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The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy

Larry C. Backer

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The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy

*Larry Catá Backer**

ABSTRACT

The distinction between the obligations of public and private entities, and their relation to law, is well known in classical political and legal theory. States have a duty that is undertaken through law; enterprises have a responsibility that is embedded in their governance. These fundamental divisions form part of the current international efforts to institutionalize human rights-related norms on and through states and enterprises, and most notably through the U.N. Guiding Principles for Business and Human Rights. The problems of conforming to evolving norms becomes more difficult where states project their authority through commercial enterprises.

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These state-owned enterprises (SOEs) operate where state duty and enterprise responsibility meet.

This Article takes a close look at the issue of the human rights duties of states as owners of SOEs, and of the responsibilities of SOEs for their own human rights related conduct. The form and substance of these duties and responsibilities are considered in light of three recent developments. The first is the increasingly prominent focus on SOEs as human rights-bearing institutions in international soft law and norms. The second is the substantial change in the direction of US policy in trade and globalization. The other is the maturation of Chinese outbound economic and investment policy, where its construction of an outbound nationalist globalization—the One Belt One Road policy—relies to some extent on the projection of commercial power through Chinese SOEs.

The Article offers a set of challenges and recommendations for further development. These recommendations and challenges suggest that issues of corporate personality, sovereign immunity, asset partition, and regulatory compartmentalization may well hobble the work of embedding human rights within the operation of states as owners and SOEs as public enterprises. To embed human rights more effectively in accordance with evolving international standards, it may be necessary to substantially change contemporary and backwards-looking legal frameworks within which SOEs now operate. Moreover, the Article demonstrates the shortcomings of the current strongly held consensus that the focus of regulatory governance must be grounded in and through a formally constituted enterprise, the SOE, rather than focusing regulation on economic activity irrespective of the form in which it is undertaken. Until these conceptual issues are considered, the effective regulation of SOEs, supply chains, and multinational corporations will remain elusive.

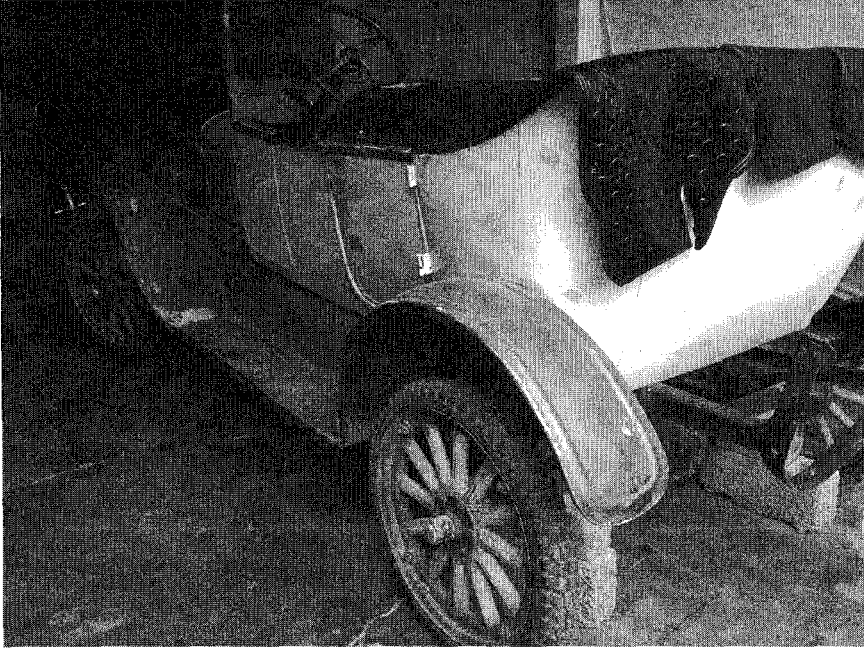
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I. INTRODUCTION



(Ancient Automobile Trinidad, Cuba 2015 Pix © Larry Catá Backer 2016)

Consider the antique automobile pictured above. It sits rusting in a shop, still beautiful but now incapable of being driven anywhere and always awaiting repair. One can repair the auto, and perhaps one can drive it. But it remains obsolete, relates poorly to the modern highway and the objectives of driving, and has become less relevant to everyday life. It produces a comforting nostalgia for the museum or the Sunday drive, but is hardly fit for modern life.

This Article takes that automobile as its starting point. Sovereign conduct on the margins of the law, the title of the Symposium for which this Article was produced,¹ is perhaps no better manifested than in the commercial activities of states. And it is most fully formed when the state—the fundamental political body corporate—reconstitutes part of itself as an economic body corporate to engage in activities in national and transnational markets.² Yet,

1. Larry Catá Backer, “Sovereign Conduct on the Margins of the Law” Notes From the Symposium Hosted by the *Vanderbilt Journal of Transnational Law*, LAW AT THE END OF THE DAY (Feb. 17, 2017), <http://lbackerblog.blogspot.com/2017/02/sovereign-conduct-on-margins-of-law.html> [https://perma.cc/XRE6-72BS] (archived Feb. 22, 2017).

2. JAN M. BROEKMAN & LARRY CATÀ BACKER, LAWYERS MAKING MEANING: THE SEMIOTICS OF LAW IN LEGAL EDUCATION II 176–78 (2013).

like the antique automobile in the picture above, the conventional law of the commercial activities of states, especially when undertaken in the form of state owned enterprises (SOEs), suggest not merely that old auto, but the futility of bringing life back to a model of economic activity that has not had a sound foundation since the beginning of this century. This futility is most acutely expressed in current debate touching on state and SOE engagement with the human rights consequences of their economic activity. Global elites might better consider the value of that work for the purposes to which it is being deployed. This Article develops that thesis in the context of recent efforts at the public international level to breathe new life into an old machine and suggests the contours of new approaches—a new regulatory machine for new times. This Introduction provides the context for the argument that follows. It sketches the emerging character of SOEs within globalization and the failures of governance regimes to regulate the conduct norms for these enterprises.

The conduct of economic activities through SOEs occupies the space where public duty and private obligation meet—that is, where the legal duties of the state merge with the governance responsibilities of the private organization. The SOE does not easily fit within the classical division of obligation, expressed in political and legal theory, between public and private entities, or into those entities' respective relationships to law.³ States have a duty that is undertaken through law;⁴ enterprises have a responsibility that is embedded in their governance.⁵ These fundamental divisions form part of the current international efforts to institutionalize human rights related norms on and through states and enterprises, most notably through the U.N. Guiding Principles for Business and Human Rights (UNGPs).⁶ The problems of conforming to evolving norms become more difficult where states project their authority through commercial enterprises—that is, where the societal (and

3. See generally, e.g., JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW MAKERS 45–65 (2005); José Alvarez, *Are Corporations 'Subjects' of International Law?*, 9 SANTA CLARA J. INT'L L. 1 (2011); A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L STUD. 133, 133 (2001).

4. See, e.g., THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26–29 (1995).

5. See, e.g., David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 953–56 (2004); see generally Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008) (suggesting measures that conform to the classical division of authority).

6. See generally Special Representative of the U.N. Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, HR/PUB/11/04 (2011) [hereinafter UNGP].

economic) governance order of the enterprise is conflated with the political and legal order of the state.⁷

SOEs have undergone tremendous change in both operation and framework ideology since 1945.⁸ The contemporary faces of SOEs also reflect substantial divergences in the character and operation of SOEs.⁹ Within globalization, consensus about the role and operation of SOEs, like that of sovereign wealth funds (SWFs),¹⁰ has moved toward a commercial and private model.¹¹ For all that change, SOEs remain an important element of national macroeconomic policies and a means through which states may directly operationalize macroeconomic policies through governmental instrumentalities;¹²

7. See generally, e.g., John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007). The interstices of that conflation have produced some interesting conceptual scholarship. See, e.g., Eric Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

8. Compare, e.g., THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD (Pier Angelo Toninelli ed., 1983) [hereinafter Toninelli] (discussing SOEs before 1945), with Philippe Aghion et al., *The Behaviour of State Firms in Eastern Europe, Pre-Privatisation*, 38 EUR. ECON. REV. 1327 (1994) (discussing SOEs in Soviet-dominated Europe through the 1980s), and Toninelli, *supra*, at 103–253 (discussing Western European SOEs).

9. For a discussion of European SOEs within the European Union, see generally Angela Huyue Zhang, *The Single-Entity Theory: An Antitrust Time Bomb for Chinese State-Owned Enterprises?*, 8 J. COMPETITION L. & ECON. 805 (2012) (discussing anti-trust treatment of European SOEs). For a discussion of the operation and principles of Chinese SOE operation, see generally Fan Gang & Nicholas C. Hope, *The Role of State-Owned Enterprises in the Chinese Economy*, in US-CHINA ECONOMIC RELATIONS IN THE NEXT TEN YEARS: TOWARDS DEEPER ENGAGEMENT AND MUTUAL BENEFIT 2–17 (2013), www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+16.pdf [https://perma.cc/5362-7MV8] (archived Aug. 27, 2017) [hereinafter Fan Gang]. Many developing states have created SOEs through which to manage their natural resources, especially in the extractive sector. For a discussion, see generally, e.g., Michael L. Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297 (1999).

10. See generally, e.g., INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, *SOVEREIGN WEALTH FUNDS GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO . PRINCIPLES"* (Oct. 2008), http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf [https://perma.cc/U7RL-3M3D] (archived Aug. 27, 2017); Larry Catá Backer, *Sovereign Wealth Funds, Capacity Building, Development, and Governance*, 34 WAKE FOREST L. REV. (forthcoming 2017) [hereinafter Backer, *Sovereign Wealth Funds*].

11. See generally, e.g., OECD, *GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES* (2015 ed.) <http://www.oecd-ilibrary.org/docserver/download/2615061e.pdf?expires=1493181688&id=id&accname=guest&checksum=0613E3D8DE30A7861776806095099811> [https://perma.cc/Q4KV-SD76] (archived Aug. 27, 2017) [hereinafter OECD GUIDELINES].

12. See generally, e.g., A. Erin Bass & Subrata Chakrabarty, *Resource Security: Competition for Global Resources, Strategic Intent, and Governments as Owners*, 45 J. INT'L BUS. STUD. 961, 975–78 (2014); Francisco Flores-Macias, *The Return of State-Owned Enterprises*, HARV. INT'L REV. (Apr. 4, 2009) <http://hir.harvard.edu/article?a=1854> [https://perma.cc/ED73-ZFF5] (archived Aug. 27, 2017).

they continue to serve quite important public purposes.¹³ The SOE's importance is in part the product of the malleability of the SOE concept itself, which has made the device a useful tool for states.¹⁴ That malleability has also permitted SOEs to become an increasingly important factor in globalized economic activity,¹⁵ shaping its patterns and approaches with a reference to the national policy and politics of the owner-state.

But their use by states has also been criticized for inhibiting the construction of robust internal and global markets, in part because of their inefficiency,¹⁶ and in part because such open and robust markets serve as the foundation of economic activity within and beyond states.¹⁷ The difficulty stems from the relationship between states and their economic enterprises. On the one hand, states regulate all economic enterprises—including SOEs (to the extent they are treated like other similarly constituted entities). On the other hand, the state that regulates also owns the regulated entity; the state, in this instance, may distort markets by using its regulatory power to favor its own entities over others. That produces asymmetries in market power that might challenge the efficacy of the emerging market-driven regulatory structures of globalization and its

13. See generally, e.g., Jing-Lin Duanmu, *State-Owned MNCs and Host Country Expropriation Risk: The Role of Home State Soft Power and Economic Gunboat Diplomacy*, 45 J. INT'L BUS. STUD. 1044 (2014) (arguing SOEs promote international business); James S. Ang & David K. Ding, *Government Ownership and the Performance of Government-Linked Companies: The Case of Singapore*, 16 J. MULTINATIONAL FIN. MGMT. 64 (2006).

14. See generally, e.g., Aldo Musacchio & Sergio G. Lazzarini, *Leviathan in Business: Varieties of State Capitalism and Their Implications for Economic Performance* (May 30, 2012) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2070942 [<https://perma.cc/L8DF-ZC9N>] (archived Aug. 27, 2017) [hereinafter Musacchio].

15. See generally Alvaro Cuervo-Cazurra et. al., *Governments as Owners: State-Owned Multinational Companies*, 45 J. INT'L BUS. STUD. 919 (2014); Lin Cui & Fuming Jiang, *State Ownership Effect on Firms' FDI Ownership Decisions Under Institutional Pressure: A study of Chinese Outward-Investing Firms*, 43 J. INT'L BUS. STUD. 264 (2012).

16. See generally, e.g., Gabriel Wildau, *China's state-owned zombie economy*, FIN. TIMES (Feb. 29, 2016), <https://www.ft.com/content/253d7eb0-ca6c-11e5-84df-70594b99fc47> [<https://perma.cc/JA7W-S52T>] (archived Aug. 27, 2017); Julia Ya Qin, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) - A Critical Appraisal of the China Accession Protocol*, 7 J. INT'L ECON. L. 863 (2004). But see Musacchio, *supra* note 14.

17. For an early version, see generally DOUGLAS F. LAMONT, *FOREIGN STATE-OWNED ENTERPRISES: THREAT TO AMERICAN BUSINESS* (1976). For contemporary consideration of the issue, see generally, e.g., IAN BREMMER, *THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS?* (2010); see also Fernanda Ribeiro Cahen, *Internationalization of State-Owned Enterprises Through Foreign Direct Investment*, 55 REV. DE ADMINISTRAÇÃO DE EMPRESAS 645, 653–55 (2015).

so-called neoliberal order.¹⁸ The asymmetries run beyond the usual problem of state subsidies, from that of states being tempted to tilt markets in favor of SOEs (producing a sort of systemic corruption in markets driven systems), to that of issues of interference with sovereignty when SOEs serve as the apex enterprise in global production chains.¹⁹

The legal status of an SOE varies from being a part of government to being a stock company with a state as a regular stockholder.²⁰ But their purpose—national development and the projection of economic power abroad—has remained constant, though with quite distinct differences in emphasis and application among states inclined to use them.²¹ The regional variations are quite contextually rooted and historically driven.

European models from the 1980s were driven by the principles of free movement basic to the EU treaties, within the context of de-socialization from the 1980s.²² The contemporary approaches of European states represent a long dialogue (sometimes quite strident) between market-driven states and the brand of market-rejecting European Marxist Leninism that characterized the old Soviet Empire and its satellites in Europe. The apex of this European flirtation with

18. See Daniel J. Ikenson et al., *Should Free Traders Support the Trans-Pacific Partnership? An Assessment of America's Largest Preferential Trade Agreement*, 54–56 (CATO Institute, Working Paper No. 39, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-39_3.pdf [<https://perma.cc/C9ZM-DCPH>] (archived Aug. 27, 2017).

19. For the OECD position, see generally OECD, *COMPETITIVE NEUTRALITY: MAINTAINING A LEVEL PLAYING FIELD BETWEEN PUBLIC AND PRIVATE BUSINESS* (2012). An apex enterprise is the company (however organized) that resides at the top of the production chain, that is, that effectively owns or controls the production chain that defines the scope of its economic activities. Most multinational enterprises are apex enterprises. The relationship among apex enterprises can be complex. For example, Foxconn can be seen as an apex enterprise producing or assembling products for wholesale markets, yet Foxconn is also downstream of Apple's production chain for iPhones. Larry Catá Backer, *Realising Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India*, in *SOCIO-ECONOMIC RIGHTS IN EMERGING FREE MARKETS: COMPARATIVE INSIGHTS FROM INDIA AND CHINA* 44, 59–63 (Surya Deva ed., 2016).

20. See Wei Cui, *Taxing State-Owned Enterprises: Understanding a Basic Institution of State Capitalism*, 52 *OSGOODE HALL L.J.* 775, 787–90 (2015).

21. See generally, e.g., Hans Christiansen, *The Size and Composition of the SOE Sector in OECD Countries* (OECD Corporate Governance, Working Paper No. 5, 2011), <http://dx.doi.org/10.1787/5kg54cwps0s3-en> [<https://perma.cc/4J2J-ZR7L>] (archived Aug. 27, 2017) [hereinafter Christiansen].

22. See, e.g., Nicola Bellini, *The Decline of State Owned Enterprise and the New Foundations of the State-Industry Relationship*, in Toninelli, *supra* note 8, at 25–48; see generally Carles Boix, *Privatizing the Public Business Sector in the 1980s: Economic Performance, Partisan Responses, and Divided Governments*, 27 *BRIT. J. OF POL. SCI.* 473 (1997).

robust SOE-driven economies occurred through the 1970s²³ with substantially different approaches to “socialism” and state management of economic activities across democratic Europe, in contradistinction to the central planning economies of the Soviet Union with a negligible private sector.²⁴ By the end of the 1990s, that system was in the advanced stages of dismantling. The dismantling of SOE-driven economies was propelled both by the fall of the Soviet Union and by the rise of a level- and unsubsidized-markets ideology within the jurisprudence of the European Court of Justice and reflected in the policies of the institutions of the European Union.²⁵ The emerging rules constraining state aids reduced the value of state ownership and its relevance, and economic integration made the consequences less drastic.

The Nordic states are a current driving force in European SOEs, under the so-called policy of Nordic Capitalism.²⁶ Nordic Capitalism is guided by principles of profitability and exemplary responsibility—profits rendered to the state and the state directing the form and effect of the responsibilities it meant to impose.²⁷ Sweden provides a

23. See William L. Megginson & Jeffrey M. Netter, *From State to Market: A Survey of Empirical Studies on Privatization*, 39 J. OF ECON. LITERATURE 321, 323 (2001) (“Until Margaret Thatcher’s conservative government came to power in 1979, the answer to this debate in the United Kingdom and elsewhere was that the government should at least own the telecommunications and postal services, electric and gas utilities, and most forms of non-road transportation (especially airlines and railroads). Many politicians also believed the state should control certain ‘strategic’ manufacturing industries, such as steel and defense production. In many countries, state-owned banks were also given either monopoly or protected positions.”); see also Ulrich Wengenroth, *The Rise and Fall of the State Owned Enterprise in Germany*, in Toninelli, *supra* note 8, at 103–253.

24. See generally, e.g., Richard E. Ericson, *The Classical Soviet-Type Economy: Nature of the System and Implications for Reform*, 5 J. ECON. PERSP. 11 (1991).

25. See the “Golden Share” cases. See Case C-367/98, Comm’n of the European Communities [CEC] v. Portuguese Republic, 2002 E.C.R. I-4731; Case C-483/99, CEC v. French Republic, 2002 E.C.R. I-4781; Case C-503/99, CEC v. Kingdom of Belgium, 2002 E.C.R. I-4812; Case C-463/00, CEC v. Kingdom of Spain, 2003 E.C.R. I-4581; Case C-98/01, CEC v. United Kingdom of Great Britain and Northern Ireland, 2003 E.C.R. I-4644; Case C-112/2005, CEC v. Federal Republic of Germany (Volkswagen), 2007 E.C.R. I-9020; Case C-463/04 and C-464/04, *Federconsumatori v. Comune di Milano*, 2004 E.C.R. I-10433. For a discussion of the importance of the “Golden Share” cases, see generally Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, And the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801 (2008).

26. See generally, e.g., TORBEN M. ANDERSEN ET AL., *THE NORDIC MODEL: EMBRACING GLOBALIZATION AND SHARING RISKS* (2007), <https://economics.mit.edu/files/5726> [<https://perma.cc/H3B4-7QRH>] (archived Aug. 27, 2017); *The Nordic Countries: The Next Supermodel*, *THE ECONOMIST* (Feb. 2, 2013), <http://www.economist.com/news/leaders/21571136-politicians-both-right-and-left-could-learn-nordic-countries-next-supermodel> [<https://perma.cc/5F4Y-7C9L>].

27. See Sari Kuvaja, *Expectations for state-owned companies: profitability and exemplary responsibility*, *NORDIC MORNING* (2015), <http://reporting2015.nordicmorning.com/>

good example of the model with respect to the operation of Swedish SOEs, in which the state “has a major responsibility to be an active and professional owner. The Government’s overall objectives are for the companies to generate value and, where applicable, to ensure that specially commissioned public policy assignments are well performed.”²⁸ Other European states also maintain state enterprises.²⁹ France, for example, “has equity positions in 81 French companies, ranging from Alstom to Orange and EDF, worth an estimated €90bn and employing 1.7m people. It keeps a firm guiding hand on hundreds more, ready and able to defend its interests.”³⁰

In contrast, developing states find SOEs useful as instruments of internal development, usually for the control and exploitation of national resources.³¹ Despite substantial pressure to privatize SOEs at the end of the twentieth century,³² developing state SOEs might again be thought to serve as a mechanism for state planning and macro-economic policies.³³ Indeed, within developing states, a new turn on state to state economic activities may now be undertaken through SOE investment. In Peru, for example, the Las Bambas mines were purchased in 2014 by a consortium of Chinese SOEs.³⁴

en/corporate-responsibility/expectations-for-state-owned-companies-profitability-and-exemplary-responsibility.html [https://perma.cc/3SJV-XLSK] (archived Aug. 27, 2017).

28. See *Objectives for state-owned companies*, GOVERNMENT OFFICES OF SWEDEN, <http://www.government.se/government-policy/state-owned-enterprises/goals-for-state-owned-companies/> (last updated Mar. 10, 2015) [https://perma.cc/7KGY-EBNU] (archived Aug. 27, 2017). The Swedish state speaks here of the use of its ownership to move forward balanced gender distribution policies, economic goals, sustainability goals, and additional goals assigned to specific enterprises. *Id.*

29. See, e.g., Christiansen, *supra* note 21 (describing substantial investment in enterprises across OECD states, both in terms of overall employment and in terms of investment in enterprises). For Germany, see *Germany - Competition from State-Owned Enterprises*, EXPORT.GOV (Jan. 17, 2017), <https://www.export.gov/article?id=Germany-Competition-from-State-Owned-Enterprises> [https://perma.cc/V3CQ-5N25] (archived Aug. 27, 2017).

30. See Michael Strothard, *France: The Politics of State Ownership*, FIN. TIMES (Nov. 13, 2016), <https://www.ft.com/content/9be75d5c-a72e-11e6-8898-79a99e2a4de6> [https://perma.cc/7V8S-DML6] (archived Aug. 27, 2017).

31. See, e.g., OECD, STATE-OWNED ENTERPRISES IN THE DEVELOPMENT PROCESS 34 (2015) (“If the government of a low-income country embarks on a strategy of catch-up industrialisation, a case can certainly be made for establishing SOEs to carry out key functions.”).

32. See, e.g., John Nellis, *The Evolution of Enterprise Reform in Africa: From State-owned Enterprises to Private Participation in Infrastructure —and Back?* 37 (Energy Sector Mgmt. Assistance Program, Technical Paper 084, 2005), https://www.esmap.org/sites/esmap.org/files/08405.Technical%20Paper_The%20Evolution%20of%20Enterprise%20Reform%20in%20Africa%20From%20State-owned%20Enterprises%20to%20Private%20Participation%20In%20Infrastructure%20and%20Back.pdf [https://perma.cc/5ETW-K37Y] (archived Aug. 27, 2017).

33. See HA-JOON CHANG, STATE-OWNED ENTERPRISE REFORM 8–14 (2007), https://esa.un.org/techcoop/documents/pn_soereformnote.pdf [https://perma.cc/NQ8T-KSJJ] (archived Aug. 27, 2017).

34. See XIMENA BENAVIDES REVERDITTO, ECONOMIC DEVELOPMENT AND STATE OWNED ENTERPRISES (SOES) 1 (2014), <https://law.yale.edu/system/files/documents/pdf/>

Especially in the extractives sector SOEs owned by developing states, the role of the state varies substantially “but can include tax collection, assignment of operating rights, monitoring and management of cadasters, setting rules governing performance, ensuring compliance by companies with legislation, regulation and contracts, and approving key decisions by partner companies.”³⁵

For developing states, SOEs are a legacy of both the ideologically driven post-colonial policies of their first generation of leaders, and the then fashionable policies that sought to convince developing states that the future lay in export substitution policies and in economic development that would produce a self-sufficient state. Globalization has substantially softened these ideologies and in the process also reduced the vigor with which developing states have sought to build up and deploy SOEs. Yet especially in resource-rich states, SOEs remain an important part of macroeconomic and production management. SOEs are also important stabilizers of labor markets and thus indirectly of political stability.³⁶ Increasingly, these efforts have been tied to stabilization strategies that are advanced by international financial institutions (IFIs) and in conjunction with state SWFs as the basis of development efforts, including development finance. Not inconsequential is the use of SOEs (and SWFs) as a means of reducing corruption in state where corruption is systemic.³⁷ Producing autonomous enterprises that may be managed or made accountable through mechanisms not under the control of state officials may sometimes serve to protect those resources. Yet issues of productivity and economic viability continue to weaken these enterprises, even as they continue to be viewed as essential to developing states.³⁸

SELA14_Benavides_CV_Eng.pdf [<https://perma.cc/B56M-EDBM>] (archived Aug. 27, 2017).

35. See NAT. RES. GOVERNANCE INSTIT., STATE PARTICIPATION AND STATE-OWNED ENTERPRISES: ROLES, BENEFITS, AND CHALLENGES 4 (2015), https://resourcegovernance.org/sites/default/files/nrgi_State-Participation-and-SOEs.pdf [<https://perma.cc/GD4F-U5BA>] (archived Aug. 27, 2017).

36. See generally, e.g., Arkamoy Dutta Majumdar, *West Bengal to restructure state-owned enterprises*, LIVE MINT (Feb. 12, 2017), <http://www.livemint.com/Companies/zUcXsREgJSe875buUFuGiL/West-Bengal-to-restructure-stateowned-enterprises.html> [<https://perma.cc/BBM7-Y78Z>] (archived Aug. 27, 2017) (“The government said at least 16 companies are to be merged and five subsidiaries of West Bengal Electronics Industry Development Corp. Ltd, or Webel, to be wound up. The state would, after the restructuring, continue to run 44 focused enterprises, most of which, though, are loss-making. Chief minister Mamata Banerjee reiterated that this restructuring will not lead to job cuts.”).

37. *But see SOEs holding regulation not in line with laws, says economist*, THE JAKARTA POST (Feb. 1, 2017), <http://www.thejakartapost.com/news/2017/02/01/soes-holding-regulation-not-in-line-with-laws-says-economist.html> [<https://perma.cc/HFQ4-BNB6>] (archived Aug. 27, 2017).

38. See, e.g., *PM says too many state-owned enterprises underperforming*, SATURDAY EXPRESS (Jan. 18 2017), <http://www.trinidadexpress.com/20170118/business/pm-says-too-many-state-owned-enterprises-underperforming>

Since the 1980s, The People's Republic of China has been the site of the most vibrant contemporary development of Marxist-Leninist frameworks for SOEs.³⁹ It has developed a markets-based socialism grounded in strong markets and state ownership of substantial sectors of the economy.⁴⁰ This approach—socialist modernization—is grounded in the notion that all of the productive forces of society must be available to the state through regulatory governance or direct command structures to help the Chinese vanguard party fulfill its core obligation to move society along toward the establishment of a communist society.⁴¹ Through China's Go-Out Policies (走出去战略)⁴² and policies on internationalism,⁴³ Chinese SOEs have become more and more important in global economic activity. They also have become an important element in the socialization of Chinese approaches to Marxist state planning.⁴⁴ These might also become more influential as a form of economic productivity in developing

[<https://perma.cc/5BUF-8XC6>] (archived Aug. 27, 2017) (“In his address, Rowley said that since the 1960's government has become involved in various aspects of the local economy to the point that this policy has brought “us to our present situation where we have about 100 state enterprises and their subsidiaries.”); *BIDV Securities: Reform still needed in Vietnam's state-owned enterprises*, WORLD FIN. (Feb. 6 2017), <http://www.worldfinance.com/inward-investment/asia-and-australasia/bidv-securities-reform-still-needed-in-vietnams-state-owned-enterprises> [<https://perma.cc/K68B-226U>] (archived Aug. 27, 2017).

39. For a critical assessment, see generally, e.g., Wendy Leutert, *Challenges Ahead in China's Reform of State-Owned Enterprises*, 21 ASIA POL'Y 83 (2016).

40. This policy is founded on the concept of socialist modernization and its principal object to develop Chinese productive forces under the leadership of the Communist Party to advance the development of the state and its population. See generally, e.g., CHINA'S SOCIALIST MODERNIZATION (Yu Guangyuan ed., 1984) (discussing China's transition to a socialist economy); QIZHI ZHANG, AN INTRODUCTION TO CHINESE HISTORY AND CULTURE 441–67 (2015).

41. See Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The 'Three Represents'), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 101, 133–47 (2008); see also Jiang Shigong, *How to Explore the Chinese Path to Constitutionalism? A Response to Larry Catá Backer*, 40 MOD. CHINA 196, 202–03 (2013).

42. See generally, e.g., Hongying Wang, *A Deeper Look at China's "Going Out" Policy*, CIGI (Mar. 2016), https://www.cigionline.org/sites/default/files/hongying_wang_mar2016_web.pdf [<https://perma.cc/DYQ7-B2T5>] (archived Aug. 27, 2017).

43. See generally Chen Zhimin, *Nationalism, Internationalism and Chinese Foreign Policy*, 14 J. CONTEMP. CHINA 35 (2006).

44. “Major problems plaguing the entities uncovered through the inspections include corruption, weakening of the Party's leadership, and procedural violations in personnel selection and placement, according to the findings released by the CCDI on Thursday.” *CCDI warns of corruption risks after inspections*, Xinhuanet (Feb. 4, 2016), http://news.xinhuanet.com/english/2016-02/05/c_135075770.htm [<https://perma.cc/WS4Z-T7PQ>] (archived Oct. 22, 2017). See also (CPC Central Committee and State Council On Creating a Healthy Environment for Entrepreneurship) 中共中央国务院关于营造企业家健康成长环境 弘扬优秀企业家精神更好发挥企业家作用的意见, <http://politics.people.com.cn/n1/2017/0926/c1001-29558449.html> [<https://perma.cc/CT5L-KR2P>] (archived Oct. 22, 2017).

states in which China has invested heavily. Yet, even Chinese SOEs are subject to the inefficiencies of operational objectives that include goals beyond pure financial wealth maximization.⁴⁵ And the Chinese economic and political system is incompatible with a goal of complete detachment between state (as regulator) and enterprise (including finance and bank SOEs).⁴⁶

Globalization has also had a profound effect on the character, utility, and operation of SOEs.⁴⁷ Once understood (like their private counterparts) and targeted toward national markets, the possibilities of cross-border economic activities and the development of complex and strong production chains have pushed SOEs beyond their borders.⁴⁸ SOEs now compete with their private counterparts for global business and are deeply embedded at all levels in global production chains. This produces substantial issues around concepts of competitive neutrality, grounded in fears that states could use their political power to support the economic activities of their SOEs, especially abroad.⁴⁹ To that extent, they represent not merely the

45. See, e.g., *China says debt risk for main state firms is controllable*, THE BUS. TIMES (Jan. 27, 2017), <http://www.businesstimes.com.sg/government-economy/china-says-debt-risk-for-main-state-firms-is-controllable> [<https://perma.cc/J26N-W3B4>] (archived Sept. 6, 2017) (“While many state companies are bloated and inefficient, China has relied on them more heavily over the past year to generate economic growth in the face of cooling private investment.”).

46. It has been suggested that

Given the long history of SOEs and the enormous social responsibilities imposed on them, China’s gradual approach to SOE reform is understandable. Today, deficiencies in China’s market infrastructure continue to prevent the government from fully allowing free market forces to run the economy. The government will continue, therefore, to have an important role to play in resolving these transition problems in China’s development.

See Fan Gang, *supra* note 9, at 3.

47. See generally Ian Bremmer, *The New Rules of Globalization*, HARV. BUS. REV. (Jan.–Feb. 2014), <https://hbr.org/2014/01/the-new-rules-of-globalization> [<http://perma.cc/CZ8S-PAZR>] (archived Aug. 24, 2017); Hao Liang et al., *An Anatomy of State Control in the Globalization of State-Owned Enterprises*, 46(2) J. INT’L BUS. STUD. 223 (2015) (considering globalization’s effect on SOEs).

48. See, e.g., DALI L. YANG, REMAKING THE CHINESE LEVIATHAN 33 (2004).

49. See, e.g., OECD, POLICY ROUNDTABLES, STATE OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY 9 (2009), <https://www.oecd.org/daf/competition/46734249.pdf> [<http://perma.cc/82KA-23X3>] (archived Aug. 24, 2017) (“Due to their privileged position SOEs may negatively affect competition and it is therefore important to ensure that, to the greatest extent possible consistent with their public service responsibilities, they are subject to similar competition disciplines as private enterprises.”); Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* 3 (OECD Corporate Governance Working Papers No. 1, 2011), http://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises_5kg9xfjgdhg6-en [<https://perma.cc/GY8F-UEYB>] (archived Sept. 17, 2017).

willingness of SOEs to access growth potential beyond the state, but also the willingness of states to leverage their power through SOE projection in private markets. But sometimes, SOEs tend to substitute for foreign state macroeconomic planning rather than serving in market driven transactions. This appears especially important where SOEs from larger states are used to project public policy through ownership of resources of developing states. Again in Peru, in 2013, Petrobras, a Brazilian SOE, sold its Peruvian assets to a PetroChina, a Chinese SOE.⁵⁰

Despite the growing impact of SOEs in global economic activities, there has been little successful effort to manage their behaviors in the international sphere.⁵¹ That is, there is little by way of law to govern those governance gaps⁵² that exist when SOEs (like other economic enterprises) operate between states in ways that make it impossible for a single state to assert effective regulatory oversight over the enterprise and its transactions.⁵³ There have been some multilateral efforts that have produced soft law,⁵⁴ the most important of which has been the OECD's *Guidelines on Corporate Governance of SOEs*.⁵⁵ These have sought to develop principles of conduct touching on seven areas of governance.⁵⁶ The thrust of these

50. REVERDITTO, *supra* note 34.

51. See OECD, STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS 27 (2016), http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/state-owned-enterprises-as-global-competitors_9789264262096-en#_WTNqHem1tPM [<http://perma.cc/C326-2S7X>] (archived Aug. 24, 2017).

52. See John G. Ruggie, Special Representative of the Secretary General, *Protect, Respect, Remedy: A Framework for Business and Human Rights*, Human Rights Council of the United Nations, at 3, U.N. Doc. A/HRC/8/5 (April 11, 2008). *But see* PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS AND THE HOME STATE ADVANTAGE 154 (2014) (discussing 2013 reporting standard imposed on SOEs involved in extractive projects). *See generally* Tara J. Melish & Errol Meidinger, *Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework*, in THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 303, 305–06 (Radu Mares ed., 2011).

53. I have considered this in the broader context of transnational public economic activity with a focus on China. *See* Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3, 8 (2010) (discussing regulatory oversight over Chinese SOEs in the context of transnational public economic activity).

54. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. OF LEGAL ANALYSIS 171, 198 (2010).

55. OECD GUIDELINES, *supra* note 11.

56. These include: I. Rationales for state ownership; II. The state's role as an owner; III. State-owned enterprises in the marketplace; IV. Equitable treatment of shareholders and other investors; V. Stakeholder relations and responsible business; VI. Disclosure and transparency; and VII. The responsibilities of the boards of state-owned enterprises. *Id.*

guidelines is to ensure that SOEs operate like their private counterparts—that is, to mitigate the public character of these enterprises.⁵⁷ The reasons are obvious—SOEs that are more public than private in character may be viewed as political institutions and barred from entry into foreign states. And the sovereign immunity regimes of most states distinguish between public regulatory actions and activities and commercial activities.⁵⁸

Even as the character and use of SOEs has been changing and adjusting to the potentials and risks of global activity, the international community has also sought to develop ever stronger mechanisms for the management of the character of such activity with respect to human rights, sustainability, and fidelity to the numerous international instruments that have sought to develop global consensus norms about economic behavior.⁵⁹ Efforts to create a more effective legal structure to embed human rights obligations onto SOEs have recently focused on trade agreements. However, these efforts have produced little by way of substantive changes to date. One of the targets has been in the discussion about the construction and implementation of bilateral trade agreements.⁶⁰ A related effort has been undertaken around multilateral agreements.⁶¹ The

57. See *id.* ¶¶ III–IV.

58. The issue of sovereign immunity is of long standing. See John G. Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution*, 27 MICH. L. REV. 751, 774 (1929). The issue of sovereign immunity became particularly pressing after 1945 when emerging Western markets systems confronted Soviet state based economic activity. See Bernard Fensterwald, Jr., *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 634 (1950); Michael Brandon, *Sovereign Immunity of Government-Owned Corporations and Ships*, 39 CORNELL L. Q. 425, 442 (1954); George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 671 (2008). See generally A. F. M. Maniruzzaman, *Sovereign Immunity and the Enforcement of Arbitral Awards against State Entities: Recent Trends in Practice*, in AM. ARB. ASS'N HANDBOOK ON INT'L ARB. PRAC. 338 (2010), http://www.academia.edu/519348/Sovereign_Immunity_and_the_Enforcement_of_Arbitral_Awards_against_State_Entities_Recent_Trends_in_Practice [<http://perma.cc/BZD4-XQTR>] (archived Aug. 25, 2017).

59. See, e.g., CAMILLA WEE, *REGULATING THE HUMAN RIGHTS IMPACT OF STATE-OWNED ENTERPRISES: TENDENCIES OF CORPORATE ACCOUNTABILITY AND STATE RESPONSIBILITY* 4 (2008).

60. See, e.g., Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their Investments Protected?*, 6 J. INT'L L. & INT'L REL. 1, 14 (2011); Norah Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, 31 ICSID REV. 88, 93 (2016); Junji Nakagawa, *Regulatory Harmonization Through FTAs and BITs: Regulation of State Owned Enterprises (SOEs)* (Soc'y of Int'l Econ. Law, Working Paper No. 55, 2012), <https://ssrn.com/abstract=2103237> [<http://perma.cc/8DQZ-K939>] (archived Sept. 7, 2017).

61. See, e.g., Ines Willemsyns, *Disciplines on State-Owned Enterprises In TPP: Have Expectations Been Met?* 15–18 (Leuven Ctr. for Glob. Governance Studies,

difficulty tends to focus on issues of equal treatment and on the scope and application of duties, as well as on the inclusion of SOEs (and sometimes of SWFs) as investors in such arrangements.⁶²

Beyond those trade related efforts, most other projects have been directed toward formal lawmaking and to the development of “soft” normative principles. Among the international frameworks that have been most influential are those that have been developed for managing behaviors that touch on *human rights impacts* of economic activity. These are to be distinguished from older efforts aimed generally at the legalization of the corporate social responsibility (CSR) of enterprises.⁶³ CSR frameworks tend to be state-based and focused on the structures of corporate governance and institutional obligation to society. The debates touch on the primacy of shareholder versus stakeholder benefit models of corporate operation,⁶⁴ and they have generally found expression in national law through the management of corporate philanthropy.⁶⁵ In contrast, the debate is of

Working Paper No. 168, 2016), https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp161-170/wp-168-willemys-website.pdf [<https://perma.cc/H88P-WJZG>] (archived Aug. 25, 2017) (discussing the rules placed on SOEs at the multilateral level).

62. See, e.g., Yuri Shima, *The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey* 10 (OECD, Working Paper No. 2015/01, 2015), http://www.oecd-ilibrary.org/finance-and-investment/the-policy-landscape-for-international-investment-by-government-controlled-investors_5js7svp0jkns-en [<https://perma.cc/ZNF9-TAVE>] (archived Sept. 17, 2017).

63. I have noted at greater length elsewhere on the differences between CSR and business and human rights:

At its broadest, it refers to the extent to which an aggregation of capital that is recognized as a separate legal person must, may, or should, operate in accordance with certain standards of conduct. That mimics the general conversation a society has about the legal, civic, ethical and societal obligations of its citizens. But . . . CSR has acquired a quite specific and distinct meaning. It references the question of the extent of the legal, social, civic and moral obligations of enterprises in their operations. . . . CSR has also become a key element of international debates. . . . But the debate is of a substantially different character. In this context, the principal focus was on the developing normative structures for human rights.

Larry Catá Backer, *The Corporate Social Responsibilities of Financial Institutions for the Conduct of their Borrowers: The View from International Law and Standards*, 21 LEWIS & CLARK L. REV. (forthcoming 2017).

64. See ADOLPH A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954) (discussing the stakeholder benefit model of corporate operation); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133–34 (University of Chicago Press 1962); see generally Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) (providing a more recent defense of the arguments against the doctrine of corporate social responsibility).

65. Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a*

a substantially different character where the obligations of economic activity are considered in an international framework. In this context, the principal focus is on the developing normative structures for human rights. This approach is partly structural, in the sense that global governance has tended to be constructed around the pillars of democracy, respect for human rights, and economic development.⁶⁶

These international frameworks center around a few key instruments, two of which are especially influential. The first is the UNGP,⁶⁷ introduced earlier, which the U.N. Human Rights Council unanimously endorsed in 2011.⁶⁸ The other is the OECD Guidelines for Multinational Enterprises (MNE Guidelines).⁶⁹ The MNE Guidelines have existed in one form or another since the 1970s and constitute recommendations addressed by governments to multinational enterprises operating in or from adhering countries. Their object is to provide a soft law framework “for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”⁷⁰

The UNGP are structured as three “Pillars”: the First Pillar is the state duty to protect human rights,⁷¹ the Second Pillar is the responsibility of corporations to respect human rights,⁷² and the Third Pillar is the remedial mechanism that must be established to implement the state duty and corporate responsibility.⁷³

SOEs occupy a dual place within the UNGP. They are to some extent an instrumentality of the state and thus potentially subject to the state duty to protect. At the same time, they function as commercial ventures and are thus subject to the less legalized

Harbinger of Corporate Social Responsibility as International Law, 37 COLUM. HUM. RTS. L. REV. 287, 294–306 (2006).

66. See, e.g., *What is CSR?*, AUSTRALIAN CENTRE FOR CORPORATE SOCIAL RESPONSIBILITY, <http://accsr.com.au/what-is-csr/> [<https://perma.cc/V2NQ-UQQ9>] (archived Aug. 25, 2017) (“The view of CSR as a global governance mechanism emerges from the global trans-national institutions that developed in the twentieth century, such as the United Nations, the International Labour Organisation, The World Bank and the Organisation for Economic Cooperation and Development (OECD), together with international treaties and agreements negotiated by governments and non-government organisations.”).

67. UNGP, *supra* note 6.

68. Human Rights Council, *Human Rights and Transnational Corporations and other Business Enterprises*, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), <https://business-humanrights.org/sites/default/files/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf> [<https://perma.cc/U6CH-QF9R>] (archived Aug. 26, 2017).

69. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011), <https://www.oecd.org/corporate/mne/48004323.pdf> [<https://perma.cc/K6Z9-4QQK>] (archived Aug. 26, 2017) [hereinafter MNE GUIDELINES].

70. *Id.* at 3.

71. UNGP, *supra* note 6, at 3.

72. *Id.* at 13.

73. *Id.* at 27.

provisions of the corporate responsibility to respect. Yet their owners have a duty in exercising their ownership responsibilities that may also be constrained by the state duty to protect human rights. In the context of SOEs, UNGP paragraph 4 has proven most relevant, providing that states take “additional steps to protect against human rights abuses” by their SOEs or with respect to entities that receive substantial state support in other ways.⁷⁴

The provisions of the UNGP have been substantially incorporated into the OECD framework through its MNE Guidelines. These are also non-binding, but they incorporate a remedial mechanism in the form of “special instances” (complaints) that may be lodged by individuals and others against enterprises alleging violation of the MNE Guidelines before a “National Contact Point,” an administrative office maintained by states to comply with their OECD member state obligations.⁷⁵

While these efforts have yet to produce legally binding instruments, they have produced increasingly influential systems of soft law. And irrespective of these soft-law instruments, global enterprises have sought to manage their global operations through governance mechanisms that span their production chains, drawing in substantial part on these international instruments.

Since UNGP endorsement in 2011, a Working Group on Business and Human Rights, established at the time of the endorsement, has undertaken formal international engagement with the UNGP.⁷⁶ The Working Group and the OECD recently have been considering application of multilateral soft-law frameworks to hybrid entities—SWFs and SOEs. The object is to extend the scope of the UNGP and the MNE Guidelines, but also to make the application of those instruments more coherent. At the same time, they have been following a policy of encouraging states to “lead by example,”

74. *Id.* at 6.

75. The National Contact Points (NCP) are as close as soft law frameworks have come to development of an enforcement framework. OECD states and otherwise adhering governments are obliged to establish NCP and vest them with authority under the OECD MNE Guidelines to advance the objectives of the OECD corporate governance project, and most importantly serve as a mechanism through which allegations of violations of the MNE Guidelines may be raised. *See* MNE GUIDELINES, *supra* note 69, at 71–74 (“The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.”); *see generally* Larry Catá Backer, *Rights And Accountability In Development (Raid) v. Das Air and Global Witness v. Afrimex; Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELB. J. OF INT’L L. 258 (2009).

76. *See Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, OHCHR, <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> [https://perma.cc/3AHR-58KG] (archived Aug. 28, 2017).

supported in this endeavor by Nordic states⁷⁷ especially in the context of their efforts touching on SOEs and human rights.

This focus was augmented by the theme adopted by the Working Group for the 5th UN Forum on Business and Human Rights, November 14–16, 2016.⁷⁸ One of the most important products of that approach was the delivery, during the summer of 2016, of the *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises* (the 2016 WG Report).⁷⁹ It focused on the application of the UNGP framework to the governance obligations of both SOEs and their owners. The “Note by the Secretariat” explained the reason for the centrality of this theme:

In the report, the Working Group examines the duty of States to protect against human rights abuses involving those business enterprises that they own or control, which are generally referred to as State-owned enterprises. . . . The report calls attention to and clarifies what States are expected to do in their role as owners of enterprises and why. . . . In the present report, the Working Group suggests a range of measures that States could take to operationalize the call to take additional steps with regard to State-owned enterprises, by building on existing international guidance and national practices related to the corporate governance of those enterprises.⁸⁰

The press release announcing the 2016 WG Report explained the focus and scope of the effort.⁸¹ It started with a reminder of an important premise—that states are also economic actors in their own right. Those economic activities, the management of which has been refined over the course of the last century, under conditions of

77. And principally the Ministry of Enterprise and Innovation, Government Offices of Sweden. See OHCHR, *Leadership and Leverage: Embedding Human Rights in the Rules and Relationships that Drive the Global Economy*, 2016 UN Forum on Business and Human Rights Forum Programme, http://www.ohchr.org/Documents/Issues/Business/ForumSession5/PoW_printable.pdf [https://perma.cc/8EDX-8XX8] (archived Aug. 28, 2017).

78. See *2016 United Nations Forum on Business and Human Rights*, OHCHR, <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2016ForumBHR.aspx> [https://perma.cc/T7X7-76ZF] (archived Aug. 28, 2017) [hereinafter OHCHR, *2016 UN Forum*]. The UN Human Rights Council, under paragraph 12 of its resolution 17/4, established the Forum to serve as a key global platform for stakeholders to “discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights.” It is guided by the Working Group on Business and Human Rights.

79. U.N. Secretariat, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/32/45 (May 4, 2016) [hereinafter WG, 2016 Report].

80. *Id.* at 1.

81. See *State-owned Enterprises Must Lead by Example on Business and Human Rights – New UN Report*, OHCHR (June 17, 2016) [hereinafter OHCHR, *SOEs*], <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20123&LangID=E> [https://perma.cc/F6ED-CJUB] (archived Aug. 28, 2017).

globalization and the emerging normative structures of international human rights norms, now require states and their SOEs to lead by example. But currently SOEs appear to lag behind the private sector in embedding human rights sensibilities in their operations. And this is important as the state economic sector is now quite large.⁸²

“Governments are currently sending an incoherent message to businesses,” said human rights expert Dante Pesce, who chairs the U.N. Working Group on Business and Human Rights, during the presentation of the group’s latest report to the U.N. Human Rights Council. “On the one hand, they ask private businesses to respect human rights, and increasingly set out such expectations in law and policy,” Mr. Pesce noted. “On the other hand—barring notable exceptions—they show no great desire to use the means at their disposal to ensure that those enterprises they own or control respect human rights.”⁸³

The 2016 WG Report gives itself an ambitious goal: “It is high time for States to show concrete leadership, and require the enterprises they own or control to be role models on human rights,” the expert stressed. “Doing so is part of States’ international legal obligations, and it will only reinforce the legitimacy of States’ expectations towards private businesses.”⁸⁴

This Article examines the emerging issues of the human rights duties of states as owners of SOEs, and of the responsibilities of SOEs for their own human rights-related conduct, through the lens of the 2016 WG Report for the purpose of engaging with its premises and suggestions. The 2016 WG Report represents a very needed focus on one of the more difficult challenges for the UNGP. The state duty to protect differs from the corporate responsibility to respect human rights. The differences present some complexity when it is the state itself that operates the enterprise, directly or indirectly. It is to those issues that the 2016 WG Report, and the analysis that follows, are directed.

The analysis is also informed by the proceedings of the Working Group discussions on SOEs held at the annual U.N. Forum on Business and Human Rights, which took place at the UN headquarters in Geneva (Palais des Nations) from November 14 to 16, 2016.⁸⁵ These proceedings are considered in light of two

82. *Id.* (“Many States the world over manage large portfolios on State-owned enterprises (SOEs), which have risen as significant actors in the global economy, active at home and abroad in diverse sectors such as energy, utilities, infrastructure, transports, telecommunications, and banking. The proportion of SOEs among Fortune Global 500 companies has grown from 9.8% in 2005 to 22.8% in 2014, with US \$389.3 billion of profit and US \$28.4 trillion in assets.”).

83. *Id.*

84. *Id.*

85. OHCHR, 2016 UN Forum, *supra* note 78.

particularly important developments. The first is the substantial change in the direction of US policy in trade and globalization.⁸⁶ Its abdication of a retreat from robust multilateralism and the cultivation of a project of nationalist bilateralism has changed the dynamic within which policy globally may develop. The second development is China's project of outbound nationalism—the One Belt One Road policy—which relies to some extent on the projection of commercial power through Chinese SOEs.⁸⁷

Part II develops a deep analysis of the 2016 WG Report, interrogating its conceptual framework and its implementation programs. Part III then briefly considers the work left to be done, from conceptual lacunae to implementation. It consists of a set of ten challenges and recommendations for further development. These recommendations and challenges suggest that issues of corporate personality, sovereign immunity, asset partition, and regulatory compartmentalization may well hobble the work of embedding human rights within the operation of states as owners and SOEs as public enterprises. More importantly, it demonstrates the shortcomings of the current strongly held consensus that the focus of regulatory governance must be grounded in and through a formally constituted enterprise, the SOE, rather than focusing regulation on economic activity irrespective of the form in which it is undertaken. Until these conceptual issues are considered, the regulation of economic activities—SOEs, supply chains, multinational corporations—will remain elusive.

86. See Larry Catá Backer, *Ruminations 70: American Anti-Multilateralism and the Prospects for a Comprehensive Treaty for Business and Human Rights*, LAW AT THE END OF THE DAY (Feb. 8, 2017, 8:44 PM), <http://lbackerblog.blogspot.com/2017/02/ruminations-70-american-anti.html> [<https://perma.cc/3KCX-WRP9>] (archived Aug. 29, 2017) (considering the effects of the US rebooting its policy in trade and globalization); Larry Catá Backer, *The 45th Presidency and Multilateral Treaties--Fear, Loathing and a Repudiation of 20th Century Americanism*, LAW AT THE END OF THE DAY (Feb. 2, 2017, 10:53 PM), <http://lbackerblog.blogspot.com/2017/02/the-45th-presidency-and-multilateral.html>.

87. See TDM Call for Papers: Special issue on “China’s One Belt, One Road: Economic Changes, Power Shifts and Prospects / Consequences for the World of Arbitration”, TRANSNAT’L DISP. MGMT. (Jan. 27, 2017), <https://www.transnational-dispute-management.com/news.asp?key=1652> [<https://perma.cc/MWD9-AT52>] (archived Aug. 29, 2017).

II. CHALLENGING ENGAGEMENT AND ENGAGEMENT CHALLENGES THROUGH THE LENS OF THE 2016 WG REPORT

A. *Foundations: SOE CSR and Human Rights Compliance*

The legal framework for SOE governance remains substantially underdeveloped at national and international levels.⁸⁸ That is especially the case with respect to the general CSR and the more specific human rights duties and obligations of SOEs, of their owners, or of the state financial instrumentalities through which they are supported. At the national level, two approaches are probably the most influential. The first is the Nordic model.⁸⁹ The other is the Marxist-Leninist SOE model now best developed in China.⁹⁰ Beyond these models, states have developed and operate SOEs along policy lines that advance national political frameworks.

The Nordic SOE model is well illustrated by looking at Sweden and Norway. In Sweden, the state is a significant owner of enterprises operating in Sweden and abroad. The Swedish state controls, wholly or partially, forty-eight enterprises, two of which are listed on public exchanges.⁹¹ Moreover, the Swedish government accepts the responsibility to be an active and professional owner, with the general objectives of generating value and in some cases ensuring that public policy assignments are adequately performed.⁹² Besides

88. Ironically, the Trans-Pacific Partnership, recently abandoned by the United States, included an attempt to develop multilateral approaches to SOE regulation. See OFF. OF THE U.S. TRADE REPRESENTATIVE, STATE-OWNED ENTERPRISES (SOES) 1 (2015) (“TPP’s State-Owned Enterprise (SOE) chapter ensures that businesses, regardless of ownership, compete fairly through enforceable rules to ensure that foreign-owned SOEs compete on the basis of quality and price, not on the basis of discriminatory regulation, subsidies, or favoritism.”). On the abandonment of the TPP by the United States, see Memorandum from President Donald Trump to the U.S. Trade Representative, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement* (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific> [<https://perma.cc/DMK6-UK2K>] (archived Aug. 29, 2017). For commentary, see Larry Catá Backer, “*Let’s Make a Deal*” as Economic Policy, JURIST (Dec. 29, 2016), <http://jurist.org/forum/2016/12/Backer-lets-make-a-deal.php> [<https://perma.cc/Q4C4-YH2U>] (archived Aug. 29, 2017).

89. See discussion *infra* p. 846–47 and notes 91, 92.

90. See discussion *infra* p. 847–48 and notes 100, 102.

91. See *State-owned Enterprises*, GOV’T OFFICES OF SWED., <http://www.government.se/government-policy/state-owned-enterprises/> [<https://perma.cc/5VUL-Z6MC>] (archived Aug. 29, 2017) (“In addition, two business foundations are administered. In total, the state-owned enterprises employ approximately 137 000 people. The estimated total value of the state company portfolio amounts to SEK 510 billion.”).

92. See *Objectives for State-owned Companies*, GOV’T OFFICES OF SWED. (Nov. 27, 2014), <http://www.government.se/government-policy/state-owned-enterprises/goals-for-state-owned-companies/> (last updated March 10, 2015) [<https://perma.cc/AT5C-EXDG>] (archived Aug. 29, 2017).

this overall goal, Swedish SOEs are tasked with multiple objectives, including obtaining balanced gender distribution, reaching economic goals, satisfying reporting requirements, ensuring sustainable enterprises, and ensuring completion of assigned public policy assignments tasked to some Swedish SOEs.⁹³ Furthermore, Swedish SOEs are managed and developed by an organization of the Ministry of Enterprise and Innovation that specializes in corporate governance and company management.⁹⁴ This management “is conducted in accordance with the State’s corporate governance documents, compiled in the State’s Ownership Policy,” which includes Swedish Code for Corporate Governance, board nomination process, financial targets process, sustainable business, guidelines for remuneration, and guidelines for external reporting.⁹⁵ Finally, governing boards of Swedish SOEs are made up of approximately 282 board members.⁹⁶

Similar to Sweden, Norway plays a very active ownership role. In fact, the state “has direct ownership, managed by the ministries, in 70 companies. The total value of the state’s commercial ownership was estimated to around NOK 644 billion at year-end 2015.”⁹⁷ Much like Sweden, the Norwegian state recognizes the importance of transparent, responsible corporate governance and recognizes adherence to generally acceptable principles of corporate governance.⁹⁸ Similar to the Swedish approach, Norwegian SOEs are primarily tasked with generating as much revenue as possible and, in the case of a certain category of SOEs, achieving sectoral policy objectives.⁹⁹

The Marxist-Leninist model is best illustrated by the organization and functions of Chinese SOEs. First, Chinese SOEs make up 80 percent of the value of the Chinese stock market, and the Chinese government is the biggest shareholder in the 150 largest Chinese corporations.¹⁰⁰ The Chinese government, furthermore, has announced SOEs in the last twenty months “involving 6.9 trillion yuan (\$1 trillion) of assets in what’s shaping up to be the biggest

93. *See id.*

94. *How the companies are managed*, GOVERNMENT OFFICES OF SWEDEN (July 17, 2015), <http://www.government.se/government-policy/state-owned-enterprises/how-the-companies-are-managed/> [<https://perma.cc/GQ8E-TUZ5>] (archived Aug. 28, 2017).

95. *Id.*

96. *Id.*

97. NORWEGIAN MINISTRY OF TRADE, INDUSTRY AND FISHERIES, *THE STATE OWNERSHIP REPORT 2015*, at 5, <https://www.regjeringen.no/contentassets/b7e367d388ba41dd839f34d64c0e4cc1/the-state-ownership-report-2015.pdf> [<https://perma.cc/AT7U-CJ2M>] (archived Aug. 28, 2017).

98. *See id.* at 25.

99. *See id.*

100. Ming Du, *China’s State Capitalism and World Trade Law*, 63 INT’L & COMP. L. Q. 411 (2014).

overhaul of SOEs since the 1990s.”¹⁰¹ The Chinese central government owns 106 companies (forty-seven of which ranked in the 2014 Fortune Global 500), which are referred to as *yangqi*.¹⁰² These companies are concentrated in the industries of defense, petroleum, and electricity, among others, and they participate extensively abroad, including in the “One Belt, One Road” initiative.¹⁰³

Yangqis historically have been controlled by government ministries and other state organizations; however, in 2003 administration of these SOEs was centralized under the State-Owned Assets Supervision and Administration Commission (SASAC).¹⁰⁴ China officially divides its SOEs into two groups. “The first is a core group of 53 firms known as important backbone state-owned enterprises (*zhongyao guban guoyou qiye*).” The second group, “comprises the remaining firms—a varied mix of global industry players” and “state-run research institutes.”¹⁰⁵ The former group of SOEs is ranked at the vice-ministerial level, which gives its top executives equivalent administrative rank with political elites. The latter group of SOEs has department-level rank. Importantly, while “SASAC states that administrative rank does not matter for how *yangqi* are managed and assessed, in practice it is critical to the political influence of both these firms and their leaders.”¹⁰⁶

Where reform of the SOE sector, as was seen in the Nordic model, is about leveling the playing field between SOEs and private enterprises, the Chinese model is different. Here the emphasis is on reform and efficiency in the service of state macroeconomic objectives—objectives which require SOEs to become much more nimble and variable in their scope and operation. Consider for example that China sought to drive innovation by calls on SOEs for leadership in the development of new forms and practices of well-targeted economic activity.¹⁰⁷ As a consequence, the movement is toward “tightening, not loosening, its grip over government enterprises, with some modifying their bylaws to give the Communist Party more oversight of management decisions.”¹⁰⁸ At the heart of these new reforms is categorizing SOEs “into a public class (*gongyilei*)

101. Colin Simpson, *China's Reform of SOEs May Look a Little Odd to the West: Goldman*, BLOOMBERG MARKETS (Sept. 8, 2016), <https://www.bloomberg.com/news/articles/2016-09-08/goldman-sachs-sees-chinese-soe-reform-just-not-as-west-knows-it> [<https://perma.cc/6ZY7-893W>] (archived Aug. 28, 2017).

102. Leutert, *supra* note 39.

103. *Id.* at 86–87.

104. *Id.* at 87.

105. *Id.*

106. *Id.*

107. State Council People's Republic of China, *SOEs join tide of mass innovation* (Feb. 21, 2017), http://english.gov.cn/premier/news/2017/02/21/content_281475573951833.htm [<https://perma.cc/M2Z4-FTDK>] (archived Aug. 28, 2017).

108. Simpson, *supra* note 101.

and a commercial class (*shangyelei*).¹⁰⁹ “Firms will be divided by function into those dedicated to public welfare and those seeking profit.”¹¹⁰ However, reforms will be carried out separately for the two groups: “distinct strategic objectives will be set for each, and their performance will be evaluated by different metrics.”¹¹¹

Beyond national models, developing multilateral frameworks have tended to bring SOEs within their frameworks. This is especially the case in the context of the human rights obligations of business activity.¹¹² Among the most important is the UNGP. In particular, UNGP paragraph 4 provides: “States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.”¹¹³

Beyond the substantive norms of the UNGP, OECD’s Guidelines on Corporate Governance of SOEs seeks to structure SOE governance in a manner that aligns it with private enterprise corporate governance norms.¹¹⁴ Addressed to government officials in charge of the ownership of the enterprises, they set out seven guidelines¹¹⁵ related to the corporate governance of SOEs, which aim to: “(i) professionalise the state as an owner; (ii) make SOEs operate with similar efficiency, transparency and accountability as good practice private enterprises; and (iii) ensure that competition between SOEs and private enterprises, where such occurs, is conducted on a level playing field.”¹¹⁶ The guidelines begin with the rationales for state ownership, stating that state ownership should be exercised in the interest of the general public.¹¹⁷ Therefore, the main purpose of an SOE should be to “maximise value for society, through an efficient allocation of resources.”¹¹⁸

109. Leutert, *supra* note 39, at 85.

110. *Id.*

111. *Id.*

112. For a discussion see, e.g., UNGP, *supra* note 6.

113. *Id.* at 3. (“Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.”).

114. See OECD GUIDELINES *supra* note 11, at 34.

115. See *id.* at 17–27.

116. *Id.* at 11.

117. *Id.* at 17.

118. *Id.*

The guidelines proceed with the states' role as owners and recommend that states act as informed and active owners.¹¹⁹ This guideline, moreover, calls for simplicity and standardization of legal forms, operational autonomy, respect for the SOEs' independence, clear identification of ownership rights, and accountability for the enterprise.¹²⁰ The second guideline ends with the prime responsibilities for state owners, built around the principle that "the state should act as an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness."¹²¹

The guidelines also set out a governance principle for SOEs in the marketplace. The principle, "the legal and regulatory framework for SOEs should ensure a level playing field and fair competition in the marketplace when SOEs undertake economic activities,"¹²² is structured around legal compliance and autonomy objectives. This guideline recommends clear separation between the state's ownership function and other state functions; access to remedies through unbiased legal or arbitral tribunals; high standards of transparency regarding cost and revenues; disclosure and funding of costs related to public policy objectives; enforcement of general laws, tax codes, and regulation for SOEs; engagement in public procurement; and market conditions for access to debt and equity.¹²³

The guidelines continue with a principle on the equitable treatment of shareholders and other investors, which recommends that SOEs should recognize the rights of all shareholders and ensure their equitable treatment and equal access to corporate information. This guideline also recommends that states fully implement the OECD's Principles of Corporate Governance,¹²⁴ that listed or unlisted SOEs adhere to corporate governance codes, and that they inform non-state shareholders when SOEs are required to pursue public policy objectives.¹²⁵

The fifth guideline deals with stakeholder relations and responsible business. It recommends that the state policy recognize the SOEs' responsibilities to stakeholders and that they require SOEs to report on these relations.¹²⁶ The guideline further recommends that all parties (governments and SOEs) respect stakeholders' rights, large SOEs report on these relationships with stakeholders, boards

119. *Id.* at 18.

120. *Id.*

121. *See id.* at 18–19.

122. *Id.* at 20.

123. *See id.* at 20–21.

124. *See* OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (2015), <http://dx.doi.org/10.1787/9789264236882-en> [<https://perma.cc/WC55-PTWS>].

125. *See* OECD GUIDELINES, *supra* note 11, at 22.

126. *Id.* at 23.

maintain measures to prevent corruption and fraud, SOEs “observe high standards of responsible business conduct,” and SOEs not be used as vehicles for financing political activities.¹²⁷

The sixth guideline deals with disclosure and transparency, recommending that SOEs observe high standards of transparency and that they subject themselves to “the same high quality accounting, disclosure, compliance and auditing standards as listed companies.”¹²⁸ The guideline then provides several reporting recommendations, including that SOE financial statements be subject to an independent external audit and that states publish annual reports on SOEs through web-based communications.¹²⁹

Finally, the last guideline sets out recommendations regarding the responsibilities of SOE boards. It recommends that SOEs have competent boards, with clear mandates, and recommends several courses of appropriate corporate behavior for the boards of SOEs.¹³⁰

The U.N. Working Group and the OECD are seeking to apply multilateral soft law frameworks to hybrid entities—SWFs and SOEs.¹³¹ The project poses substantial challenges, whatever the framework. Among them are traditional and systemic corruption,¹³² and inefficiency.¹³³ More broadly, SOEs might represent an element of systemic corruption of the global trade system, built around the fear that SOEs represent projection of public power by other means.¹³⁴ Yet there is also the developing notion that SOEs can serve as premier vehicles through which legalization of CSR and human rights responsibilities might be undertaken.¹³⁵ As Dante Pesce, a member of the Working Group noted:

127. *See id.*

128. *Id.* at 24.

129. *See id.*

130. *See id.* at 26–27.

131. *See infra* Section II.B.

132. *See, e.g.,* Wenhao Cheng, *An Empirical Study of Corruption within China's State-owned Enterprises*, 4 CHINA REV. 55–80 (2004); Marcelo Pontes Vianna, *Brazilian State Owned Enterprises: A Corruption Analysis* (Fall 2014), https://www2.gwu.edu/~ibi/minerva/Fall2014/Marcelo_Vianna.pdf [<https://perma.cc/Z2VE-7VQH>] (archived Sept. 17, 2017).

133. *See, e.g.,* Wildau, *supra* note 16 (describing the heavy emphasis on the old growth model in Chinese SOEs).

134. *See* ALAN P. LARSON & DAVID M. MARCHICK, *FOREIGN INVESTMENT AND NATIONAL SECURITY: GETTING THE BALANCE RIGHT* 21 (2006), <https://www.cfr.org/sites/default/files/pdf/2006/07/CFIUSreport.pdf> [<https://perma.cc/98AV-PAP7>] (archived Aug. 29, 2017) (“In certain cases, government ownership and control can create national security issues, particularly when the foreign company’s decisions become an extension of the government’s policy decisions rather than the company’s commercial interests.”).

135. *See, e.g.,* Dante Pesce, Chairperson, Working Grp. On Bus. & Human Rights, Address at the 32nd Session of the Human Rights Council (June 16, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20122&LangID=E#sthash.T78hnrS4.dpuf> [<https://perma.cc/5V3U-J7LA>] (archived Aug. 29, 2017).

Broadly speaking, the measures the Working Group suggests are of two types: (a) first, the WHAT - what should be States' expectations and requirements with regard the enterprises they own or control when it comes to human rights?; and (b) the HOW - i.e. the concrete tools, policies and measures States could take to ensure their human rights requirements are implemented. Let me flag now some of the most important measures we suggest.¹³⁶

These considerations served as the basis for the development of one approach to the embedding of SOEs within the normative projects of business and human rights. In the process they raised a number of important normative considerations that touch not just on the specific project of business and human rights obligations of SOEs, but also on fundamental issues concerning the continued viability of distinctions between the public and private activities of the state.

B. *The 2016 Working Group Report*

1. Introduction to Analysis

The following discussion of the 2016 WG Report is offered to push the excellent work of the Working Group and its Secretariat further along the lines they themselves admirably, and to a great extent courageously, have framed so well. The 2016 WG Report represents an important and necessary step in the construction of a more unified approach to the application of the UNGP. It provides a means of thinking critically about the way that states and enterprises ought to better coordinate, and in the case of SOEs connect, the duties of the First Pillar with the responsibilities of the Second Pillar. The Report also suggests the scope and direction of the work that remains to be done. It is to that effort that the engagement in this Summary Report is directed. But make no mistake, the comments and observations offered in the analysis that follows ought not to be read as a criticism of the 2016 WG Report or as a suggestion that it is somehow flawed or that it fails. Quite the reverse. Without the pioneering conceptual work in this strong 2016 WG Report, the analysis that follows would not be possible.

The 2016 WG Report is organized in four sections. Section I (a) considers the background, aims, and outline of the report, (b) defines an SOE for its purposes, (c) considers the role of SOEs in the larger global economy, and (d) defines the scope and limits of the report.¹³⁷

Section II then focuses on the normative policy framework that the Working Group advances as underpinning its notion of state action in relation to SOEs.¹³⁸ It considers (a) the state duty to protect

136. *Id.*

137. WG, 2016 Report, *supra* note 79, at 3–7.

138. *Id.* at 7–12.

against abuses by SOEs, (b) the SOE's own Second Pillar obligations independent of the state's duty under national and international law, and (c) the possible link between corporate governance and human rights.

Section III is the most ambitious—laying out the Working Group's framework for operationalizing the state's duty under UNGP paragraph 4.¹³⁹ That framework, mirroring the structure of human rights due diligence itself, involves (a) setting expectations, (b) instituting mechanisms to set and manage expectations through ownership arrangements, (c) developing the relationship between the state and SOE boards of directors, (d) ensuring oversight and follow up mechanisms, (e) instituting capacity-building obligations, (f) imposing human rights due diligence obligations on SOEs, (g) instituting disclosure requirements, transparency and reporting, and (h) developing effective remedies.¹⁴⁰

Finally, Section IV provides a brief conclusion and more extensive recommendations.¹⁴¹ The recommendations are directed separately to states, SOEs, national human rights institutions, international organizations, the UN human rights system, civil society, academia, and business organizations.

Each is considered briefly in turn. The object is to get a sense of the model developed, the consequences for implementation of the emerging normative structures of business and human rights at the international level, and the critical challenges that this approach and these implementation strategies produce.

2. Section I: Introduction¹⁴²

a. Background, Aims, and Outline of the Report

The 2016 WG Report emphasizes the somewhat narrow focus of the report: "the duty of states to protect against human rights abuses involving those business enterprises that they own or control."¹⁴³ Though they also acknowledge the independent duty of SOEs under the UNGP, even that autonomous responsibility must be understood as exercised in the shadow of the state. SOEs are, as a matter of convenience, and within the presumptions of law, sometimes treated as independent juridical persons. Yet the relationship with the state, as "owner," is qualitatively distinct from ownership by non-state actors. It is that "special relationship" that must be harmonized

139. *Id.* at 12–20.

140. UNGP, *supra* note 6, at 17.

141. WG, 2016 Report, *supra* note 79, at 20–23.

142. *Id.* at 3–7.

143. *Id.* at 1.

within the logic of the UNGP, a task that is made more difficult precisely because of the dual character of the state with respect to its SOEs. *The state serves simultaneously as the “owner” of the SOEs (and an object of law like other owners), and as the regulator of SOEs (the generator of the laws that are applied to SOEs within their home states).* In the transnational sphere, that fluidity becomes more complex:¹⁴⁴ SOEs are usually characterized as instrumentalities of (foreign) states to which exceptions to rules of sovereign immunity may apply, and they also serve as conduits through which states may project their own laws, norms, and policies by the exercise of their leadership of SOEs. Where states own a significant interest in enterprises that are domesticated in foreign states, the relationship becomes even more complex—*here the notion of SOE converges with the issues of SWFs and the duties of states as investors.*¹⁴⁵ And these multi-spatial dualities of the relationship among SOEs and states might have been better captured in the 2016 WG Report.

Following the logic of the UNGP, the 2016 WG Report adopted a coordinated compartmentalization approach—one that builds on the autonomy of each of the Pillars (protect, respect, remedy) but then seeks an overall coordination in their inter-relations. That is a very useful means of making sense of the UNGP as applied. But it also leaves certain questions dangling. The heart of that compartmentalization is found in UNGP paragraph 4. It is around this “additional steps” principle that the Working Group will build its framework for the human rights-related relationship among states and the SOEs they own or control. “Policies, guidelines and good practices are lacking at both the national and international levels. Governance and protection gaps exist, which must be addressed.”¹⁴⁶ And thus, there are two objectives of the 2016 WG Report: first to clarify “what States are expected to do,” and second to suggest “a range of measures that they could take to operationalize” the “additional steps” requirements.¹⁴⁷

The 2016 WG Report is grounded in independent investigation and also in the responses of a number of states to a questionnaire that was distributed by the WG.¹⁴⁸ A number of important SOE-driving states responded. But so did a number of important states for which SOEs may be viewed with suspicion. It was a pity that *one of*

144. Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 TILBURG L. REV. 177 (2012).

145. Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AM. U. INT'L L. REV. 122 (2013) [hereinafter Backer, *Sovereign Investing*].

146. WG, 2016 Report, *supra* note 79, at 93.

147. *See id.* at 3.

148. *Id.* at 4 n.2.

the most important drivers of contemporary SOE practice, China, did not. At some point it will be necessary to embed China more robustly in these efforts, if they are to remain relevant in *fact* and form.

b. Defining State-Owned Enterprises

Conceptual issues of definition are deceptively easy, and in the case of SOEs even more so. Yet a robust definition of SOEs for purposes of regulation, that is of distinguishing one sort of ownership structure from another for the purpose of the application of legal requirements, has not proven to be easy. The 2016 WG Report avoids the issue by relying on the definition of the OECD Guidelines on Corporate Governance of State-Owned Enterprises,¹⁴⁹ which are self-described as providing “an internationally agreed standard for how governments should exercise the state ownership function to avoid the pitfalls of both passive ownership and excessive state intervention.”¹⁵⁰

The focus is a blend of formal and functional characteristics. For the *formal requirements*: The SOEs must be recognized by some national law as (1) an enterprise (2) in which the state (3) exercises ownership. The object is to avoid distinguishing among the forms with which aggregations of capital may be organized for the purpose of engaging in concerted activity. Ownership and control are understood by reference to both formal conveyance of authority and the effectiveness of control in certain “marginal situations.” The definition is meant to include minority ownership where effective control is exercised, but in a nod to SWFs, it excludes minority ownership under 10 percent. Additionally, transitory ownership is excluded. These are political concessions, to be sure, that may tend to weaken the conceptual unity of the Guidelines.

For the *functional requirements*: the SOEs (1) as part of their purpose or activity (2) must engage in activity of an economic nature. In the OECD principles (embraced in the 2016 WG Report) the definition of economic activity has a certain old fashioned feel to it. The notion of economic activity is built around the offer of goods or services on a given market “which could, at least in principle, be carried out by a private operator in order to make profits.”¹⁵¹ At its core, however, the definition of economic activity presents a curious nod to static historicism: “Economic activities mostly take place in markets where competition with other enterprises already occurs or

149. OECD GUIDELINES, *supra* note 11.

150. *Id.* at 3.

151. *Id.* at 15.

where competition given existent laws and regulations could occur.”¹⁵²

c. State-Owned Enterprises: State of Play

The 2016 WG Report makes the case for the continued importance of SOEs in the globalized economy post-1980s.¹⁵³ And indeed, despite the denationalization of enterprises in Europe after the 1970s, the emergence of complex supply chains now makes their operation relevant again worldwide.¹⁵⁴ The discussion of the rationale for SOEs is interesting,¹⁵⁵ though one best left to the public policy of states. It is important to note, however, that the rationale reflects modern OECD thinking and European sensibilities¹⁵⁶ but may not adequately reflect the underlying importance of SOEs for contemporary Marxist states like China. Again, it is a pity that China chose not to participate more vigorously. But all of this serves as the necessary justification for the object of the 2016 WG Report, one that is certainly hard to argue with¹⁵⁷—the continuing importance of SOEs within global production chains and their relationship to states makes China’s lack of responsiveness to human rights-based concerns all the more troubling. And those relationships make the case for the embedding of human rights-related concerns in the operation of SOEs all the more compelling.

d. Scope and Limits of the Report

Perhaps it is because the 2016 WG Report makes such a strong case for the more vigorous embedding of human rights concerns in both state practice and SOE operation that the limitations of the 2016 WG Report are most troubling. First, the 2016 WG Report focuses narrowly on SOEs “in the traditional sense.”¹⁵⁸ In that respect the OECD definition is both a sword and a shield, providing narrow clarity but avoiding issues of coherence. That is lamentable. More importantly, the compartmentalization of SOEs as a factor apart permits a distinction to be made between SOEs, on the one hand, and SWFs, on the other.¹⁵⁹ It is not clear that this is necessary as a matter of theory or conceptualization, apart from political considerations. More importantly, perhaps, this

152. *Id.*

153. WG, 2016 Report, *supra* note 79, ¶ 12.

154. *Id.* ¶ 13.

155. *Id.* ¶ 14.

156. *Id.* ¶ 15.

157. *See id.* ¶ 16–17.

158. *See id.* ¶ 19.

159. *See id.* ¶ 19.

compartmentalization (investment versus direct economic activity) produces a division between the state's oversight of SOEs and its investment-related activity also embedded in UNGP paragraph 4: export credit agencies, investment insurance or guarantee agencies, and development-related agencies (§ 18).

At the surface there is an appeal to this segmentation of analysis. Each form of public engagement with economic activity has its distinctive characteristics. Yet from the perspective of managing governance with respect to a singular normative system, conceptually these distinctions are without difference with respect to the duty of states. They are different with respect to their consequences for the object of state duty. And indeed, this unnecessary constraint, grounded perhaps in an unfortunate conflation of the differentiation among Second Pillar organizations (as objects of state duty) and what should be a unitary approach to state duty, may produce a missed opportunity of conceptual advances of state behaviors under the UNGP First Pillar. The 2016 WG Report nods in that direction.¹⁶⁰ It is hoped that at some point there will be a greater exploration of those issues as the conceptual basis of the First Pillar is deepened.

3. Section II: Normative and Policy Framework Underpinning State Action in Relation to SOEs¹⁶¹

a. State Duty to Protect against Abuses by SOEs

The 2016 WG Report starts with its conception of the regulatory governance framework within which the state's duty must be understood: "States should do more than simply treat State-owned enterprises as any other business enterprise."¹⁶² This "do more than" standard is then embedded within the "additional steps" principle of UNGP paragraph 4.

To start, the 2016 WG Report adopts the view that "do more than" means "in addition to the duty of states generally under UNGP paragraphs 1-3," applicable to the state's relation with all enterprises.¹⁶³ That is, the ownership or control relationship adds another layer of duty beyond the general duty as a regulator. It takes comfort in the development of parallel thinking within the Council of Europe,¹⁶⁴ though, again, a non-European perspective might have added depth—especially, for example, as China in particular is

160. See *id.* ¶ 21.

161. *Id.* at 7–12.

162. *Id.* ¶ 22.

163. See *id.* ¶ 23.

164. See *id.* ¶ 24.

assuming a much larger and more critical driving force in the realities of economic activity (and ultimately its rules and structures).

However, the 2016 WG Report emphasizes as well that this “do more” standard goes to means and not to substance. The object is to avoid abuse. “The ultimate goal is to achieve full respect for human rights by all enterprises, irrespective of ownership.”¹⁶⁵ Yet, as will be seen, that uniformity of respect becomes incoherent in the face of a state duty that varies among states and that tends to be narrower than the full extent of the human rights responsibilities of business. That produces an awkwardness that remains unexplored. For example, may a state that defines its duty under international law to exclude the International Covenant on Civil and Political Rights (ICCPR)¹⁶⁶ ensure that its SOE abide by its policy position, even in its operations in foreign states, consistent with this rejection of the Covenant?

The 2016 WG Report then offers a number of policy rationales for its position. These include the notion that ownership provides the state with greater leverage for monitoring an ensuring respect for human rights. Implicit here is the recognition that at its limit, the SOE is an instrumentality of the state and as such ought to be subsumed within its governance matrix.¹⁶⁷ In addition, the rationale of “policy coherence” is offered, with reference to UNGP paragraph 8 and its call for internal governmental policy coherence.¹⁶⁸ That is true enough, though it has equal applicability to the state duty (through UNGP paragraphs 1-3) to all enterprises. Yet it also raises the difficult issue of the disjunction between the scope of the enterprises’ responsibility to respect human rights¹⁶⁹ and the limits of a state’s legal duty under international law applied within its domestic legal order with respect to those human rights norms and instruments domestically legalized (UNGP: “Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights”). Last, “the 2016 WG Report suggests a basis for augmenting the legitimacy of states and for strengthening the impact of “reputational risk” on states that are less influenced by their duty to protect human rights.¹⁷⁰

165. *Id.*

166. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [<https://perma.cc/EJ3E-QECQ>] (archived Aug. 29, 2017).

167. *See* WG, 2016 Report, *supra* note 79, ¶ 26.

168. *See id.* ¶ 27.

169. *See* UNGP, *supra* note 6, ¶ 12.

170. *See* WG, 2016 Report, *supra* note 79, ¶ 28.

Finally, the 2016 WG Report considers the international law implications of its application of the “do more” standard and its implementation through “additional steps.”¹⁷¹ They look to the thinking of UN treaty bodies. Most interesting, again, is the tendency, at the limit, to conflate the SOE with the state (“considering such enterprises as quasi-State organs or agents and assuming that they are wholly owned or controlled by the State”).¹⁷² And indeed there is much merit to this line of reasoning, as it reflects some substantial jurisprudence within the logic of the EU treaties and especially its state aid jurisprudence.¹⁷³ Yet it has equal applicability to emerging Marxist SOEs.¹⁷⁴ However, that line of reasoning does not necessarily square with the notion of the dual nature of the SOE as both an autonomous enterprise (the OECD approach) and a state instrumentality (the EU jurisprudential reasoning and Marxist approach). Perhaps the problem lies not in conception but in consequences. *To some extent these distinctions arise from the need to figure out a way to avoid the constraints of the principle of sovereign immunity.* Yet it seems odd that sovereign immunity principles ought to drive the conceptualization of the human rights in business conduct project of the UNGP. And the result is policy distortion in the pursuit of coherence and legal harmonization. *Perhaps it is time to detach sovereign immunity from SOE human rights duty/responsibility concepts.*

Paragraph 33 speaks to this issue obliquely by considering the extent of the state duty where the SOE performs public functions. This is the edge of the conceptual constraints of the OECD SOE definition on which the reasoning of the Report itself is based. Here, the Report offers a hint that at the limit, again, the SOE responsibility to respect human rights merges into the state duty to protect. This suggests most importantly that the UNGP Pillars are hierarchically arranged, and that the state duty pillar invariably supersedes the corporate responsibility pillar when the two share governance spaces. Yet this produces the contradiction mentioned earlier. Where the scope of the state duty is considerably narrower than the autonomous corporate responsibility to respect, the result is a diminution of the scope of human rights consideration rather than an augmentation. There might be little comfort in the knowledge that what this narrowing “buys” is “legalization” of the obligation—to the

171. See *id.* ¶¶ 29–34.

172. See *id.* ¶ 32.

173. See Backer, *supra* note 19, at 33.

174. Larry Catá Backer, *Central Planning Versus Markets Marxism: Their Differences and Consequences for the International Ordering of State, Law, Politics, and Economy*, 32 CONN. J. INT'L L. (forthcoming 2017).

extent that the state itself permits remedial mechanisms for its own failure of duty under the First Pillar.

And yet the 2016 Working Group has a point. UNGP paragraph 23 makes clear that the enterprise's responsibility to respect human rights may be subject to and limited by the constraints of the states in which enterprises operate. UNGP paragraph 23 Commentary notes that "Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard." What this suggests is that where there is contradiction between the constraints of the state's duty and the corporate responsibility, states may indeed limit compliance with Second Pillar requirements to the extent they are inconsistent with a state's domestic legal and constitutional order. On the other hand, in cases where there is no conflict—for example, where the state duty is more limited than the scope of the responsibility to respect, but the two are not inconsistent—enterprises do have a responsibility to embed human rights under the Second Pillar beyond the legal requirements of the First Pillar. For SOEs that may mean, for example, that Chinese SOEs may be required to ensure respect for the provisions of the ICCPR when operating abroad to an extent quite different from its application in its home state.

Lastly, paragraph 34 of the 2016 WG Report notes the possibility of state liability for SOE breaches where the acts of the SOE can be attributed to the state. Of course, as an instrumentality of the state, in theory, all acts of the SOE ought to be attributed to the state. Here again, the intersection between complicity, attribution, and sovereign immunity rules distorts rather than clarifies the relation and muddies the analysis. The 2016 WG Report offers a facts and circumstances approach that largely reflects consensus thinking. But these conceptual conflations and distortions produce a potentially important liability that is not considered. Consider the following possibility: an SOE with its own independent and autonomous responsibility to respect human rights is found to have breached an obligation under the ICCPR. Because of the nature of the relationship between SOE and state, that breach can be attributed to the state. But the state in question has not incorporated the ICCPR in its domestic legal order. Under these circumstances the SOE has breached its responsibility, but has the state breached its duty? This can be seen as a back door way of imposing international law on states otherwise unwilling to consent to its adoption. But states will tend to reject this as inconsistent with international law. Or it

suggests a *jus cogens*¹⁷⁵ character to the International Bill of Human Rights that is belied by the contemporary political realities. More likely that attribution may make the case for reducing the scope of the SOE corporate responsibility so that it aligns with the scope of the state duty. Yet that would do a disservice to the UNGP project and emphasize a fracture of corporate responsibility under the Second Pillar grounded on the ownership relationship between the enterprise and the state.

b. The SOEs as Business Enterprises: the Corporate Responsibility to Respect Human Rights

It is somewhat ironic, given the possibilities inherent in the reasoning of the 2016 WG Report paragraph 34, to then turn to the extent of the SOE responsibility to respect human rights under the Second Pillar of the UNGP.¹⁷⁶ But this is irony with an important purpose. It is a strong reminder in the 2016 WG Report that the Second Pillar matters, its scope of responsibility is autonomous of the state duty, and it applies in equal measure to both private and public enterprises—including the most state-identified SOEs.¹⁷⁷ And indeed, there is a point in noting that SOEs do carry the imprimatur—and thus the ethical and public purpose—burdens of the state, especially of transparency, accounting, disclosure, ethics, and compliance—including, but not limited to, legal compliance.¹⁷⁸

These premises cannot be underestimated in importance. For though some of the preceding section of the 2016 WG Report might be read to suggest not mere convergence but the subsuming of the Second Pillar within the duty framework of the First Pillar, the Working Group here makes it clear that this ought not to be the case. Yet the result of this dual obligation for SOEs can pose significant disjunctions. The most important of these—those touching on the scope of rights—has already been discussed. But it matters. States will not be eager to have their SOEs apply international law under the Second Pillar that the state itself has rejected as a legal obligation under international law (and thus falling outside of the state duty). Alternatively, any implication that the state duty to protect human rights extends to instruments that do not bind states as a matter of international law likely would be rejected by a large number of states. These include those human rights that (1) are not

175. See generally THOMAS WEATHERHILL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* (2015).

176. See WG, 2016 Report, *supra* note 79, ¶¶ 35–37 (“[I]t is clear that Principles 11 to 24, applicable to pillar II of the Guiding Principles, . . . fully and equally apply to State-owned enterprises.”).

177. See *id.* ¶ 35.

178. See *id.* ¶ 36.

legally binding, (2) reflect international norms inconsistent with the constitutional or political principles of a specific state, or (3) constitute the unilateral legalization of such law to states that have neither ratified nor transposed treaties and related documents evincing legal affiliations.

It is not clear, however, that the possibility of opting out of the Second Pillar, implied by the 2016 WG Report on the basis of a “performs public functions” standard,¹⁷⁹ is consistent with the implications of the UNGP or its underlying philosophy. There is a little tension between that notion and the expression of the broad scope of the application of the Second Pillar to SOEs “regardless of whether they are purely commercial or related to specific public purposes.”¹⁸⁰ The UNGP are meant to frame the way that human rights ought to be deeply embedded within the structures of economic activity. To add contingencies about the scope and manner of that protection on the basis of the character of the activity is at best ill advised. First, the “performs public functions” standard is itself ambiguous. Public functions are understood quite differently depending on the political economy of a state, its traditions, and its operations. Moreover, such a standard is at best difficult to implement and monitor. The U.S. Supreme Court’s efforts to distinguish between traditional governmental functions and ordinary economic activity proved too difficult a task to undertake in any sort of principled way, and the task becomes even more complicated when the jurisdictional limits of sovereign immunity statutes are added to the mix.¹⁸¹ Adding the complication of differences among states, the resulting variation in the scope of coverage might well be used to undermine the coherence of the human rights project itself. It might be more useful to continue to focus on the character of the activity—whether or not it constitutes economic activity—and base distinctions on that criterion alone. And indeed, the OECD’s own definition of SOEs has already embraced that view.

c. Link between Corporate Governance and Human Rights

The 2016 WG Report also seeks to make the case for a strong link between corporate governance and the human rights project. This is consistent with the position of international financial institutions, such as the World Bank, and of multi-lateral organizations, principally the OECD. And it reflects the notion that the management of the parameters of the internal governance of the

179. *See id.* ¶ 33.

180. *Id.* ¶ 37.

181. For the classic cases, see, e.g., *OBB Personenverkehr AG v. Sachs*, 577 U.S. (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

corporation is intimately tied to the way in which the corporation itself manages its behaviors with other stakeholders, especially with their environmental and human rights effects. And yet, like these other institutions, the WG had to be quite careful to avoid offending that core principle of corporate governance—the shareholder or institutional welfare maximization theory that underlies the whole of the structures of corporate law and the principles of corporate governance. While the issue of who the corporation serves remains a hotly contested one, the consensus among enterprises and OECD states remains the same as it was in the early part of the last century—the corporation serves its shareholders through its institutional activities. While that may provide “play at the joints”¹⁸²—long or short term time horizons, the ability to work toward aggregate shareholder welfare maximization, the ability to consider a host of factors in making the calculation (not just a narrow band of traditionally considered financial factors and the like)—the fundamental principle remains undisturbed.

And thus, in making the business case for business and human rights, and in making that case for the SOE, the 2016 WG Report faces the same constraints as have others who have sought to manage behaviors without running afoul of this basic principle.¹⁸³ *As a consequence, when considering corporate governance, one falls back—as one always falls back—on market and societal mechanisms for effective disciplining of corporate action, including the shape and operation of its governance regimes.* The best one can do under these circumstances is what states have started to do in greater and more effective measure: (1) regulatory governance regimes in which corporate governance is nudged through objectives based regulation (principally relating to corruption, the institution of effective monitoring and surveillance mechanisms, and the reporting of their effective use); and (2) markets disciplining disclosure and transparency regimes (the UK Modern Slavery Act¹⁸⁴ and the Dodd Frank Act paragraph 1502 Conflict Minerals rules¹⁸⁵ are two cases in point).

182. This is a reference to a “catch phrase” from the constitutional jurisprudence of the Religion Clauses. See generally Carl H. Esbeck, *Play in the Joints Between the Religion Clauses’ and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331 (2006). On the issue of who the corporation serves, see, e.g., Backer, *Multinational Corporations, Transnational Law*, *supra* note 65.

183. See WG, 2016 Report, *supra* note 79, ¶¶ 40, 43–44.

184. Modern Slavery Act 2015, c. 30 (U.K.), <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> [<https://perma.cc/JA2Z-C3V9>] (archived Aug. 29, 2017).

185. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376 (2010). For a discussion, see *Specialized Corporate Disclosure*, SECURITIES AND EXCHANGE COMMISSION (last updated Oct. 16, 2014), <https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml> [<https://perma.cc/4JKB-L9WF>] (archived Aug. 29, 2017).

The most interesting addition is the additional role for the state as the owner or controlling shareholder of the SOE. There is a sense that state conduct that transforms corporate governance to a mechanism through which the state (owner) may “spell out and implement their expectations that State owned enterprises respect human rights”¹⁸⁶ is troubling to the extent that it suggests a singular lack of enterprise autonomy. On the other hand, it is also troubling to the extent that state ownership can give rise to a corporate governance model for SOEs that is appreciably different from that applicable to private enterprises. These more aggressive suggestions are to be distinguished from the “active ownership” recommendation.¹⁸⁷ Principles of active ownership have been pioneered—not in the governance of SOEs but in the management of the investments of SWFs. The Norwegian model provides a nice example.¹⁸⁸ It suggests the strong convergence between SOE and SWF models—in the governance context (another reason it was a pity that SWFs were excluded in this report).

4. Section III¹⁸⁹

Section III is the most ambitious—laying out the Working Group’s framework for implementing the theoretical justification and conceptual framework developed in Sections I and II. That framework, mirroring the structure of human rights due diligence itself,¹⁹⁰ is centered around a “range of measures that States, as owners of companies, could take to operationalize their obligations under [UNGP] principle 4.”¹⁹¹ Each of the eight measures is considered quite briefly:

186. See WG, 2016 Report, *supra* note 79, ¶ 41.

187. See *id.* ¶ 42.

188. See, e.g., *Norway’s Active Attitude to Corporate Governance*, FIN. TIMES (Aug. 10, 2015), <http://bit.ly/1J7Ejax> [<https://perma.cc/RDX2-XDQV>] (archived Aug. 29, 2017) (praising Norway’s oil fund as a beacon to other such funds); June Rhee, *Sovereign Shareholder Activism: How SWFs Can Engage in Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Aug. 7, 2014), <https://corpgov.law.harvard.edu/2014/08/07/sovereign-shareholder-activism-how-swfs-can-engage-in-corporate-governance/> [<https://perma.cc/3Q8U-5AHW>] (archived Aug. 29, 2017) (recognizing Norway as the most prominent model). See generally Backer, *Sovereign Investing*, *supra* note 145.

189. WG, 2016 Report, *supra* note 79, at 12–20.

190. See UNGP, *supra* note 6, ¶ 17.

191. *Id.* ¶ 45.

a. Setting Expectations

The initial measure, setting expectations, is both natural and necessary. Yet it is often overlooked. But one must consider this in two respects. First, the SOE ought to set expectations under the framework for enterprises contained in the Second Pillar responsibility to respect human rights. Second, the state, as the owner (controlling stakeholder), must set expectations in its role as owner. This is to be distinguished from the state regulating. Here the state duty does not extend to the legalization of its relationship as a shareholder to its SOE, but rather extends to the construction of a set of decisions with respect to its operating rules as a shareholder and to its management of its ownership interests. The difference is subtle but necessary. The former goes to UNGP paragraphs 1–3. The latter goes to the policy and operational obligations suggested in UNGP paragraph 4.

This is especially important, as the 2016 WG Report notes, in the elaboration of national CSR guidelines.¹⁹² But as the 2016 WG Report rightly notes, there is a distinction between CSR guidelines and the incorporation of business and human rights elements within them. Mere CSR codes that do not reference the UNGP framework or otherwise elaborate its principles are of little good, even for managing the reputational risk of states.¹⁹³ And the idea of operationalizing the “role model” function of SOEs¹⁹⁴ is laudable.

More problematic are the suggestions of extraterritoriality suggested by the “setting expectations” mechanisms¹⁹⁵ with respect to the prevention of human rights abuses abroad by reference to the policies and laws of home states. This problem is magnified when the home state is both regulator and owner or is operating through an instrumentality organized in corporate form. There is a very thin line between projections of economic activity abroad and projections of state power abroad through the medium of institutions organized as SOEs. At worst, this sort of approach will make it harder for SOEs to operate outside their home jurisdiction.¹⁹⁶

192. See WG, 2016 Report, *supra* note 79, ¶ 47.

193. See *id.* ¶ 49.

194. See *id.* ¶ 51.

195. See *id.* ¶ 49.

196. *Committee on Foreign Investment in U.S. (CFIUS)*, U.S. DEP'T OF THE TREASURY, <https://www.treasury.gov/resource-center/faqs/CFIUS/Pages/default.aspx> [https://perma.cc/2FEF-JTCM] (archived Aug. 29, 2017).

b. Instituting Mechanisms to Set and Manage Expectations through Ownership Arrangements

The 2016 WG Report follows the OECD here to good effect. Expectations set and established by the state (but note here also those expectations that ought to be set by the SOE under the Second Pillar as well, a distinction missing from the Report) should be publicly disclosed, “and mechanisms for their implementation be clearly established.”¹⁹⁷ To that end the Report falls back on a number of its alternative approaches—its National Action Plan project, responsible business conduct policy and state conduct policies with respect to their ownership interests. The most useful mechanism considered is the suggestion for the centralization of ownership supervision within the state.¹⁹⁸ In China, the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), a special commission directly under the State Council, is responsible for managing SOEs.¹⁹⁹ It is important to clarify which institutional actor within the state can exercise ownership rights, and to specify the norms those organs must apply in exercising ownership and control. On the other hand there is always the danger of adding an additional layer of bureaucracy, with its consequences for policy coherence and its danger for democratic accountability. The more remote the ownership facility, the less accountable it may be to either the state organs or the people.

c. Developing the Relationship between the State and SOE Boards of Directors

The 2016 WG Report constructs an interesting relationship between the state, as owner, and the boards of directors, as the incarnation of the SOE as an autonomous institution. To avoid the potential implications of conflating state and enterprise, the 2016 WG Report posits the SOE board as a sort of conduit for state direction but also as the institution that protects the SOE from absorption into the state. The method selected for this careful balancing is a “comply or explain mechanism.”²⁰⁰ This makes excellent sense and draws on the notions of regulatory governance in a useful way. Here the SOE remains free of direct control but must also satisfy the owner either that its preferences have been met or that they have been considered

197. See WG, 2016 Report, *supra* note 79, ¶ 55.

198. See *id.* ¶ 57.

199. *Main Functions*, STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMMISSION OF THE ST. COUNCIL, <http://en.sasac.gov.cn/n1408028/n1408521/index.html> [https://perma.cc/H89R-9SKJ] (archived Aug. 29, 2017).

200. See WG, 2016 Report, *supra* note 79, ¶ 61.

and rejected. On the other hand, it is unlikely that in an SOE context “comply or explain” would ever produce a situation where the SOE board did not comply.

That suggests that this method might be less effective than it appears as a means of protecting the autonomy of SOEs, especially where the state has set up an aggressive and vigorous program of oversight and direction. The latter may especially be the case in political systems grounded on ideologies that advance socialist modernization or related principles. In these cases, “comply or explain” combined with supervisory and support mechanisms,²⁰¹ control of board nomination and evaluation,²⁰² and efforts at managing the gender equality of the board²⁰³ may effectively reduce autonomy to a formality. If that is the case, then the question emerges again—the extent to which the SOE, as a state instrumentality in fact, is required to comply with the responsibility to respect in addition to serving as the expression of the state’s duty to protect human rights to the extent of the state’s legal obligations under international law and otherwise in the state’s discretion.

In addition, it raises another concern—where the state oversight of the board of directors is so complete, there is a question of its compliance with OECD Principles. But more importantly, it opens the SOE to issues of *veil piercing*—the doctrine in many jurisdictions that presumes that an enterprise is solely liable for its own obligations and entitled to the sole use of its assets, unless the enterprise is found to be a sham, or the enterprise is deemed to be the alter ego of the state. A state owner whose control is extensive enough may be deemed to have assumed both the authority for and the obligations of the enterprise. In that case, the state as well as the enterprise may be liable. Yet if that is the case, the state could seek to avoid liability by invoking *sovereign immunity principles*. And here, again, in this context, it suggests the perverse effects of the OECD definition of SOEs limited by the formal requirement of separate incorporation. *The human rights effects of economic activity are not a function of the form of that activity but of the activity itself—whether the result of the conduct of a private enterprise, an SOE, or the state. Economic activity, in whatever form, ought to be subject to the corporate responsibility to respect, and where appropriate, to the state duty.* The embrace of the more antiquated framework will continue to bedevil both conceptual and implementation issues.

201. See *id.* ¶ 62.

202. See *id.* ¶ 63.

203. See *id.* ¶ 64.

d. Ensuring Oversight and Follow Up Mechanisms

The 2016 WG Report again turns to principles of regulatory governance in suggesting methods for SOE oversight and follow up mechanisms. And again, the consequences of these might produce either special legislation or rules for SOEs—a consequence that is at odds with the equal treatment principles of the OECD Guidelines and the UNGP—but they might also substantially reduce SOE autonomy to the point where the SOE and the state merge.

Specifically, and following the lead of the Council of Europe,²⁰⁴ the 2016 WG Report suggests that “[s]tates should evaluate measures taken and respond to any deficiencies as necessary, including by providing adequate consequences.”²⁰⁵ To that end it is suggested that states “set up—or at a minimum require that SOEs adopt—explicit human rights targets, and monitor their achievement in the same manner and with the same mechanisms used for sustainability targets.”²⁰⁶

There is an interesting wrinkle to this proposal. It suggests that value maximization for SOEs departs from the traditional calculus of profitability using generally accepted accounting principles and instead adopt a broader interest maximization model grounded in the maximization of “value to society.”²⁰⁷ That value, it is assumed, would be measured in relation to the targets imposed, though it is not clear how they would be measured. To that end, perhaps, the 2016 Report also suggests the creation of systems of ownership meetings and dialogues²⁰⁸ and the use of assessment tools with more detailed human rights related criteria.²⁰⁹ Lastly, the state could also use independent review and audit mechanisms.²¹⁰

All of these are quite laudable suggestions. One wonders, however, about the costs of compliance and their effects both on productivity (of the SOE) and the institutional capacity (of the state) to actually and appropriately engage in these activities robustly and over a long period of time. It is easy enough for rich states with complex and well-seasoned bureaucracies to begin to work through these institutional mechanisms, but poorer states, especially those downstream in supply chains—where a number of human rights related violations may occur—may not be in a position to do more than give lip service. And that returns to privatization—the need to

204. *See id.* ¶ 65.

205. *Id.*

206. *See id.* ¶ 67 (referencing the experiences of some states with respect to the latter at ¶ 66).

207. *See id.* ¶ 68.

208. *See id.* ¶ 69.

209. *See id.* ¶ 70.

210. *See id.* ¶ 71.

delegate these functions with SOEs or to private certification and monitoring institutions, delegate them up to international organizations, or permit states chartering apex SOEs to intervene downstream more directly. Any of these alternatives is likely to be unacceptable.

e. Instituting Capacity-building Obligations

Its discussion of oversight and monitoring brings the 2016 WG Report inevitably to capacity building.²¹¹ Capacity building is focused on building the capacity of SOEs²¹² and the nature of international standards, national expectations, and appropriate systems building. But it also relates to capacity building focused again on SOEs with respect to multi-stakeholder initiatives²¹³ including international public mechanisms. These are important areas of capacity building. Yet it is as important to note that states themselves may require substantial efforts at capacity building *and the funds necessary to effectively commit resources to the development of capacity*. Indeed, with respect to the state duty to protect human rights through SOE ownership, the critical question becomes the capacity of states—as much as the capacity of SOEs—to work effectively within these human rights frameworks. It is not clear that this has been addressed, especially for low and middle income states and states with weak or thin governmental structures. More will have to be done to avoid capture by larger, richer states and the problems of projection of national interests and views downstream to poorer, weaker, and less prepared states.

These efforts might also find ties with corruption, an area of emerging human rights-based conduct.²¹⁴ The issue of corruption runs not just to those affected by corruption in its various forms, but also goes to the heart of the legitimacy of state oversight and SOE operation. Corruption thus can be understood both as a form by which government capacity is threatened, and as a cluster of actions that themselves contribute to human rights threats to stakeholders. The global scandals of property seizures for land deals through the misuse of official discretionary authority provides a case in point.²¹⁵ There

211. See *id.* ¶¶ 72–73.

212. See *id.* ¶ 72.

213. *Id.* ¶ 73.

214. See David Kinley, *A New Human Right to Freedom from Corruption* 3–4 (Sydney Law School Research Paper No. 14/12, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393205 [<https://perma.cc/8Z7M-VWT9>] (archived Aug. 29, 2017) (demonstrating how a state's tax laws can be used to shift wealth from taxpayers to wealthy executives in SOEs and create a system of "legal corruption").

215. See generally OLIVIER DE SCHUTTER, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE AND GLOBAL WITNESS TAINTED LANDS: CORRUPTION IN

are substantial overtones to the discourse and challenge of corruption in the context of state investment in enterprises through SWFs. In that respect the approach of the Norwegian Pension Fund Global might be instructive, for both its efforts to develop substantive norms and the difficulties of coherent application of those norms.²¹⁶

f. Imposing Requirements of Human Rights Due Diligence

The key issue for the state under UNGP paragraph four's "additional steps" standard appears to revolve in some key respects to the question of mandating human rights due diligence (HRDD) for SOEs. Under the corporate responsibility to respect Pillars, enterprises have a responsibility to conduct HRDD, but there is no legal obligation to do so. States, of course, are free to impose the requirement. Most have not. But the issue becomes acute where the enterprise is state owned. The 2016 WG Report shies away from a recommendation of mandatory HRDD for all SOEs as a baseline. Instead they move back to the traditional encouragement standard.²¹⁷ But they also point to regimes where HRDD for SOEs are mandatory and, in addition, suggest that States define the criteria under which they will require SOE HRDD.²¹⁸ That is an important step in the right direction.

g. Instituting Requirements of Disclosure, Transparency, and Reporting

It is in the context of disclosure, transparency, and reporting that the 2016 WG Report makes its strongest points. It notes the trends toward regimes of greater transparency and disclosure for all enterprises relating to matters of economic, social, and environmental significance.²¹⁹ On that basis it recommends "that States take the additional step to systematically require the enterprises that they own or control to report on environmental, social and human rights performance."²²⁰ Companies should follow an established methodology.²²¹ Though here, of course, the issues of coordination and analysis loom large. In the absence of a uniform standard the

LARGE-SCALE LAND DEALS (2016), <https://www.globalwitness.org/en/campaigns/land-deals/tainted-lands-corruption-large-scale-land-deals/> [<https://perma.cc/6HED-AH5S>] (archived Aug. 29, 2017).

216. See Larry Catá Backer, *Incoherence or Discretion in Corruption and Investment Approaches?*, LAW AT THE END OF THE DAY (Feb. 2, 2016), <http://lcbackerblog.blogspot.com.au/2016/02/incoherence-in-corruption-and.html> [<https://perma.cc/AGF3-LMMQ>] (archived Aug. 28, 2017).

217. See WG, 2016 Report, *supra* note 79, ¶¶ 75–77.

218. *Id.*

219. See *id.* ¶¶ 78, 79.

220. *Id.* ¶ 80.

221. *Id.* ¶ 81.

disclosure may be difficult to compare across industries and between companies in the same sector. Perhaps some greater coordination on disclosure methodologies would be useful for SOEs as well.

h. Developing Effective Remedies

The issue of remedies has been a difficult one for the UNGP project. Both the Working Group and the Office of the High Commissioner have devoted efforts, sometimes coordinated, to the problem of the integration of remedial mechanisms with the conceptual and framework structures of human rights norms, including but not limited to the UNGP. This remains very much a work in progress. Part of the problem, of course, is that the conversation is usually directed downward, from elites in powerful states and their coordinates in “downstream” states to governmental organizations. These elites—well-educated and well-off members of an increasingly coherent intellectual, social, and economic class—tend to work for, but rarely with, the objects of remedial measures. The problem is of course one of representation, coordination, and engagement with significant obstacles.²²² The problems are magnified in the case of SOEs. Here the obligation of the state in its own right ought to be paramount—that at any rate is an implication of the organization of the Third Pillar of the UNGP. At the same time, the SOE as an instrumentality of the state, sometimes more and sometimes less connected with the governmental apparatus, ought to have a heightened responsibility precisely because of that connection, which is absent in the case of private enterprises. Yet even this premise is complicated where SOEs of one state operate in the territory of another. In that case, they represent both an instrumentality of the state, a guest in the territory of another, and a commercial venture with few of the advantages of state power.

Within this difficult conceptual context, the 2016 WG Report seeks to chart a middle ground—but one focused especially on the home country relationships between an SOE and its state owner. They start with the premise that access to remedy ought, as an initial matter, to advance an equal treatment principle,²²³ at least with respect to the state duty to protect within its territories. The Report then elaborates on the nature of the specific manifestation of that duty with respect to the SOE.

As the owner of state-owned enterprises, the state should make sure that: (a) the enterprises it owns or controls do not obstruct

222. See generally Larry Catá Backer, *Fractured Territories and Abstracted Terrains: The Problem of Representation and Human Rights Governance Regimes Within and Beyond the State*, 23 *IND. J. GLOBAL LEGAL STUD.* 61, 94 (2016).

223. See WG, 2016 Report, *supra* note 79, ¶ 83.

justice; (b) the enterprises cooperate fully with judicial and non-judicial grievance mechanisms; and (c) the enterprises fully comply with their responsibility to respect human rights, including providing remediation for human rights abuses that they may be causing or to which they may be contributing.²²⁴

These recommendations are then applied to the three main categories of remedial mechanisms provided under the UNGP's Third Pillar. With respect to state-based judicial mechanisms,²²⁵ the 2016 WG Report notes but does not resolve the issue of sovereign immunity. It suggests a continuing role for immunity. But it is not clear how preservation of the principle and protections of sovereign immunity—running to either the SOE or the state as owner—exercising the sort of oversight contemplated in this Report advances in any respect the project of human rights protection. It certainly works effectively to obstruct the availability of effective remedy, and it reduces any real incentive for states to undertake their duty or for the people (usually victims) to vindicate their rights through judicial mechanisms. That is lamentable. Indeed, it is now time to consider reversing the traditional premise of sovereign immunity as counter to the spirit of the UNGP. *It is now time to interpret the state duty as requiring the waiver, most likely without exception, of sovereign immunity for acts of state related to the operation of SOEs, and to eliminate entirely the whole complex of sovereign immunity for SOEs, whether operating within the state or abroad.* The privilege of operating in private markets, as enterprise or investor, ought to carry with it all of the obligations, duties, and responsibilities of market participants.

Lastly, the 2016 WG Report aptly describes the utility of state based non-judicial remedies²²⁶ and SOE-based grievance mechanisms.²²⁷ The continuing development of the connection between the OECD's NCP process and its judicialization is to be welcomed.²²⁸ More focus, however, ought to be given to SOE grievance procedures and especially to mechanisms for anticipating issues and resolving them before loss occurs. To that end, there ought to be a stronger connection, one implied in the UNGP, between HRDD and grievance procedures.

224. *Id.* ¶ 84.

225. *See id.* ¶ 85.

226. *See id.* ¶ 86.

227. *See id.* ¶ 87.

228. *See generally* Larry Catá Backer, *Rights and Accountability in Development (RAID) v. Das Air and Global Witness v. Afrimex*, 10 MELB. J. INT'L L. 258, 307 (2009).

5. Section IV: Conclusions and Recommendations²²⁹

a. Conclusions

The conclusions draw together the conceptual insights around which the Working Group would construct a framework for managing the human rights-related relationship among states and the SOEs they own or control.²³⁰ There is an emphasis on the distinct character of the SOE responsibility to respect human rights and the state duty to protect human rights. Yet those distinctions are sometimes blurred even in the construction of the framework put forward in the 2016 WG Report. The difficulty is in compartmentalizing the role of the state as a regulator and its role as an owner. Yet in a world in which regulatory governance—market-based and principles-based governance—is becoming more prominent,²³¹ such a compartmentalization is neither easy nor necessary. It also emphasizes the context-based approach to the development of the state duty with respect to its role as SOE owner and specifically with respect to the application of the “additional steps” specified in UNGP paragraph 4. Yet more might be necessary to avoid the strategic use of context to either avoid the state duty or to substitute it for the sometimes broader scope of obligation under the Second Pillar. It is true as well that states should lead by example. Yet until states get their own houses in order—that is, until their own legal frameworks are more compatible with international consensus standards—it will be difficult to consider First Pillar duties important contributors to the legal management of human rights in business activities.

b. Recommendations

The recommendations are directed separately to states, SOEs, national human rights institutions, international organizations, the UN human rights system, civil society, academia, and business organizations.²³² Most of these are driven by the need to develop systems of engagement and coordination among these relevant stakeholders. And they rightly point both to the neglect of this important area of business and human rights and to the need to ensure that SOEs and private enterprises engage in the business of human rights in an equivalent way. And yet there is a tension here as

229. See WG, 2016 Report, *supra* note 79, ¶¶ 88–112.

230. See *id.* ¶¶ 88–94.

231. See Larry Catá Backer, *Theorizing Regulatory Governance Within its Ecology: The Structure of Management in an Age of Globalization*, 23 CONTEMP. POL. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783018 [<https://perma.cc/HN29-HDRA>] (archived Aug. 29, 2017).

232. See WG, 2016 Report, *supra* note 79, ¶¶ 95–112.

well. Equivalence remains a difficult concept principally because the nature of the ownership structures of public and private enterprises make all the difference in the world. In effect, what the Working Group appears to seek is *functional equivalence*. Yet in the face of the inherent conflicts of interest that exist when a state owns some businesses and regulates all, equivalence tends to be very relative and will look different depending on the extent to which a state has invested resources in SOEs and on the place of the state (and its SOEs) in global production chains.

IV. THE WORK LEFT TO BE DONE: FROM CONCEPTUAL LACUNAE TO IMPLEMENTATION

What might one learn from the 2016 WG Report? What work might be left to be done in the wake of the powerful insights developed in that Report? This Part briefly and perhaps somewhat provocatively suggests challenges and sketches the work to be done and the ways forward in the construction of a robust framework for managing the human rights-related relationships among states and SOEs.

A. *Definitions Impede Efficient Regulatory Approaches*

The reliance on the OECD SOE definitions and framework is troublesome. That framework is altogether too strongly grounded in European historicism and ignores the robust development of new forms of SOE and SOE–state relationships within modern Marxist-Leninist states. Moreover, this definitional approach—so severely grounded in institutional formalism—tends to ignore and marginalize the object of the regulatory management goals of this effort, which is the management of economic activity in whatever form it is undertaken.²³³ The institutional imperatives of the OECD and of the 2016 WG Report, tend to hobble the analysis and create substantial conceptual complexities. Yet they remain critically important as guides for states, especially developing states, as they seek to develop their own legal and normative approaches to governmental economic activity in SOE form.²³⁴

233. See generally Larry Catá Backer, *Are Supply Chains Transnational Legal Orders?: What We Can Learn From the Rana Plaza Factory Building Collapse*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L, & COMP. L. 11, 66 (2016).

234. See *Lei das Estatais - Pontos interessantes e inovações da nova lei das estatais*, JUSBRASIL (2016), <https://meggielecioli.jusbrasil.com.br/artigos/360344232/lei-das-estatais-pontos-interessantes-e-inovacoes-da-nova-lei-das-estatais> [<https://perma.cc/HQH5-8GQK>] (archived Aug. 29, 2017) (discussing how Brazil's SOE

Form matters, to be sure. But in this case, one gets the sense that definitions are constituted for the convenience of the regulator, rather than to describe an existing phenomenon. State-owned enterprises are inherently public in character, if only because of the character of their owner. This is the case whether the SOE is entirely owned and constituted by the state or is owned in partnership with non-state organizations and individuals. A better approach might start from the premise that economic activity owned or controlled by the state, in whatever form organized, is the subject of both the UNGP's First Pillar paragraph 4 and the Second Pillar. *Economic activity and not its forms should guide the framework that shapes the First Pillar state duty to protect (as extracted from UNGP paragraph 4) as a direct obligation when undertaken within a home state, and should be subject to the requirements of the Second Pillar when undertaken abroad.*

*B. The Current Approach Exacerbates the Existing Disjunction
Between the Legal Duty of States and the Societal Responsibilities of
Enterprises*

The current approach leaves undisturbed the startling disjunction between the broad scope of responsibility to respect human rights in the Second Pillar and the quite variegated scope of state duty to protect human rights in the First Pillar. *This disjunction is only augmented where the state owns and operates enterprises engaged in economic activity.* The resulting contradictions produce the opportunity to both “game” the oversight of human rights activities and fracture any effort to produce uniformity in an approach. In the context of the management of the global economy, these are particularly important negative effects. Yet states are not inclined to adhere to uniform international legal standards—localist sovereignties tend to avoid efforts at harmonization. *The only source of such uniformity—the scope of the Second Pillar obligations of enterprises—is effectively undermined by a state duty-based approach to management. That irony produces farce.*

The disjunction might be bridged by an approach that ensures that the state duty extend down to its enterprises and that the corporate responsibility ought to extend up to the state. However, that bridging could expose other disjunctions, among them that the framework is altogether too strongly grounded in European historicism and ignores the robust development of a new form of SOE and SOE–state relationship within modern Marxist-Leninist states. States may indeed use their SOEs to advance both economic and legal policy interests. States may seek to govern through their economic

law, Lei No. 13.303 (de 30 de junho de 2016) was revised in 2016 with no eye to issues such as corruption).

enterprises and project regulatory power through their commercial activities. But other states may realize in SOEs either fundamental development objectives or longer term projects of modernization towards quite specific goals. The 2016 WG Report suggests the power of that perspective in the construction of global standards.

The disjunction between legal duty of states and the societal responsibilities of enterprises is centered on the substantial focus on institutional formalism of the state duty that tends to ignore and marginalize the object of the regulatory management goals that appear to underlie the 2016 WG Report. Those goals touch on the management of economic activity in whatever form it is undertaken. And, indeed, the categorization that tends to find its greatest contradiction in the conflation of public and private within the operation of SOEs suggests the extent to which an insistence on keeping to the antique niceties of law (for public bodies) and governance (for non-state actors) makes little sense in a world in which such actors tend increasingly to exhibit characteristics of both.²³⁵ The modern SOE is both state and enterprise simultaneously. The legal rules based on their separation no longer makes much sense.

*C. The Possibility of Double Standards (Home State-Host State)
Detracts From Regulatory Coherence and Promotes Regulatory
Hierarchy*

There is little mention of the ways in which the application of both state duty and corporate responsibility might vary from the home to host state, and from application to apex SOE and then downstream to supply chain partners. The use of extraterritoriality and a bilateral investment treaty-inspired internationalization of local law applied more or less normally everywhere hardly suffices. Indeed, recent G20 related approaches underline this difficulty. For example, consider the *G20 Guiding Principles for Global Investment Policymaking (GPGIP)*, endorsed at the 2016 G20 Ministerial Meeting under held under the Chinese presidency.²³⁶ James Zhang, one of the conceptualizers and facilitators of the negotiation leading to the GPGIP, explained the functional constraints of embedding

235. See Larry Catá Backer, Remarks, Transnational Legal Orders and Global Regulatory Networks (May 15, 2017), <http://www.thecepe.org/wp-content/uploads/2013/05/RemarksFranquiSymposium5-2017.pdf> [https://perma.cc/XX4T-BAV9] (archived Aug. 29, 2017) (discussing the fracturing of legal frameworks as global systems of governance evolve).

236. See G20, ANNEX III: G20 GUIDING PRINCIPLES FOR GLOBAL INVESTMENT POLICYMAKING 1–2 (2016), <http://www.meti.go.jp/press/2016/07/20160711006/20160711006-3.pdf> [https://perma.cc/QCB8-X97A] (archived Aug. 29, 2017).

corporate social responsibility (much less the human rights related aspects of CSR) within principles based investment regimes.

The real-world situation is paradoxical in that, on the one hand, there is a proliferation of CSR standards at the global, regional, and national levels (including through thousands of industry and firm-level standards and codes of conduct); on the other hand, the concept of CSR is either weak or absent in most existing International Investment Agreements (IIAs).²³⁷

The current UNGP WG National Action Plan process²³⁸ only highlights and deepens the contradictions—fostering a “not in my backyard” attitude that permits developed states to impose stricter standards to overseas conduct than to the conduct of their own apex corporations within their home territories.²³⁹ Again, *starting from the basic premise that it is economic activity rather than discrete institutions that are being regulated may help produce a better conceptualization base for this issue.*

D. Extraterritoriality Continues to Plague Regulatory Governance at the Transnational Level

The continued obsession with extraterritoriality as a sort of means of papering over governance failures down supply chains ought to be reconsidered.²⁴⁰ First, it exacerbates the unequal

237. JAMES ZHAN, G20 GUIDING PRINCIPLES FOR GLOBAL INVESTMENT POLICYMAKING: A FACILITATOR'S PERSPECTIVE 6 (2016), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Zhan-Final-1.pdf>. [<https://perma.cc/7LCD-4Z79>] (archived Aug. 29, 2017).

238. See U.N. WORKING GRP. ON BUS. AND HUMAN RIGHTS, GUIDANCE ON NAT'L ACTION PLANS ON BUS. AND HUM. RTS. (2014), http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf [<https://perma.cc/2U2D-ZK97>] (archived Aug. 29, 2017).

239. It is not unusual for National Action Plans to focus on the imposition of the UNGP for outbound enterprise activity rather than for domestic activity of enterprises. Few of them speak to the issue of SOEs, either domestic SOEs in their operations abroad, or foreign SOEs operating within host states. An exception might be provided by the National Action Plan of Columbia that speaks to the state as an economic actor. But even here the emphasis is on the state as a governance organ of economic activity, some of which might be directed toward or through the state itself (“El Estado es uno de los actores económicos más relevantes para cualquier país, desde su posición, debe garantizar la protección y el respeto de los derechos Humanos en el mundo empresarial”). COLOMBIA AVANZA: DERECHOS HUMANOS Y EMPRESAS : PLAN DE ACCIÓN DE DERECHOS HUMANOS Y EMPRESAS (2015), http://www.ohchr.org/Documents/Issues/Business/NationalPlans/PNA_Colombia_9dic.pdf [<https://perma.cc/TD7P-D65L>] (archived Aug. 29, 2017). See also Larry Catá Backer, *On the U.S. National Action Plan on Responsible Business Conduct*, LAW AT THE END OF THE DAY (Dec. 22, 2016), <http://lcbackerblog.blogspot.com/2016/12/on-us-national-action-plan-on.html> [<https://perma.cc/2KXF-RHGN>] (archived Aug. 29, 2017) (discussing the U.S. National Action Plan on Responsible Business Conduct).

240. See, e.g., MOSSAVAR-RAHMANI CTR. FOR BUS. & GOV'T., HARV. KENNEDY SCH., EXPLORING EXTRATERRITORIALITY IN BUSINESS AND HUMAN RIGHTS: SUMMARY

relations among states. Extraterritoriality tends to be a useful instrument for developed and powerful states. It tends to be of little value to developing states. That is the hidden premise that underlies much of the discussion about extraterritoriality—it is advanced precisely because it advances the authority of certain “useful players”—mostly Western states—to supplant the law of host states with their own. The effect is to turn production chains into conduits for the projection of national law.

Second, it tends to marginalize the voices of developing states, where the bulk of human rights wrongs occur. And, indeed, its full effects can be understood as a means of breaking up the domestic legal orders of developing states along production chain lines. Extraterritoriality colonizes developing states in which downstream elements of production chains can be controlled by the home states of apex multinationals.

Third, it serves as an impediment to development by substituting foreign state power for the development of indigenous capacity. Developing states that receive the law of developed states through and to the extent of their connection to global production chains lose their capacity to develop coherent national capacity for macroeconomic planning and development.

Where the apex multinational is an SOE, the effect is even more pronounced. In that case, the state undertakes a double projection of power. First it projects power through law. Second it projects governance through the operations of its enterprise. The business and human rights project, then, can be understood as a project of economic coherence through the flow of law and production from apex SOEs downstream to receiving states. These are no doubt unpopular arguments.²⁴¹ Yet the dangers of extraterritoriality as a substitute or

NOTE OF EXPERT MEETING (2010), <https://business-humanrights.org/sites/default/files/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf>

[<https://perma.cc/G5M6-924Q>] (archived Aug. 29, 2017) (stating the issue was an important element of the dialogue leading to the UNGP); see also Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (Harv. Corp. Soc. Resp. Initiative, Working Paper No. 59, 2010), https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

[<https://perma.cc/4GDJ-9DDA>] (archived Sept. 17, 2017) (exploring extraterritoriality in the regulatory areas of anti-corruption, securities, antitrust, criminal law, civil cases generally and the environment).

241. See Daniel Augenstein & David Kinley, *When Human Rights ‘Responsibilities’ become ‘Duties’: The Extra-Territorial Obligations of States that Bind Corporations*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271 (D. Bilchitz & S. Deva eds., 2013) (arguing “the corporate responsibility to respect human rights grounded in the corporation’s ‘social licence to operate’ translates into its legal accountability for human rights violations”); Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 J. BUS. ETHICS 493 (2013); Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70

short term measure should not be underestimated.²⁴² Perhaps SOEs, like SWFs, might be seen as a vehicle for the internationalization of legal norms; there is less danger of unfairness where state enterprises seek only to embed international law in their operations. Yet even in that respect, national interpretations of the extent and character of international law may produce fracture rather than coherence. As creatures of national law and policy, SOEs illuminate the danger of using private forms to advance national ends abroad. Yet there is little by way of policy or legal frameworks.²⁴³

E. There is a Contradiction between the Principle of Active Shareholding and the Legal Protection of Corporate Autonomy and Asset Partitioning

The focus on active shareholding and SOE autonomy creates challenges to the integrity of global markets and its regulatory governance. Ownership steering by the Finnish state apparatus provides a window into the relationship between state and enterprise.²⁴⁴ At its limit, a strong active shareholding by states—operating by analogy to the controlling shareholder of a closely held enterprise—can collapse the distinction between state and enterprise. That implicates both sovereign immunity and the integrity of the public-private distinction on which much law is still based. More importantly, it suggests the collapse of the principle of corporate autonomy at the heart of corporate law. Asset partitioning rules were not designed to work in an SOE context in which the SOE is considered a distinct and autonomous legal person for some purposes and as an instrumentality of the state, like a ministry, for others. Conventional legal approaches have not caught up with this more fluid conception of corporate legal personality.

MOD. L. REV. 598 (2007); Michael Wabwile, *Re-examining States' External Obligations to Implement Economic and Social Rights of Children*, 22 CAN. J. L. & JURIS. 407 (2009).

242. See, e.g., Anna Hankings-Evans, *Power and Justice in International Investment Law: China's Rise and Its Extraterritorial Human Rights Obligations vis-à-vis the African Host State Population*, 4 THE CHINA MONITOR 6 (2016).

243. See Yuri Shima, *The Policy Landscape for International Investment by Government-controlled Investors*, (OECD Working Papers On Int'l Inv. 2015/01, 2015), <http://www.oecd.org/investment/investment-policy/WP-2015-01.pdf> [<https://perma.cc/J6A6-2BJM>] (archived Sept. 17, 2017) (showing a trend toward treating certain SOEs like commercial enterprises in investment treaties).

244. See *Ownership Policy & Steering*, PRIME MINISTER'S OFFICE OF FINLAND, <http://vnk.fi/en/ownership-policy-and-steering> [<https://perma.cc/6SD3-4MQD>] (archived Aug. 29, 2017) ("The state ownership policy and ownership steering in practice is governed by legislation, the decisions of the Finnish Government and good corporate governance. The Ownership Steering Department in the Prime Minister's Office is responsible for the preparation and practical implementation of the State's ownership policy and the control exercised in respect of the companies concerned.").

F. *Sovereign Immunity Serves as the Procrustean Bed*²⁴⁵ on which State-SOE Relations are Distorted, and with it the Global Economy

Related to the issue of asset partitioning and active ownership is the more general issue of sovereign immunity. It seems odd that sovereign immunity principles ought to drive the conceptualization of the human rights in business conduct project of the UNGP. And the result is policy distortion in the pursuit of coherence and legal harmonization. And yet, that appears to be the way that the narrative of SOE responsibility to respect and state duty to protect human rights are themselves carefully structured around the legal categories of current structures of sovereign immunity, a structure created to serve the needs of an age before globalization. In this respect, the European approach is instructive.²⁴⁶

Perhaps it is time to detach sovereign immunity from SOE human rights duty/responsibility concepts. Better still, it is time to abolish sovereign immunity in all respects from the exercise of the state duty to protect human rights with respect to its ownership of SOEs and to eliminate sovereign immunity entirely from SOE activity. Yet this is an aspirational goal for which the time is not close. The recent actions of the American Law Institute and its Restatement of the Foreign Relations Law of the United States, touching on sovereign immunity suggests that adherence to ancient principle remains quite strong even in the face of changing underlying realities.²⁴⁷

245. As J. William Callison noted in the context of benefit corporations and the shareholder welfare maximization principle:

In current parlance, a procrustean bed is an arbitrary standard to which exact conformity is enforced; that which does not fit the standard is either ignored or stretched and cut until compliant. A procrustean law is canonical, formal, rigid, hard, and fast, from which there can be no deviation. Procrustean laws have their place, and where uniformity is necessary or desired, Procrustes should rear his head. However, procrustean laws have costs as well, since individual circumstances, choice, and liberty are neglected at the expense of uniformity.

J. William Callison, *Putting New Sheets On A Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, The Dangers Created, And Suggestions For Change*, 2 AM. U. BUS. L. REV. 85, 86 (2012).

246. See European Convention on State Immunity, May 16, 1972, C.E.T.S. No. 074, 11 I.L.M. 470.

247. Jennifer Morinigo, *U.S. Foreign Relations Law, Sovereign Immunity Approved*, THE ALI ADVISOR (May 22, 2107), <http://www.thealiadviser.org/us-foreign-relations-law/sovereign-immunity-approved/> [<https://perma.cc/BUU2-MLHD>] (archived Aug. 29, 2017).

G. Encouraging Governance Gaps and Multiple Standards among Classes of Public Economic Activity Produces Regulatory Incoherence within States and Governance Gaps among them

The unnecessary constraint, grounded perhaps in an unfortunate conflation of the differentiation among Second Pillar organizations (as objects of state duty), and what should be a unitary approach to state duty, may produce a missed opportunity and the possibility of conceptual advances of state behaviors under the UNGP First Pillar. Greater exploration of those issues is required as the conceptual basis of the First Pillar is deepened. Much of this tension is grounded in old habits, habits that might once have made sense but which no longer square with the reality of the business of government. Sovereign wealth funds and development banks now sometimes tend toward the same objectives and sometimes engage in the same business.²⁴⁸ SOEs may be the subsidiaries of SWFs.²⁴⁹ SOEs may engage in investment-related activity. SOEs may serve as the internal financial market for the global operations of an enterprise. Given the realities of economic activities in this century, inertia, and the political difficulties of conforming law to reality, serve as a drag on regulatory coherence and thus on efficiency in the operation of the state and its engagement in the economy.

This is particularly important in the context of the development of the UNGP. Both the UNGP and the Working Group's efforts reflect a strong willingness to compartmentalize investment versus direct economic activity. The effect produces a division between the state's oversight of SOEs and its investment related activity also embedded in UNGP paragraph 4: export credit agencies, investment insurance or guarantee agencies, and development-related agencies.²⁵⁰ *Conceptually, these distinctions are without difference with respect to the duty of states.*

H. Legalization through SOE Active Shareholding Damages the UNGP Framework and Calls into Question the Value of Legalization

The suggestion that the UNGP Pillars are hierarchically arranged, and that the State Duty Pillar invariably supersedes the Corporate Responsibility Pillar when the two share governance spaces, ought to be rejected. Where the scope of the state duty is

248. See Backer, *Sovereign Wealth Funds*, *supra* note 10.

249. See *Turkey Transfers Stakes Worth Billions in Major Public Companies to Wealth Fund*, HURRIYET DAILY NEWS (Feb. 6, 2017), <http://www.hurriyetdailynews.com/turkey-transfers-stakes-worth-billions-in-major-public-companies-to-wealth-fund.aspx?pageID=238&nID=109384&NewsCatID=344> [<https://perma.cc/L8NU-KA4B>].

250. UNGP, *supra* note 6, ¶ 4.

considerably narrower than the autonomous corporate responsibility to respect, the result is a diminution of the scope of human rights consideration rather than its augmentation. There might be little comfort in the knowledge that what this narrowing “buys” is “legalization” of the obligation—to the extent that the state itself permits remedial mechanisms for its own failure of duty under the First Pillar. This is a particularly troublesome consequence for SOEs. Key developed states have developed a domestic legal order that may not completely incorporate the entire corpus of law and governance that are imposed on enterprises through the Second Pillar. At the same time, states might well resist the embedding of international law obligations they have rejected by requiring states to apply these obligations within the operations of their SOEs. And lastly, in the absence of a mechanism for uniform interpretation, even the uniform provisions of the Second Pillar could receive substantially distinct interpretations from state to state.²⁵¹

I. *The Perversities of Capacity Building in an Asymmetrical Global Order*

The issue of capacity building must be understood not merely as a methodological issue but as an issue at the core of development.²⁵² States that require substantial efforts at capacity building also may require *the funds necessary to effectively commit resources to the development of capacity*. But there is a more pernicious element to capacity building obligations. In a global context in which only developed states have the resources to fund capacity (or to buy it), capacity-building obligations tend to have two consequences worth considering. The first is that capacity building will tend to shift toward developed states and toward international organizations—international financial institutions in particular²⁵³—that have the capacity to build capacity. The second is that developing states tend to lose control over the shaping of the content of capacity. Capacity is invariably understood in terms consonant with the interests of the states against which capacity is judged. And it tends to affect the way

251. See Larry Catá Backer, *From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes that Institutionalizes the Advocacy Role of Civil Society*, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* 97–110 (César Rodríguez Garavito ed., forthcoming 2017).

252. See, e.g., FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* (2004).

253. See, e.g., SAHR KPUNDEH & BRIAN LEVY, *BUILDING STATE CAPACITY IN AFRICA*, (2004); Larry Catá Backer, *International Financial Institutions (IFIs) and Sovereign Wealth Funds—SWFs as Instruments to Combat Corruption and Enhance Fiscal Discipline in Developing States*, *INT’L REV. L.* 5 (2015).

in which elites respond both to indigenous desire and international expectations.²⁵⁴ Where the international expectations come from SOEs, the problem is exacerbated—either the economics of the SOE overtakes local politics or the politics of the SOE's owner trumps local economics.

J. Data-Driven Regulatory Governance and Its Distorting Effects

The problem of the meaningfulness of data and data driven disclosure and transparency systems remains unexplored. I have suggested in previous articles that the narrative approach to environmental, social, and human rights reporting is ineffective.²⁵⁵ This Article renews the call for the development of financial statement-based reporting mechanisms for the value and cost of environmental, social, and human rights compliance and failures to comply.²⁵⁶ Additionally, in the absence of a uniform standard, the disclosure may be difficult to compare across industries and between companies in the same sector. Perhaps some greater coordination on disclosure methodologies would be useful for SOEs as well.

This is one theme that might merit substantially greater exposition within the Second Pillar framework discussion, and one especially well-suited to SOEs. Human rights due diligence information might best be understood in the same way as financial statement information. With respect to the latter, it has become a matter of common knowledge that a single simple exposition is not enough to provide an accurate picture. Instead at least three “pictures” are needed.²⁵⁷ Human rights due diligence ought to produce an equivalent set of statements that, together, produce a picture of corporate compliance with human rights obligations in a manner that makes it possible to compare information between reporting companies. That requires the production of a picture of human rights compliance at the end of the company's fiscal or reporting year (*the balance sheet equivalent*). It also requires an assessment of the items that produced the change from one year to the next (*the income statement equivalent*), provided in both

254. See generally Anna Persson & Martin Sjöstedt, *The Political and Historical Origins of Good Government: How Social Contracts Shape Elite Behavior*, in ELITES, INSTITUTIONS AND THE QUALITY OF GOVERNMENT 69–92 (Carl Dahlström and Lena Wängnerud eds., 2015).

255. See Larry Catá Backer, *Moving Forward the U.N. Guiding Principles for Business and Human Rights*, 38 FORDHAM INT'L L. J. 457, 542 (2015).

256. See *id.* at 490.

257. The first is a picture of the condition of the enterprise at a moment in time (e.g., the balance sheet). The second is a picture of the movement from one balance sheet to another across time, focusing on the key elements of movements (e.g., the income statement). The third separates technical from substantive changes in position (e.g., the statement of cash flows).

qualitative (identifying the particular rights affected and the source of those rights) and quantitative (measuring the effect of the action) terms. Lastly, human rights due diligence reports ought to provide an analysis of the flow of human rights events across the business (*the statement of cash flows equivalent*).

The financial statement equivalents approach produces reporting coherence that is an essential part of a state's obligation to produce policy coherence across its operations. Such policy and operational coherence is less likely where appropriate monitoring of state activity becomes difficult. One of the basic lessons of accounting in a global context has been that information becomes less useful if it cannot be readily read and understood from year to year and across businesses. The great genius of generally accepted accounting principles²⁵⁸ was their utility as a means of developing a common language for targeting information for harvesting, and for assessing and digesting information. The focus of internationally accepted accounting principles developed by an international body²⁵⁹ is to make it possible for investors and others to produce a common language for financial reporting information globally. Current projects seeking to develop a common language are a useful first step, but their failure to intimately connect to the financial reporting of enterprises, especially SOEs, hampers that effectiveness as a monitoring and accountability tool.²⁶⁰

V. CONCLUSION

The human rights responsibilities of corporations have become better established; the human rights responsibilities of states, however framed, are also well established.²⁶¹ But these responsibilities and duties, though they intersect, do not speak to the same actions or produce the same consequences. Where state duty and corporate responsibility meet, the standards for holding both state and enterprise to account becomes more complex.

258. These have been developed in the U.S. by the Financial Accounting Standards Accounting Board. See *Accounting Standards Updates - Effective Dates*, FINANCIAL ACCOUNTING STANDARDS BOARD (Aug. 2017), <http://www.fasb.org/jsp/FASB/Page/LandingPage&cid=1175805317350> [https://perma.cc/GD3L-4ZM8] (archived Aug. 29, 2017).

259. In this case the International Accounting Standards Board (IASB). See IFRS, <http://www.ifrs.org/> [https://perma.cc/57RD-GD8T] (Aug. 29, 2017).

260. See, e.g., UN GUIDING PRINCIPLES REPORTING FRAMEWORK, <https://www.ungpreporting.org/> [https://perma.cc/GCE4-BANV] (archived Aug. 29, 2017).

261. Cf. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 491 (2001).

This Article has taken a close look at the issue of the human rights duties of states as owners of SOEs, and of the responsibilities of SOEs for their own human rights related conduct. It offers a set of ten challenges and recommendations for further development. These recommendations and challenges suggest that issues of corporate personality, of sovereign immunity, of asset partition, and of the mania for compartmentalization that marks certain approaches to global economic and financial regulation may well hobble the work of embedding human rights within the operation of states as owners and SOEs as public enterprises.

Both international human rights standards and SOEs have evolved. The legal standards and premises within which these occur have lagged considerably behind. SOEs are not merely enterprises but also serve as key components of national macroeconomic planning. SOEs are objects of development and state aid, but they also serve as a conduit for both.²⁶² The state sits at all ends of the operation of SOEs—owner, regulator, financier, and coordinator with other public and private productive sectors. The resulting relationships produce effects far beyond that which the regulatory framework can digest, much less positively manage. The failure is most apparent in the context of the human rights obligations of states and SOEs, where the social responsibilities of SOEs to the state and state objectives may be in conflict with the normative obligations of enterprises (as well as their state owners and state-owned financiers) to protect or respect human rights in accordance with international norms. Focusing on the effects of *economic activity* rather than on the legal character of the *economic actor* might serve as a first step toward better integration of international human rights standards into the operations of states and their economic and financial instrumentalities.

262. See Hu Yongqi, *State Council Designates 92 Bases for Entrepreneurship and Business Startups*, CHINA DAILY (June 22, 2017), http://www.chinadaily.com.cn/china/2017-06/22/content_29849346.htm [https://perma.cc/QP2N-EBQN] (archived Aug. 29, 2017).