The Informality of the International Forum of Sovereign Wealth Funds and the Santiago Principles: a Conscious Choice or a Necessity?

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Abstract

The present contribution examines the International Forum of Sovereign Wealth Funds (IFSWF) under the spectrum of Informal International Lawmaking (IN-LAW). According to the IN-LAW framework, IN-LAW constitutes an alternative form of cooperation devoid of certain limiting formalities of international law. IN-LAW is less institutionalized and hence is more apt to advance rule-making in areas which are in dire need of detailed and effective regulation in technical or highly political matters. It is characterized by a triple informality in terms of process, output and actors. Process informality refers to a loosely organized forum or network, other than a traditional international organization. Output informality dispenses of the requirement to adopt legally binding texts allotting obligations and rights to the actors involved, but rather focuses on guidelines, standards or even more informal policy coordination or exchange. Last, actor informality excludes from the IN-LAW framework the participation of traditional diplomatic actors, but rather encompasses the participation of governmental and/or private actors and/or international organizations. It is this triple informality which endows IN-LAW with the possibility to advance rule-making in the area of SWFs, an area often characterized as highly political, mainly due to the conflicting interests involved. IN-LAW is however not without criticisms. As it falls outside the strictures of both international and domestic law, it is considered to suffer from an accountability deficit. The present contribution scrutinizes the IFSWF under the IN-LAW framework. It examines whether the requirements of process, output and actor informality are met and thus whether the IFSWF can constitute an IN-LAW. It then proceeds to examine whether the IFSWF suffers from an accountability deficit. The IFSWF itself does not provide for any mechanisms to hold SWFs members accountable to the forum. However, the Santiago Principles, adopted by the forerunner to the IFSWF, do contain accountability and transparency mechanisms for SWFs. In order to determine to whom SWFs should be held accountable, the contribution upholds the 4 axes of accountability of SWFs advanced by Gelpen. It furthermore attempts to classify the relevant Santiago Principles under one or more of these axes. Lastly, the author examines whether current SWF practice complies with the accountability and transparency mechanisms contained within the Santiago Principles. To this end, the results of the Report on the Application of the Santiago Principles, prepared by Sub-Committee 1 of the IFSWF, are presented. Possible gaps and avenues of enhancement are also discussed in the concluding chapter.