed investment funds has lead to confusion and over-generalization in the public debate on various aspects of potential regulation of these funds, especially regarding the regulation of their overseas investment practices and plans. Part of the problem is attributable to the funds decisions in some cases to provide little or no disclosure of details surrounding their operation, legal basis and investment prospects.¹⁶ While some funds scrupulously publish details of their structures, assets, performance and prospects,¹⁷ others are secretive, possibly misleading and even coy in responding to inquiries from press, international financial bodies and foreign governments in whose jurisdictions they may be invested.¹⁸ There is a great deal of research that should be done regarding the governance, investment performance and success of these funds in fulfilling their missions—not least because of their public ownership. Current proposals range from “increased transparency” on a voluntary basis by the funds (see the draft of “Generally Accepted Principles and Practices” proposed by the International Monetary Fund (IMF 2008)), to a “stripping” of the voting rights of equity investments by sovereign wealth funds investing in the United States (see Gilson and Milhaupt 2008).

Risks abound, as do potential benefits. The opportunity to properly structure the ownership and management of these enormous pools of capital is in many cases most likely a one-time chance to boost national development and retain the wealth created by exploiting natural resources (which may be depleted, or for which the market uses may disappear with technological improvement and declining market demand) or achieving large trade and treasury surpluses. The sections below identify and introduce a series of policy issues critical to the successful integration of sovereign wealth funds as global financial players. As fund-specific information, experience and regulatory learning regarding the sovereign wealth funds all are at a preliminary stage at best (at least with respect to the newest and largest funds from East Asia and many of the petrodollar funds), conclusions in any of the policy areas introduced here would be premature.

It is timely, however, to engage in a multi-disciplinary and multi-national conversation on these issues during the formative stages of these capital pools. The benefits of properly balancing financial, legal and political concerns to develop a functional set of institutions around the national funds (at home), and in the regulatory screens of the recipient states (abroad) for foreign investments by the sovereign funds would be significant; in fact, a coherent and compatible approach to stewardship of the sovereign funds and regulation of targets markets is a necessity, not an option, given the enormous size of the funds to be deployed by sovereign funds globally. This paper proposes a set of models for national

level treatment (see Section II below), and places these models in the broader context of the on-going (and far more generalized, "soft law") projects at the IMF and OECD (see Section IV below).

As of 2007, the sovereign wealth funds probably already hold U.S. \$2-3 trillion, based on relatively consistent recent reports from the IMF,¹⁹ McKinsey Global Institute (2007B) and global banks including Standard Chartered,²⁰ Morgan Stanley²¹ and Merrill Lynch.²² Based on credible assumptions and recent history, growth in the value of these funds is estimated to result in fund sizes of approximately US \$7.9 trillion by 2011 (Merrill Lynch 2007), US \$10 trillion by 2012 (the IMF-Johnson 2007), US \$12 trillion by 2015 (Morgan Stanley 2007) and US \$13.4 trillion "over the next decade" (Standard Chartered, Lyons 2007). These guesses, constructed from disclosures made by some of the sovereign funds and investigative work triangulating numbers for the more secretive ones,²³ provide a mere starting point for analysis of the potential and capabilities of these funds to benefit the home governments and citizens, affect international capital flows-liquidity, financial stability, open capital markets and latent protectionist tendencies which could flare with the inevitable change in the locus of global financial power.

These issues currently appear rather muddled and tangled in the public debate. As the McKinsey Global Institute (2007B) emphasizes in its report, "it would be useful ... to be clear about the differences between corporate purchases by state-owned companies and diversified financial market investors, such as sovereign wealth funds." This assumes a great deal about the nature and operations of sovereign wealth funds-that they are in fact financial investors (first and only), diversified and somehow immune from political intervention by their owners.

There is a distinct divergence of analytical approaches and interests observable between researchers and commentators from financial institutions (and their legal communities) compared to their compatriots in the security and political ranks (and their lawyers). Whereas banks and private law firms see wealthy new clients for whom they are instituting new specialized practice groups,²⁴ there is less enthusiasm than suspicion in the perspective of national security studies (Ikenberry and Slaughter 2006; Larson and Marchik 2006) on the development of large sovereign funds. The suspicions arise both from a backward-looking concern that these wealth pools may be ill-gotten gains, the spoils of fixed exchange rates that exacerbate world trade imbalances; and from a forward-looking concern for national security in the age of terrorist plots to punish the western world, national defense concerns for the protection of sensitive technology and competitiveness concerns about the global rankings of domestic companies. These concerns have induced a broad discussion of potential political and regulatory/legal responses in destination nations for this vast wealth to-be-invested. Now that the basic gathering of fund size data has begun in earnest, the policy discussion needs to focus on specific and practical approaches to managing home and host economies to best benefit from (and prevent unnecessary costs and foreseeable abuses from

occurring in) the new global financial landscape.

III. AT HOME: MANAGING FOR THE PEOPLE

The current diverse array of sovereign investment funds does not reveal a common model for effective governance. While the longer-lived funds do offer some opportunity for learning by experience, their methods are not necessarily transferable to the newer funds-e.g., the China Investment Corp. has very different sources, purposes and political constraints than Norway's Government Pension Fund or the Abu Dhabi Investment Authority. Clearly the particular governance structures adopted will be the product of the domestic political and legal landscape rather than a minor adaptation of a global "best practices" model based on another nation's quite different fund.

However, diversity in wealth source, politics and purpose does not render the funds wholly unique in their design and operation. They share some important common characteristics with each other and with private sector investment funds (after whose success they are roughly patterned). Therefore, a set of basic governance models, adapted from fund types used in the private sector, may be analyzed as prototypes for the public investment funds. Existing public funds may then be compared to the models to better understand the aspects that are particular in the experience of publicly managed funds. A set of best practices may then be built on the twin experiences of public and private investment funds. In markets where public funds intend to behave as private funds, competing for the same assets and seeking the same alpha, the similarities in purpose and behavior between public and private funds may in fact extend upwards, informing issues of fund governance and accountability to the ultimate beneficiary citizens.

Fund governance in the private sector largely is determined by the nature of the investors and the extent of their control over fund managers and redemption/liquidity. For investment companies of the mutual fund model whose investors are retail individuals needing liquidity, a high level of disclosure and broad diversification, governance is largely dictated by investor-protective regulations in all developed financial markets.²⁵ This liquid, investor-protective, high-disclosure regime offers a Model IC ("investment company") for a public fund governance regime. Its central characteristic is an informed beneficiary with the ability to sell into a liquid market, whose asset value is determined by centralized professional managers who bear the burden of significant regulatory and fiduciary obligations.²⁶ In the public version of Model IC, the owner (the national government, usually via its Treasury or Ministry of Finance) is separate from its beneficiaries (individual citizens). In funds whose purpose includes preserving wealth for future generations of beneficiaries, a time-smoothing formula is required to allocate the fund among the generations of beneficiaries-meaning

that perhaps a large portion of the fund cannot be allocated until a future date. The problem is not intractable, however, the key being that some allocation is made and the beneficiaries are identified. In this Model IC, citizen beneficiaries have a property right in the fund's corpus, which they may choose to sell at their discretion, and their pro rata share of the fund's income, which they may choose to receive in cash dividends or reinvest in the fund-i.e., liquidity exists with respect to both the fund ownership ("shares" or "units") and income on these shares or units. This model requires timely and detailed disclosure of asset allocation, performance, procedures for electing the cash distribution and the like.

Model IC could conform to the private market version by further allocating voting power to the beneficiaries-Model IC-V; or alternatively, the model could accommodate ministerial or political appointment of the governing board and manager(s) of the fund and retain government control of all aspects of fund administration-Model IC-NV. Without a vote, beneficiaries would have only economic rights; poor management would therefore be deterred only by the threat of withdrawal of most or all of the fund corpus owned by the current generation of beneficiary citizens (voting per the Wall Street Rule to invest this wealth with better managers, or consume it). Control of all aspects of fund stewardship would be maintained by the political party in power. In the full private market analog, Model IC-V, the beneficiaries' income share could be linked to a set of voting rights through which beneficiary welfare could be protected by the ability to replace fund manager(s) and/or governing directors. Interestingly, the allocation of voting rights to beneficiaries need not be limited to the current generation of income-recipient beneficiaries, but could be expanded to include votes allocated to future beneficiaries whose rights to withdraw income have not yet vested-i.e., the vote could be available to all (living) beneficiaries, regardless of whether or when their income rights may accrue. This vote distribution has the merit of representing future beneficiaries whose interests may be different from the current group of income-rights holders (e.g., they may prefer a different manager willing to invest more or less aggressively, or governing board members from their generation). In defensible circumstances, a government agency may be allocated some portion of the vote as representative of a future generation and its welfare (such as the pension plan or health service). Model IC's governance would be determined by the allocation of the income rights and voting rights; the perceived fairness of the structure would depend on the method for determining citizen beneficiaries. This determination is probably least complicated where the fund's purpose is to provide pensions for retirees.

A different model derived from private markets-that for unregulated "private" investment funds, Model PF-would rely on a group of government agencies as beneficiaries or "limited partners" (instead of individual citizens); because they are sophisticated, the disclosure requirements would be lessened and they

would have voting and other control rights commensurate with their proportional participation in the fund as beneficiaries. Allocation of beneficial or ownership interests among agencies would stimulate at least a minimal amount of disclosure, interest and oversight of fund managers. While the control of the fund and uses of income would remain subject to political decision, the plurality oversight would in a favorable political environment link fund performance to available public services and retain some measure of pressure on the fund to deliver acceptable results in the medium term. The Model PF relies not on liquidity, but a stable beneficiary base. Like private market private equity firms of various stripes, the ability to withdraw an investment is the subject of negotiation among sophisticated investors and the fund; the time horizon is medium term and investors/beneficiaries may choose whether or not to invest in the next fund offered by the management team. In the public version, agency beneficiaries could be given the discretion to maintain their investment in the fund or withdraw after certain periodic redemption terms—thus injecting a stiff incentive for performance. Unimpressive fund performance could result in the agency withdrawing its share of capital and investing it in a different government-run or private market investment fund.

A third model, Model T, is the public version of the classic trust fund. Trust funds separate ownership of the assets under management from the beneficiaries and entrust the management of the assets (which are owned by the trust) to a qualified trustee. The trustee is bound by fiduciary duties to manage the assets according to a “prudent person” or other legal standard, and the beneficiaries have the ability to enforce the trust provisions in the event of breach by the trustee. The classic “spendthrift trust” is a close match for the wealth preservation issues that arise with sovereign funds, and indeed many public funds are governed by a structure recognizable as very similar to the legal trust. The beneficiaries are generally stated to be the public served by the government entity creating the trust, but in fact legal recourse is the right of the government itself (in the role of beneficiary) rather than with private citizens. Information rights are set by the terms of the trust, and this arrangement is disciplined by legal duties of the trustee rather than detailed disclosure regulations. There is no liquidity for the beneficiary until a certain date or other event stipulated by the trust, and there is no right to receive income except according to the dictates of the trust’s terms and usually the discretion of the trustee. This is the model most likely to be observed in public investment funds. Its governance and design are supportive of the spendthrift purpose (to preserve the initial asset base) only; it is less successful in creating incentives for fund growth and manager discipline than the Model IC or Model PF structures.

Public fund structures are unlikely to adopt private market structures very closely due to their longer-term investment horizon, necessity of domestic political support and perceived need for flexibility for various government/public uses

over time. However, the introduction of sovereign funds with certain private market characteristics raises the question of how they may be governed effectively. They may best be organized in a quasi-private/quasi-government form as suggested by one of these adaptive models. Discussions of best practices may then proceed on the basis of the identified beneficiaries, basis of legal duties and liquidity profile for the beneficiaries.

Effective governance at home may additionally resolve some of the deepest fears of target market governments and private market competitors of the sovereign wealth funds. These fears include the possibility that foreign reserves and investments held in sovereign wealth funds may be used by a government to execute a mercantilist trade policy (i.e., keeping foreign currency assets available to the central bank to use in the manipulation of exchange rates, keeping the local currency value artificially low for export promotion and implicitly unfair competition for export goods). They include also rather sinister notions of sovereign fund owners controlling foreign companies with a "political motive" to benefit home state-based competitors or to undermine the broader development of technology and research, or perhaps the provision of goods and services in the foreign market-i.e., the Trojan Horse theory of sovereign investment funds. This theory extends further to broad competitive effects on the development of financial markets in the host state of this potential foreign direct investment, in a scenario where the foreign sovereign fund privatizes domestic companies in leveraged buyouts and raids the private companies' assets in the absence of the watchful eye of public investors and their legal protections.

Certain further limits on the applicability of private market "beneficiary" models also exist due to some purposes and potentially necessary uses of the sovereign funds, particularly those in East Asia. Infrastructure development and financial restructuring are two likely "general" uses cited for keeping funds available to the general treasury; recession or other source of budget deficits is another. While some funds are intended for pensions or education or another particular purpose, some are needed in historically volatile political environments-something comparable to "Earthquake insurance"²⁷ against potential domestic social or political disruptions; the damage and beneficiaries are not identifiable, but the need to keep extensive resources available to handle the situation seems prudent.

IV. ABROAD: LIQUIDITY AND PROTECTIONISM

The growth in size of foreign currencies held by emerging market national treasuries has recently surpassed, by wide margins, the amounts necessary to meet the traditional needs of stabilizing a sometimes volatile (pegged or fixed) national currency and insure against possible near-future government deficit spending needs. For these potentially urgent needs for liquidity, sovereign foreign

currency reserves need to be held in highly liquid, low-risk securities, primarily U.S. Treasury Bills in the modern era. Globalization of financial markets, the successful development of previously riskier and poorer nations (the formerly emerging markets) and increasingly sophisticated financial management of government treasuries all have combined to produce the tectonic shift occurring in the management of sovereign wealth we see in the form of the new investment funds, existing and proposed.

At their current trajectory, these "excess" funds collectively will not only grow to constitute a significant part of the global financial stock (estimated at US \$140 trillion as of January 2007 (McKinsey Global Institute 2007A) and sizable in relation to the total value of exchange-traded securities (debt and equity) -of which the U.S. portion is approximately \$50 trillion. (Johnson 2007) Perhaps a better perspective is offered by the relative size of assets under management globally as of 2006 by pension funds (\$21.6 trillion), mutual funds (\$19.3 trillion) and insurance companies (\$18.5 trillion)(McKinsey Global Institute 2007A); whereas the entire hedge fund industry is around \$1.5 trillion in capital assets, and the private equity industry manages approximately \$0.7 trillion in value.(McKinsey Global Institute 2007A) Surprising to even the most attuned global finance observers, predictions of the financial community are that the sovereign wealth funds won't just be a player in global finance, they will "be" the global financial market soon²⁸ --large enough to "buy every public U.S. company" on top of a few European ones already purchased.

This "threat" seems rather far-fetched in a world where most sovereign states and their populations seem finally to have been convinced that the end-goal is a political system capable of supporting a functioning market economy (regulated but not owned by government), globally integrated with an increasingly efficient international financial structure where "segmented markets", price controls and protected industries are the exception rather than the norm. The broad spectrum, and in some cases the boldness, of policy responses under consideration in the United States and some European nations reflect the gravity of the challenge presented by the sovereign wealth funds to a world that seemed to have been destined for democratic capitalism and open markets instead of government ownership of the means of production.

The political decision to retain sovereign wealth in government coffers can be characterized as a paternalistic one, with the purpose of saving for future generations' wealth that has been created at present but may not "belong" solely to the current generation of citizens. The paternalistic vision is not necessarily incompatible with democracy or market economies; it does pose complex challenges to the traditional roles of property owners, fund managers and regulators in competitive capitalist economies, precisely because the government owners of private-acting investment funds are foreign and therefore not subject to the checks and balances of the domestic political system.

A foreign sovereign fund may be the perfect “socially responsible” investor, and a long-term one with sovereign-quality credit, but its responsibilities are to a foreign government and the system that elects or otherwise empowers the ruling party—not domestic “stakeholders” of invested companies. Having thoughtfully erected a system of “competitive capitalism—the organization of the bulk of economic activity through private enterprise operating in a free market” (Friedman 1962)—it remains to be seen what role foreign government agents can or should play as market actors. A critical component to the answer will be the distance (political, structural, financial) of fund managers from foreign government bodies—i.e., how independently a fund or its professional manager agents may operate from the politicians and state-owned enterprises of the foreign government. Another critical measure of risk will be the concentration of funding from multiple investment entities, each of which invests money from various allied foreign governments (in political matters or in commercial matters).

Of course it would be ironic for communist and authoritarian regimes themselves to purchase the means of production in markets they would never allow to flourish at home. A greater irony would arise when such investors seek the protections of laws in a host country legal system that would not be available to investors in the sovereign's legal system.²⁹ However, experience with private property, relatively efficient capital markets and the rule of law (as investors in market economies) may beneficially expose these sovereign investors to the merits of these institutions. In fact, participation as investors may present the fastest and most direct path to the next higher order of development for many investor nations; given their success with participation in the global economy as exporters (and, in important instances, members of the key international financial and trade organizations), participation as investors in foreign capital markets may inspire a deeper appreciation for the logic of markets,³⁰ the essential legal institutions and, ultimately, the representative political systems that underlie the success of the capital markets.

Between the policy debates of 2007 and this bright and prosperous future lies a path strewn with political risk for the recipient markets. Sadly, any of (i) nationalization of industry by a foreign government (in the absence of appropriate regulation), (ii) wasteful over-regulation (in the absence of an understanding of actual risks as opposed to paranoid assumptions), or (iii) the gradual undermining of the competitiveness and security of domestic economies could result instead. The following policy proposals from the United States form a case study of the raft of regulations a capitalist democracy may employ to balance the risks of foreign state ownership through financial intermediaries of the capitalist variety.

1. Acquisition Approval: CFIUS

The U.S. executive branch position on foreign investment has been consistently

represented as expressed by U.S. Treasury Under-Secretary Clay Lowery in a summer 2007 statement: "From the U.S. perspective, we unequivocally support international investment in the country-both portfolio and direct investment-and are committed to ensuring that the United States continues to be the most attractive place in the world to invest." Internationally, the U.S. has obligations to fulfill that promise because it has agreed to refrain from investment screening pursuant to many bi-lateral trade agreements with trading partner nations. National security is the single significant exception to the open investment policy.

The Committee on Foreign Investment in the U.S. (CFIUS) was established under the Ford administration in 1975 to address concerns about the first wave of petrodollar investments in the United States.³¹ CFIUS was authorized as a twelve-agency committee with responsibilities to "monitor the impact of foreign investment in the United States, both direct and portfolio" including "[providing] guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States" and "[reviewing] investment in the United States which, in the judgment of the Committee, might have major implications for the United States national interests..."³² Thus CFIUS has broad "oversight authority in the area of foreign investment in the United States, particularly investments by foreign governments" --authority not limited to defense or national security concerns. (Riven 1993)

In 1988, an amendment to the Defense Production Act of 1950 (the Exon-Florio Amendment³³) focused the CFIUS mission on national security. Exon-Florio empowered the U.S. President to "block mergers and acquisitions of U.S. companies by foreign firms when such takeovers threatened national security and where that threat could not be adequately addressed through other laws and regulations." (Larson and Marchick 2006) These Presidential powers are significant: Exon-Florio requires no action by Congress, allows for no judicial review and has no statute of limitations, "meaning the president could unwind a transaction that was never reviewed by CFIUS years after it closes." (Larson and Marchick 2006) In practice, the work of CFIUS to date has been triggered by voluntary filings requesting review by the committee of proposed acquisitions by foreign companies (whether or not state controlled). The "flexibility" of not requiring a CFIUS filing seemed efficient-the parties to a transaction were free to seek the safe harbor of CFIUS review to eliminate national security as a block to the transaction, or to assume the risk of a future review and proceed with the acquisition without CFIUS approval.

The "Byrd Amendment" to Exon-Florio in 1993 revised the statute (in response to French state firm Thomson's bid for LTV) to make a filing and 45-day CFIUS review mandatory for an acquisition by an entity that is "controlled or acting on behalf of" a foreign government. The Byrd amendment requires that "when the foreign government is on one side of the negotiating table, the U.S. government should be on the other side."³⁴

Since the September 11, 2001, attacks on the United States, concerns about foreign ownership have escalated as national security has become a focus of primary importance in acquisitions as well as other aspects of American business and finance. The CFIUS system has been recognized for its potential to be effective as a national security screen, and it has been roundly criticized for its extreme murkiness on several levels. Two recent cases of state-owned enterprises attempting acquisitions of American business assets (in the oil industry³⁵ and ports operations³⁶) raised concerns about CFIUS and how it may apply its "national security" mission to future transactions involving both direct foreign state control of a company and less direct foreign government influence via investment funds. A hearty public debate and much input from both the national security and business communities resulted in a major update to CFIUS, the Foreign Investment and National Security Act of 2007 (FINSA), which went into effect on October 24, 2007.³⁷

FINSA refined the CFIUS process by adding some criteria for the range of "covered transactions" considered as "national security" issues; empowered the committee to extend its timetable for its investigation and review of foreign government-controlled entities; added a requirement for CFIUS to monitor its mitigation agreements; and mandated that CFIUS will report to Congress on its decisions (among other measures). (Gotts 2007) The FINSA amendments seem destined to greatly publicize and therefore politicize many acquisition transactions that might otherwise not have been filed in practice in prior years, as well as to significantly delay the closing of any deal involving foreign ownership. Business groups³⁸ and lawyers with a CFIUS practice³⁹ (something unheard of until 2005) applauded the "greater transparency and certainty both to Congress and investors" under the reformed process; they seem to believe the right balance was reached through a swift and cooperative political process. What remains to be seen is the practical effect on the behavior of the sovereign wealth funds. They may respond as desired by American policymakers with significantly greater transparency and cooperation in satisfying investee nation concerns about foreign state activities in private markets. It is quite possible such funds investing in the U.S. will now hire third party investment managers or build other governance safeguards into their fund-government structures such that investment management (and control of portfolio companies) truly are outside the influence of a foreign government. Alternatively, they may respond by constructing superficial structures for CFIUS purposes that in fact have little operational effect. Or they may respond by investing elsewhere.

2. Competition Law

American federal anti-trust law regulates business combinations in the pre-merger notification system pursuant to Hart-Scott-Rodino Antitrust Improvements Act

of 1976⁴⁰ and more generally pursuant to the Sherman Anti-trust Act of 1890, which makes illegal “every contract, combination ... or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations.”⁴¹ Commentators concerned with acquisitions of private sector companies by foreign state-owned enterprises have based their opposition to such direct investment on the presumed “anti-competitive nature” of state-owned firms; tautologically, it is noted that “they do not possess the basic characteristics of a private firm.” (Riven 2007, 771) Their behavior as private market actors, however, is not necessarily dictated by their ownership. Importantly, their behavior is subject to regulations enacted to police anti-competitive activity.

The basis for the legal treatment of “commercial” activities by foreign government entities in the U.S. was established by the Foreign Sovereign Immunities Act (FSIA).⁴² (The FSIA provides the basis for jurisdiction of U.S. federal and state courts for lawsuits involving entities that are “majority-owned” by “foreign states”-i.e., entities that might otherwise claim immunity from domestic law due to their sovereign status.)⁴² Adopted to “protect the rights of American citizens against the increasing number of foreign corporations” owned by foreign states, (Griggs 1998, 434) and to clarify that when foreign states engage in “commercial” activity like private market actors, they too are subject to the laws of the jurisdictions in which they operate and subject to suit. Anti-trust law, therefore, is available as a means of regulating the commercial activities and ownership concentration in markets that include foreign state fund-invested companies, even if the foreign government fund achieves control or has an outright majority ownership of companies (i.e., both portfolio and direct investment should not exempt the company from anti-trust or other domestic regulation).

Respecting the potentially anti-competitive effects of *ownership* by a foreign sovereign wealth fund of a company doing business in the United States, there appears to be no barrier for the U.S. Department of Justice and Federal Trade Commission to regulate transactions with such effects. They have not practiced specific pre-screening for ultimate foreign government control via financial intermediaries, and the case for a justifiable need for special scrutiny has not yet been made. It is conceivable, however, that competition law and its enforcers may be called upon to rid state-owned investment firms of the opportunity to abuse their relationship with their sovereign owner to the detriment of private market competition abroad.⁴⁴

3. Investment Fund Regulation

The Securities and Exchange Commission (SEC) regulates disclosure and certain aspects of corporate governance of various investment funds in the interest of protecting retail investors and orderliness of the financial markets. A general trend towards institutional ownership and management of financial stocks (dubbed

“deretailization” by the SEC General Counsel Brian G. Cartwright 2007) has increasingly concerned the SEC. The growth of institutionalization raises issues of the concentration of ownership in a few hands; retail access to comprehensible information about how the institutional funds are run and the fees they charge; and ultimately the method of regulation by the SEC (i.e., whether the largely un-regulated (“anti-fraud only”) legal classification of many of the large institutions is adequate (“anti-fraud only” currently applies to hedge funds, private equity funds and, under current exemptions from regulatory oversight, sovereign wealth funds). On the same day the new CFIUS law went into effect, the SEC’s General Counsel cited current activities of sovereign wealth funds as investors in private equity, proxy advisory services and stock exchange companies in the U.S. (and the potential of any government-run fund to act with non-commercial motivations -“it’s in their DNA” (Cartwright 2007)), and SEC Chairman Christopher Cox (2007) set out the philosophical foundation for different treatment (far greater regulatory scrutiny or exclusion) of governments as participants in American capital markets as follows:

In the case of the securities markets ... there was never an impulse for the federal government to own the exchanges, the investment banks, or the broker-dealers. The creation of the Securities and Exchange Commission in 1934 marked a deliberate effort to clearly define and separate the role of the national government, on the one hand, and the capital markets, on the other ... government is an auxiliary to the market, not a substitute for it or a participant in it.

The cited consequences of violation of this fundamental separation of government from markets include: (i) unavoidable conflicts of interest between the regulator (government) and regulated industry (if government is its owner); (ii) the deterioration of inter-governmental cooperation on cross-border fraud where a foreign government is an owner of a company under suspicion; (iii) the tendency for large governmental power combined with large commercial power to result in the misuse of assets for personal gain (corruption); (iv) informational disadvantages for market participants where government actors can abuse insider information and apply covert security intelligence to market transactions (“the ultimate insider trading tool”); and (v) mispricing and misallocation of capital in markets generally where government participants conduct their affairs not in furtherance of investment returns but “in pursuit of other governmental interests.” (Cox 2007)⁴⁵

While acknowledging the possibility that foreign government entities investing in the U.S. could have more benign, even beneficial results (“a stabilizing and modernizing influence in global finance”, “a new source of liquidity for our capital markets”, with private-public ownership “simply a new range of investment choices”), the SEC Chairman appears to see the risks tilted towards results a result in which U.S. financial markets are “less transparent, less yielding to outside law enforcement, and less able to serve their role of wisely allocating scarce resources.” (Cox 2007) While nearly 75 years of highly effective stewardship

of capital markets suggests the SEC will adjust regulations to minimize identifiable risks and otherwise let the market operate, Chairman Cox seems correctly to have recognized the issues raised by foreign government ownership as one of “first principles” and intractable conflicts. The American reaction can be expected to reflect fundamental American political and economic values of “individual freedom, our suspicion of government excess and abuse of power, and our skepticism that the few can make wiser choices than the many.” (Cox 2007) While the American case study has some unique characteristics defined by the nation's particular history of independence, its touted “free market” preferences and its institutional regulatory structures, it has plenty of company among the OECD nations (particularly the European ones) in suspecting the newly powerful foreign government funds of long-term mischief or worse consequences in their home markets, as reflected in EC President Jose Manuel Barroso's declaration that “We cannot allow non-European funds to be used as an implement of geopolitical strategy.”⁴⁶

V. INTERNATIONALLY: SOFT LAW AND TRADE REGIMES

1. Voluntary Disclosure

Following a well-trod path for preventing onerous and likely inefficient regulation of financial firms, sovereign wealth funds could cooperate in developing a common code of conduct, including a minimum threshold for transparency. “Soft law” standards have gone a long way to satisfy anxious regulators and to reduce global financial risk in the modern financial architecture developed in the wake of the various currency crises of the 1990s. Under the auspices of the Financial Stability Forum, the IMF or World Bank, an international standard or voluntary code of conduct would help to “keep politics out of investment decisions and require the funds to share information about the composition of their portfolios and their investment strategies.” (Weisman 2007) The G-7, in an October 2007 meeting, asked the IMF to lead an effort to develop and “seek voluntary buy-in” to a code of conduct to improve transparency and ease concerns “in developed markets about the purchasing power” of sovereign wealth funds. (Weisman 2007) The U.S. Treasury supports the development of “best practices” by the IMF and World Bank, and has stated for the record that “the U.S. government itself has responsibilities” in addressing issues related to “sovereign foreign asset accumulation.” (Lowery 2007) The drafting of Generally Accepted Principles and Practices (GAPP) relating to sovereign wealth funds remains in progress as of mid-2008, with participants from most major nations with sovereign funds. The stated purpose (according to press releases from the IMF's International Working Group on Sovereign Wealth Funds) of GAPP is to “set out a framework

of sound operation of SWFs", "improve understanding of SWFs" in both the home country and recipient countries, and, together with the OECD's best practice guidelines for recipient countries, contribute to stability in the global financial system. (IMF 2008) "Core principles" include compliance with national law in investee countries, investment "on the basis of economic and financial risk and return related considerations", and transparent and sound governance structures." (IMF 2008) The optimist would expect a more detailed version to eventually emerge from the working group, but buy-in by the funds themselves will be necessary to realize any concrete benefit from the international soft law project. Like other multilateral best practices, the approach is limited to voluntary cooperation rather than legal regulation by a sovereign power.

A more specific set of sample policy parameters are put forward by Edwin M. Truman of the Peterson Institute for International Economics, proposing that a voluntary code would "apply to the gamut of international investments of governments, including traditional foreign exchange reserves, stabilization funds, nonrenewable resource funds, sovereign wealth funds, and government-owned or controlled entities such as pension funds", and "should ensure that international investments of governments are based on clearly stated policy objectives and investment strategies." (Truman 2007) Content would include "the role of the government and the managers of the investment mechanism/entity", disclosure of the fund's objectives and investment strategy, transparency in its governance, and implementation of certain investment mechanisms. (Truman 2007) Large funds might be subject to certain behavioral guidelines with respect to their management (Truman 2007).

As with other hedge funds and private equity players in recent years, the industry code of conduct may pre-empt mandatory controls that most certainly would be more costly to enforce and less likely to produce responsible behavior. However, voluntary codes in this case, perhaps more than others, would not ensure 100% compliance or participation by all major players; it can be predicted that some funds would exercise their right to decline. However, if the code achieves widespread support from both funds and investee nations and in fact achieves its aims to increase transparency and alleviate political concerns, there may eventually be consequences for funds that opt out in the form of limited market access-thus soft law may evolve into something more "enforceable." (Radin 2004).

2. International Trade Law

The genius of the enforcement mechanisms developed for the world trade regime offer a model and an institution through which investment, too, may achieve openness under a multilateral agreement. Until recently, adding "investment" to the many issues on the negotiating table has seemed untenable,

given the lack of progress in the Doha round and memories of the OECD's unconsummated Multilateral Agreement on Investment.⁴⁷ The tide has now turned so significantly⁴⁸ with the outward investment missions of the sovereign wealth funds that broad support for a new Multi-lateral Agreement on Investment may be achievable. The relative success of the trade regime to facilitate enforcement of international obligations offers a ready institutional structure for an investment treaty.

Bob Davis, in a policy piece written for the *Wall Street Journal*, suggests the trade regime is capable of handling, and resolving, "red-hot political disputes" such as this seems likely to get. He envisions a negotiating process that begins with the United States, Europe and Canada blocking out basic rules of the sovereign investment game in their jurisdictions, developing a unified position on major questions. This opening volley could propose consistent policies on whether (i) foreign government funds should be limited to minority stakes; (ii) certain industries (he lists defense and media) should be off-limits to any investment by foreign sovereign funds; and (iii) countries whose funds invest in certain sectors (e.g., financial services) should be "required to open those same sectors at home to foreign investment?"⁴⁹ The second round of the "trade-related aspects of investment" talks would have the governments of the largest funds represent the investors' issues and reach for the "freest possible access to the world's richest markets." Failing agreement, the investee nations could impose unilateral rules. In a political environment threatening protectionism, investor governments may achieve better access under a negotiated agreement.

If the WTO is unattractive for this purpose, the World Bank's International Center for Settlement of Investment Disputes (ICSID), whose membership (at 143 contracting parties as of December 2006 (World Bank 2006)) rivals the WTO's (at 151 members as of July 2007),⁵⁰ may be an appropriate venue.⁵¹

VI. CONCLUSIONS

The re-deployment of vast amounts of treasury funds into higher yielding equities and alternative asset funds is likely to be highly beneficial, both for global financial markets and the underlying real economies, particularly for the home nations whose citizens may enjoy a substantial improvement in quality of life if higher earnings on national wealth in fact is transferred into productive uses. An improvement in global financial balances and long-term material standards of life could be the result of the new funds. Early research has yielded observations that the investment destinations of the new sovereign funds (particularly the petrodollar funds) include less developed financial markets where such government-source capital is perhaps more needed and less controversial than in the United States or Europe; the net result is predicted to be the speedier development

of deep and liquid financial markets in those yet-to-emerge economies.

For the investment destined for the United States and Europe, the benefits of vast new funds willing and able to finance industry and growth are a potential tantalizing feast. Despite the lure of this capital, concerns over national security have and will continue to trump in some cases; this is especially likely under the revised CFIUS process where the foreign government controls its investment fund manager. For governments willing to distance their overt control over their sovereign fund managers and comply with the emerging best practices, code of conduct and norms of transparency, there may be ample opportunity to participate as investors in private markets around the world. Such a happy result may only be achievable, however, under a more comprehensive national or multi-lateral system of investment opening, given the significant concerns of private market-based economies over foreign "nationalization" by investment fund. Properly structured, governed and monitored, the sovereign wealth funds may serve as an important source of capital for global growth and prosperity.

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ENDNOTES

- ¹ See Norges Bank, www.norges-bank.no/Pages/Article_42084.aspx and www.norges-bank.no/Pages/Article_41137.aspx, describing Norway's Government Pension Fund as "the largest fund managed by [Norges Bank Investment Management (NBIM)]" and "a continuation of the former Petroleum Fund, which was established in 1990." Norway's Ministry of Finance "is responsible for the management of the Fund, and has delegated responsibility for the operational management of the Fund's international assets to NBIM. The capital is invested in non-Norwegian financial instruments (bonds, equities, money market instruments and derivatives), and in 42 developed and emerging equity markets and 31 currencies for fixed income investments. NBIM manages the Fund partly internally and partly by engaging external managers." As of March 2007, Norway's Pension Fund-Global reported its fund value at US \$322 billion. (Lyons 2007, Hannesson 2001).
- ² The California Public Employee's Retirement System (CalPERS) is one of the largest institutional investors in United States and international stock markets, with investments in a diverse range of asset classes (including cash, domestic and international fixed income, domestic and international equities, alternative investments in private equity and other types of funds, and real estate), extensive disclosure of its assets, operations and performance, and "assets totaling \$246.4 billion as of August 31, 2007." "The CalPERS Board of Administration has investment authority and sole fiduciary responsibility for the management of the System's assets. The Board is guided by the CalPERS Investment Committee, management, and more than 215 staff in our Investment Office who carry out the daily activities of the investment program." See www.calpers.ca.gov/index.jsp?bc=/about/home.xml. CalPERS is famous for its role as an activist corporate governance crusader in relation to its role as an equity investor.
- ³ See also University of Texas Investment Management Company at www.utimco.org.
- ⁴ <http://taiwanjournal.nat.gov.tw/ct.asp?xItem=17769&CtNode=122>; Lyons, supra note 1, at 34.
- ⁵ The permanent preservation of the fund's corpus is protected by the Alaskan Constitution (Hannesson 2001, at 57-68).
- ⁶ Alberta Heritage Savings Trust Fund, www.finance.gov.ab.ca/business/ahstf/index.html.
- ⁷ www.adic.ae.
- ⁸ <http://www.kia.gov.kw/kia>.
- ⁹ Stabilization Fund of the Russian Federation, www1.minfin.ru/stabfond_eng/about_eng.pdf.
- ¹⁰ <http://www.finance.gov.bn/index1.htm> and Lyons, 2007, 29.
- ¹¹ www.nationalfund.kz and Lyons 2007, 35.
- ¹² <http://www.istichmar.ae/> and Lyons 2007, 37.
- ¹³ www.cesla.com and Lyons 2007, 36.
- ¹⁴ Lyons 2007 at 32, citing an "unofficial quote by senior member of Central Bank of Venezuela."
- ¹⁵ "The purpose of DIC is to create a return for its shareholder, Dubai Holding and its ultimate shareholders, the ruling family of the Emirate of Dubai." (Lyons 2007, 38).
- ¹⁶ Headline articles in *The Wall Street Journal*, *The International Herald Tribune* and *The Financial Times* (among others) in mid-2007 reflected the political, legal and financial unease with which largely western (American and European) markets viewed the potentially large investments to be made in the near future by newly-founded or newly-prosperous government investment funds with a mandate to invest in foreign markets, more actively and via traditional buyout funds and other activist investment vehicles—an important departure from the low-risk investment style which had limited such funds to holding U.S. Treasury Bills for decades. Prominent economists featured by *The Financial Times'* Economists' Forum took to the concerns and arguments of Lawrence Summers' introduction to the major financial issues in his column, "Funds That Shake Capitalist Logic" (July 29, 2007) along with Martin Wolf's "The Brave New World of State Capitalism" (October 16, 2007) and Jeffrey Garten's "We Need Rules for Sovereign Funds" (August 7, 2007).
- ¹⁷ Norway's Government Pension Fund is usually the role model for transparency; it has the convenience of having nothing to hide, as its practice and commitment is to "not buy more than 5% of any one company." "Keep Your T-Bonds, We'll Take the Bank", *The Economist*, July 28, 2007, at 67.

- ¹⁸ The head of Russia's Stabilization Fund, Pyotr Kazakevitch, is reportedly "puzzled by the fears in the west about the threat posed by sovereign wealth funds" comparing the history of Arab nations' and Singapore's investment company's equity purchases (and the relative lack of political outcry) to what he perceives as an unfair response to similar plans by Russia: "I find it really strange that when Russia only starts discussing such a possibility we hear a lot of concerned speeches . . . I don't understand why we hear a lot of voices that demonise our activity." Catherine Belton, "Russia Torn Over How To Invest Its Oil Riches", *Financial Times*, Sept. 18, 2007. Experience with Gazprom, the state-owned gas company, in European nations experiencing supply cut-offs amidst price negotiations remain fresh memories confronting Mr. Kazakevitch; he clarifies, "We're not talking about capturing strategic stakes in foreign companies or seizing sectors of foreign economies . . . We can't be accused of trying to use the fund as a political tool." Under the Russian Finance Minister's currently-announced plans for restructuring, the Stabilization Fund will be split into two parts by February 2008 in which (i) a Reserve Fund would be invested "conservatively in government bonds", holding "funds equal to 10 per cent of GDP" and (ii) the National Wealth Fund would invest \$19bn "for more aggressive investment into infrastructure projects in Russia and global equities." China Investment Corp.'s head, Lou Jiwei, has sought to reassure markets that CIC will "follow strictly 'commercial goals' free of political motivation"- a response necessitated by European demands for "greater transparency for sovereign funds amid fears they could mix investment goals with political agendas" (Richard McGregor, "Beijing Fund Chief Seeks to Calm Fears", *Financial Times*, October 16, 2007). The European reaction seems not entirely paranoid, given the role of China Development Bank and Singapore's Temasek Holdings Pte. Ltd. in financing British Barclays PLC in its bid to acquire the major Dutch bank ABN Amro Holding NV-the biggest banking battle ever in Europe (waged in 2007) and the recent unsolicited \$21.8 billion takeover offer for a British supermarket, J. Sainsbury, by the Qatar government's investment fund. Jason Singer, Henny Sender et al, "Governments Get Bolder in Buying Equity Stakes", *The Wall Street Journal*, July 24, 2007.
- ¹⁹ Noting that the sovereign funds held at most around US \$500 billion as recently as 1990, the September 2007 estimate of the IMF was US \$2-3 trillion in current value, and a prediction "based on the likely trajectory of current accounts" that the sovereign funds' size "could reach \$10 trillion by 2012." (Johnson 2007).
- ²⁰ Standard Chartered prepared its research report in reliance on empirical work by Oxford Analytica and sums the value of the largest twenty sovereign wealth funds at US \$2.2 trillion. Lyons 2007, 4.
- ²¹ Morgan Stanley Global Research reported in May 2007 its "guesstimate" that "the total size of the world's SWFs may now be around US \$2.5 trillion"-a number that excludes the portion Russia will exclude from its "Future Generations Saving Account" from early 2008, and excludes expected future contributions to China's CIC. (Morgan Stanley Research 2007).
- ²² Merrill Lynch's report puts current asset values at US \$1.9 trillion. (Merrill Lynch Global Research 2007) see also Andy Mukherjee, "Sovereign Funds Bring Political Leverage, Jobs", *Bloomberg.com*, October 22, 2007, at <http://www.bloomberg.com/apps/news?pid=20601039&sid=aF2znXjMMfEI&refer=home>.
- ²³ These would include Qatar Investment Authority, which consistently has declined to reveal the size of its funds under management, though it is under pressure to do so due to its recently activist buyout activity (press reports estimate the fund's size at US \$40-50 billion), and Abu Dhabi Investment Authority, whose fund size an IMF official helpfully states as lying "somewhere between \$250 billion and 875 billion." Simeon Kerr, "IMF Calls for Transparency in State Funds", *Financial Times*, October 30, 2007.
- ²⁴ The global financial institutions stand to benefit from large volumes of new business in almost all of their major functions, including asset management, mergers and acquisitions advice and investment banking services.
- ²⁵ For example, the U.S. Investment Company Act of 1940, Investment Advisers Act and regulations promulgated by the Securities and Exchange Commission tightly limit the flexibility of mutual funds in favor of detailed disclosure and strong investor protections in the United States.
- ²⁶ For a proposal of a fund structure with similarities to my Model IC, designed with macroeconomic objectives, and handling the issues of domestic currency-denominated citizens shares with foreign currency assets, see Prasad and Rajan 2005.
- ²⁷ Jeanne (2007) offered this apt analogy in relation to China.
- ²⁸ Remark attributed to Harvard professor and former IMF chief economist Kenneth Rogoff in Bob Davis, "Sovereign Funds Spur Call to Action", *The Wall Street Journal*, October 29, 2007, at 1.
- ²⁹ It defies political logic that foreign governments would divert treasury funds from various electorate-pleasing domestic uses that would be necessary in most any liberal democracy to keep the ruling party in power. It is worth noting that few of the governments beginning to invest national wealth abroad through a large sovereign investment fund are representative democracies (exceptions include Norway and the Republic of Korea).
- ³⁰ The logic that private owners are properly motivated to put their assets to the highest use and

to engage in innovation to achieve capital growth where they are permitted to retain the profits of their enterprise; that strong protection of ownership rights and freedom of contract are efficient; and that the market's track record beats the government's in terms of providing good and services that people want and need at the lowest total cost to society.

³¹ Exec. Order No. 11,858, 11 Weekly Comp. Pres. Doc. 496 reprinted as amended in 15 U.S.C. § 87b (1988).

³² *Id.*

³³ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107 (1988), more commonly referred to as the Exon-Florio Amendment after its sponsors in the U.S. Senate and House of Representatives.

³⁴ Laura Tyson, testifying at a hearing of the Senate Banking Committee in June 1992, as recounted by Patrick A. Malloy to a Council on Foreign Relations roundtable in 2006 (Patrick A. Malloy, *Inward Investment and U.S. National Security* [transcript], June 13, 2006).

³⁵ CNOOC's unsolicited bid for Unocal in 2005, which ultimately was withdrawn after the Chinese state-owned company essentially lost the policy debate with a politically charged American Congress, despite CNOOC's well-planned and carefully orchestrated public relations campaign that included an early voluntary filing accompanied by expressions of cooperation with CFIUS, Congress and the policymaking community; the CNOOC Chairman's letter, published in *The Wall Street Journal*, with assurances that a Chinese-owned Unocal would not remove oil access from the American consumer and would not lay off American employees was not enough to overcome concerns that "national security" must include "energy security" and perhaps broad "economic security"—which might be threatened by the nature of the corporate parent of CNOOC. ChevronTexaco, the successful bidder for Unocal, portrayed CNOOC's offer as unfair competition in the market for corporate control due to alleged below-market financing available from Chinese government-related sources. (Petrusic 2006; Sud 2006).

³⁶ Dubai Ports World, "a UAE-based commercial entity" (The White House, Fact Sheet: The CFIUS Process and the DP World Transaction, February 22, 2006 press release) acquired P&O Steam Navigation Company based in Britain, which managed several ports in the U.S. The transaction was reviewed by CFIUS and approved pursuant to the 30-day review period, but heavily criticized in Congress and popular media due to the foreign government ownership of the acquirer.

³⁷ Pub. L. 110-49, became effective, amending section 721 of the Defense Production Act of 1950.

³⁸ including the Financial Services Forum, Business Roundtable, Organization for International Investment and the U.S. Chamber of Commerce (Sascha McKenzie, CFIUS Reform, anitrustlawyerblog.com, July 25, 2007).

³⁹ Stuart E. Eisenstat and Alan Larson, *The Sovereign Wealth Explosion*, WALL ST. J., November 2, 2007, at 13.

⁴⁰ Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94-435, 15 U.S.C. § 18a.

⁴¹ Sherman Anti-trust Act of 1890, 15 U.S.C. § 1.

⁴² 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (1994).

⁴³ 28 U.S.C. § 1603(a) provides immunity protection to any entity which is "an agent or instrumentality" of a foreign state; § 1603(b) defines such an agency or instrumentality as an entity whose majority of shares or other ownership interests are owned by a foreign state. For a helpful analysis of the applicability of the FSIA to "tiered corporate subsidiaries" whose ultimate owner is a foreign government. (Griggs 1998).

⁴⁴ Regarding these opportunities, see Rivin 2007, 771-773, explaining how and why "state-owned firm make irrational decisions" because "their motives are not strictly profit-based."

⁴⁵ Cox 2007: "When the SEC was created, its purpose was to serve as an independent regulator of the unbridled profit-seeking activity of self-interested individuals and firms in the securities markets. It was not, however, to supplant the market or directly participate in it. Government ownership of the economy was an issue in other countries at that time, but not in America."

⁴⁶ "Suspicion Lingers", *The Economist*, February 28, 2008. Concern arose in Europe amidst large amounts of capital-raising conducted by troubled financial institutions in early 2008, in which the most visible buyers of debt and equity were the petro-dollar sovereign wealth funds, and battles for control of major stock and derivatives exchanges. Regulators and politicians from Sweden to France expressed concern with the new market participants.

⁴⁷ The Organization for Economic Cooperation and Development has led the efforts of historical capital-exporting nations (i.e., its members) to craft a multi-lateral agreement among a large number of nations (well beyond its membership) to establish an international agreement in support of open capital markets and in opposition to investment screening and other barriers to cross-border investment. The OECD's Investment Committee, together with the "Freedom of Investment Project" (including non-member state participants), drafted agreements in 1961 ("OECD Code of Liberalization of Capital Movements"), 1976/2000 ("Declaration on International Investment and Multinational Enterprises"), and most recently, directly in response to the rise of sovereign wealth funds, the draft "Sovereign Wealth Funds and Recipient Country Policies", adopted April 4, 2008. The SWF and Recipient

Country Policies report advocates the following guidelines for investment policy of recipient nations: non-discrimination, transparency, progressive liberalization, standstill, and unilateral liberalization. OECD Investment Committee 2008.

⁴⁸ Timothy Aepfel, "Globalization Takes a New Turn", *The Wall Street Journal*, September 17, 2007, at 1.

⁴⁹ Davis, see note 28 above.

⁵⁰ World Trade Organization, Members and Observers, at www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁵¹ Gary Hufbauer of the Peterson Institute for International Economics suggests ICSID as the best forum for an investment convention.