

# State Ownership and the United Nations Business and Human Rights Agenda: Three Instruments, Three Narratives

MIKKO RAJAVUORI\*

## ABSTRACT

The rise of globally-oriented state ownership has emerged as a crucial issue across political, economic, and legal planes during the past decade. Contrary to the traditional approach where state ownership is viewed primarily through trade law, antitrust law, and corporate law, this article discusses the proliferating state shareholder power in relation to international human rights law. In particular, the article interrogates three recent U.N. human rights governance instruments by using narratives that highlight perils, potential, and specialty of state ownership in the emerging business and human rights agenda. It is argued that the U.N. instruments realize the changes in the architecture of globalized state ownership, portray it as a regulatory space, and seek to utilize this space by recalibrating states' private shareholder identities with public ends. At the same time, however, the nascent human rights-based regulation of state ownership exposes a deeper market contingency underpinning the techniques of contemporary human rights governance.

## INTRODUCTION: STATE OWNERSHIP AND HUMAN RIGHTS

The rise of globally-oriented state ownership has emerged as a crucial issue across political, economic, and legal planes during the past decade. Marked by examples as diverse as the Chinese "Going Out"

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\* PhD Candidate, LL.M. (University of Turku), B.A. (University of Helsinki). A part of this article was written while participating in the Visiting PhD Scholar Program under the auspices of the Australian Research Council Laureate Fellowship (FL 100100176) Project "Strengthening the International Human Rights System: Rights, Regulation and Ritualism" at the Centre for International Governance and Justice, RegNet, Australian National University.



strategy,<sup>1</sup> the rise of sovereign wealth funds (SWFs) in the emerging economies,<sup>2</sup> and the bailouts in the United States and in the Eurozone,<sup>3</sup> state ownership is increasingly understood as a vital tool in contemporary economic governance. As a natural response to the proliferating state shareholder power, a complex regulatory web encompassing trade law, investment law, corporate law, and antitrust law has developed. Historically, human rights law has mostly been absent from the regulatory palette curtailing the state shareholder power. However, as state ownership goes global, be it through foreign direct investment (FDI) of a state-owned enterprise (SOE) or a portfolio investment by a SWF, it is increasingly exposed to the demands rising from the international human rights system.

This article discusses state ownership as a space for human rights governance. As state ownership structures have become more international and more powerful, the market-driven legal underpinnings of the regulation of state ownership are increasingly augmented with human-rights-based regulatory rationales. Taking this insight as its starting point, the article reviews three recent U.N. human rights governance instruments: the United Nations Guiding Principles on Business and Human Rights, implementing the “Protect, Respect and Remedy” framework; the Committee of the Rights of the Child General Comment No. 16; and the U.N. Global Compact’s Human Rights and Business Dilemmas Forum’s treatment of SOEs. The article unfolds by interrogating three narratives that are used to couple state ownership with human rights across legal and policy discourses.<sup>4</sup> These narratives, which I call the peril narrative, the potential narrative, and the specialty narrative, lay down key parameters for understanding state ownership as a site for human rights governance and help to bring

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1. See, e.g., NARGIZA SALIDJANOVA, GOING OUT: AN OVERVIEW OF CHINA’S OUTWARD FOREIGN DIRECT INVESTMENT U.S.-CHINA ECONOMIC & SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT 1-4 (2011), available at <http://www.uscc.gov/sites/default/files/Research/GoingOut.pdf>.

2. See, e.g., Diego López, THE MAJOR ROLE OF SOVEREIGN INVESTORS IN THE GLOBAL ECONOMY: A EUROPEAN PERSPECTIVE 2-3 (2015), available at <https://www.pwc.com/gx/en/sovereign-wealth-investment-funds/publications/assets/major-role-of-sovereign-investors-in-the-global-economy.pdf>.

3. See, e.g., Stéphanie Marie Stolz & Michael Wedow, EXTRAORDINARY MEASURES IN EXTRAORDINARY TIMES – PUBLIC MEASURES IN SUPPORT OF THE FINANCIAL SECTOR IN THE EU AND THE UNITED STATES EUROPEAN CENTRAL BANK OCCASIONAL PAPER SERIES NO. 117 7-16 (2010), available at <https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp117.pdf>.

4. This article focuses on the U.N. human rights governance instruments. For an analysis of international human rights jurisprudence touching on state ownership, see Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-Sensitive State Ownership Function*, 26 EUR. J. INT’L L. 727, 729-37, 741-45 (2015).

the business and human rights enterprise into the context of the existing structures regulating state ownership.

Ultimately, a detailed reading of the instruments suggests that the U.N. experience with state ownership takes a functional, market-oriented form that shares many core positions, policy prescriptions, and regulatory interventions developed in the course of privatization. Nevertheless, by defining modern state ownership policies on their own terms, the U.N. human rights system attempts to reclaim globalized and financialized markets as a regulatory space in the pursuit of economic justice. As such, the lessons of state ownership reveal an attempt by the U.N. human rights system to assume a more central role in the future of economic governance. Further, as the U.N. experience builds, by and large, on traditional distinctions between public and private identities in state ownership policies, it suggests a vision where the regulatory subjectivity of the state operates primarily by imprinting *public* ends onto *private* governance arrangements. Therefore, the treatment of state ownership also exposes a deeper market contingency underpinning the techniques of contemporary human rights governance.

Part I gives a brief account of the new rise of state ownership. Part II introduces three narratives connecting state ownership and human rights. Part III uses this narrative typology to interrogate three contemporary U.N. human rights governance instruments. The Conclusion discusses the lessons of connecting state ownership with human rights.

## I. THE REINVENTION OF STATE OWNERSHIP

This section describes the rise of new modes of state ownership. It illustrates the strengthened position that state shareholders have assumed in the global economy and the new institutional variations of state ownership—often discussed with reference to state capitalism. These changes are then briefly contrasted with the existing regulatory responses aimed to manage the relationship between state shareholders and investee companies. This section then suggests that the rise of state ownership provides a discursive space for revisiting the underpinnings of the current regulatory structure and the overall conception of state shareholder power in the global economy, particularly when viewed from the perspective of human rights.

### A. *The New Rise of State Ownership*

For the past four decades, most policy and regulatory interventions targeting state ownership have operated under a paradigm defined by



liberalization and privatization. Grounded in the critiques mounted against state ownership since the 1970s, the “common sense” approach has remained suspicious of states intervening heavily in the economy both as regulators and direct shareholders.<sup>5</sup> These policies have emphasized a variety of faults inherent in state ownership, such as efficiency losses traceable to weak internal governance and dominant market positions.<sup>6</sup> As a remedy, the dominant regulatory architecture has emphasized the separation of a state’s regulatory function and its shareholder function.<sup>7</sup>

At least since the global financial crisis started to unfold in 2008, however, the realities and implications of state ownership have been discussed in a new, more careful register.<sup>8</sup> Following the worldwide bailouts of key financial companies and the capital injected into the world economy by SWFs,<sup>9</sup> heavy-handed state intervention was, at least for the moment, suddenly a legitimate course of economic policy. Ranging from SWFs effectively rescuing the Western banking system with stock purchases and recapitalizations surpassing \$90 billion between July 2005 and October 2008 to the nationalizations of financial powerhouses on both sides of the Atlantic,<sup>10</sup> the interventions did not, however, materialize out of thin air. Instead, the rescue measures were indicative of a much more constitutive change in the global economy: the new rise of state ownership—often discussed with direct reference to emergent state capitalism.<sup>11</sup>

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5. The term “common sense” is derived from David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95 (David M. Trubek & Alvaro Santos eds., 2006).

6. For a concise summary, see Daniel M. Shapiro & Steven Globerman, *The International Activities and Impacts of State-Owned Enterprises*, in *SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS* 98, 114–25 (Karl P. Sauvant, et al. eds., 2012).

7. See Organisation for Economic Co-Operation and Development [OECD], *OECD Guidelines on Corporate Governance of State-Owned Enterprises* 12 (2005), available at <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>.

8. See, e.g., John Plender, *The Return of the State: How Government is Back at the Heart of Economic Life*, *FIN. TIMES*, Aug. 21, 2008, at 1. For an insightful analysis from the perspective of innovation economics, see MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* 15-28 (rev. ed. 2014).

9. William L. Megginson et al., *Determinants of Sovereign Wealth Fund Cross-Border Investments*, 48 *FIN. REV.* 539, 540 (2013).

10. *Id.*

11. In this article, the term “state capitalism” is used as a shorthand expression for increased global significance of state shareholders. Consequently, the use of the term differs slightly from the most prevalent notion where “state capitalism” is usually often discussed with relation to economic policies pursued by BRIC countries, particularly China. See, e.g., Ming Du, *When China’s National Champions Go Global: Nothing To Fear*

Led by strong emerging economies, but also followed by other governments regardless of developmental status or their location on the North-South or the East-West axis, state capitalism has seen states assuming strong shareholder positions in companies operating globally. According to recent statistics, nearly 20 percent of the world's top 100 and over 10 percent of the top 2,000 publicly traded multinational corporations (MNCs) are partially state-owned.<sup>12</sup> Their combined FDI amounts to roughly 11 percent of the global FDI flows, and they command more than \$2 trillion in foreign assets.<sup>13</sup> Organizationally, revitalized international state ownership is mostly channeled through streamlined multinational SOEs, often known as “national champions.”<sup>14</sup> However, the institutional structures sustaining modern state ownership are more varied. SWFs, for example, have emerged as an important minority shareholder group, with their assets growing faster than those of any other institutional investors. Recent estimates suggest that up to 25 percent of listed European companies have SWF shareholders.<sup>15</sup> Further, the scope and geography of SWF investments are growing, as new areas, such as sub-Saharan Africa, and new industry sectors are targeted by sovereign investment.<sup>16</sup> Finally, as an illustrative example of the overall rise of state ownership, over the period of 2001–2012, governments around the world acquired more assets through stock purchases than they sold through privatizations and direct sales.<sup>17</sup> In sum, by bolstering their shareholder positions, states have strengthened their control over various economic actors.<sup>18</sup> Fifteen years ago, state-owned entities were absent from the lists

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*but Fear Itself?*, 48 J. WORLD TRADE 1127, 1129–38 (2014); see also *The Rise of State Capitalism*, ECONOMIST, Jan. 21, 2012, at 11 (discussing problems from state-directed capitalism in the BRIC context).

12. Przemyslaw Kowalski et al., STATE-OWNED ENTERPRISES: TRADE EFFECTS AND POLICY IMPLICATIONS 6 (OECD, Trade Policy Papers No. 147, 2013), available at <http://dx.doi.org/10.1787/5k4869ckqk71-en>.

13. United Nations Conference on Trade & Dev. [UNCTAD], *World Investment Report 2014: Investing in the SDGs: An Action Plan*, xviii, 19–22 (2014), available at [http://unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf) [hereinafter UNCTAD 2014].

14. See generally Alvaro Cuervo-Cazurra et al., *Governments as Owners: State-Owned Multinational Companies*, 45 J. INT'L. BUS. STUD. 919, 921–25 (2014).

15. UNCTAD 2014, *supra* note 13, at 19.

16. See *id.*

17. William L. Megginson & Veljko Fotak, *Rise of the Fiduciary State: A Survey of Sovereign Wealth Fund Research*, 29 J. ECON. SURV. 733, 734 (2015).

18. It should be noted that, according to most recent data, the internationalization of SOEs seems to be decelerating. UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* 17 (2015), available at [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf); see also *State Capitalism in the Dock; Government-Controlled Firms*, ECONOMIST, Nov. 22, 2014, at 57–58 (discussing the poor performance of SOEs).

ranking the world's top firms. Now, they dominate the Forbes listings.<sup>19</sup>

### *B. State Ownership in Context*

Naturally, there is nothing new in states intervening in the economy, either as regulators or as market participants.<sup>20</sup> On the contrary, the interplay between private and public ownership on the domestic level, or between protectionism and free trade on the international level, constitutes a significant part of modern politics and international relations.<sup>21</sup> As much of the contemporary discussion has opted for the lens of “state capitalism,” the following account also positions state ownership in the framework of three generations, or waves, of state capitalism.

The first wave of state capitalism, between the mid-nineteenth century and the 1920s, was characterized by trade protectionism and the development of the domestic industry by tariffs and supported by the establishment of various infrastructures such as central banks.<sup>22</sup> By contrast, the second wave, following the Great Depression and the Second World War, introduced many facets that continue to dominate the discourse on state ownership today.<sup>23</sup> In this phase, which also spanned the socialist experience and the emergence of the East Asian developmental states, governments often nationalized national infrastructure and strategically important companies but also extended their reach beyond public services by assuming entrepreneurial roles in

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19. See FORBES, *The World's Biggest Public Companies*, <http://www.forbes.com/global2000/list/> (last visited Dec. 10, 2015) (listing Industrial and Commercial Bank of China, China Construction Bank, Agricultural Bank of China, and Bank of China within the top five).

20. For a succinct introduction, see Ian Thynne, *Ownership as an Instrument of Policy and Understanding in the Public Sphere: Trends and Research Agenda*, 32 POL'Y STUDS. 183, 184–91 (2011).

21. See generally Pier Angelo Toninelli, *The Rise and Fall of Public Enterprise: The Framework*, in THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD 3 (Pier Angelo Toninelli ed., 2000) (contextualizing the development of public enterprise in historical perspective); 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 (2010) (examining the role of SOEs since the financial crises of 2007).

22. See Andreas Nölke, *Introduction: Toward State Capitalism 3.0*, in MULTINATIONAL CORPORATIONS FROM EMERGING MARKETS: STATE CAPITALISM 3.0 1, 3–6 (Andreas Nölke ed., 2014).

23. See ALDO MUSACCHIO & SERGIO G. LAZZARINI, REINVENTING STATE CAPITALISM: LEVIATHAN IN BUSINESS, BRAZIL AND BEYOND 25–36 (2014); Louis Galambos & William Baumol, *Conclusion: Schumpeter Revisited*, in THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD, *supra* note 21, at 303, 305.

various manufacturing and services sectors.<sup>24</sup> Further, domestic companies were sheltered from competition, and different units of government actively managed business activities. In sum, this model emphasized the inherent potential of patient state capital in correcting market failures and spurring development for the benefit of the domestic economy.<sup>25</sup>

The central tenet of the current, third wave of state capitalism, on the other hand, is the variety of formal and informal cooperative relationships between various public authorities and individual companies.<sup>26</sup> Direct shareholder control over corporate entities is a natural facet of these cooperative relationships. While both the second and the third wave of state capitalism center on state ownership of firms, the forms and modes of ownership preferred in these eras differ considerably from each other. If a wholly-owned SOE, created “solely by state capital, managed by political appointees and chartered to serve the collective good”<sup>27</sup> of a specific polity, was the hallmark of the second wave of state capitalism, the third wave is characterized by more varied organizational models.

The organizational models of state ownership can also be broadly divided into three historical phases. These phases describe the state as an entrepreneur, as a majority investor, and as a minority investor.<sup>28</sup> In the first phase, the state assumed the role of a service provider, in circumstances where the private sector was not able to provide a certain good, in the case of natural monopolies where capital markets were underdeveloped, or for reasons stemming from social policy.<sup>29</sup> In the second phase, brought about by privatization, the prototypical SOEs of

24. See, e.g., Robert Millward, *State Enterprise in Britain in the Twentieth Century*, in *THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD*, *supra* note 21, at 157 (providing a long-term perspective and contextual discussion of British state enterprise).

25. See, e.g., ALICE H. AMSDEN, *THE RISE OF “THE REST”: CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES* 213–15 (2001); see also David M. Trubek, *The “Rule of Law,” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 5, at 74.

26. See generally Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 *STAN. L. REV.* 697 (2013) (examining the organizational structures of SOEs in China); Andreas Nölke et al., *Domestic Structures, Foreign Economic Policies and Global Economic Order: Implications from the Rise of Large Emerging Economies*, 21 *EUR. J. INT’L REL.* 538 (2015) (describing Brazil, India, and China’s institutional model for economic governance and the implications of institutional commonalities for the global economic order).

27. Cuervo-Cazurra et al., *supra* note 14, at 922.

28. This typology is derived from MUSACCHIO & LAZZARINI, *supra* note 23, at 25–52.

29. See Jari Kankaanpää et al., *Steering and Monitoring Model of State-Owned Enterprises*, 37 *INT’L J. PUB. ADMIN.* 409, 409 (2014).

the earlier era were either sold or transformed into more independent public-private hybrids through listings and governance reforms.<sup>30</sup> In the third phase, prevalent since the 1990s, states continue both to experiment with their flagship companies, the national champions, and retain or introduce minority equity positions in a range of former SOEs and wholly private companies through SWFs, holding companies, and development banks.<sup>31</sup>

In sum, state ownership has both varied in scope and magnitude and evolved institutionally. Since the heyday of state ownership in the late 1960s and the early 1970s, SOEs have been reduced in number, following the capitalist and mixed economies embracing promarket reforms.<sup>32</sup> Additionally, the prototypical SOEs with lagging governance systems mostly have been redesigned.<sup>33</sup> Most importantly, states have relinquished their status as sole shareholders either through full privatization or through transforming SOEs into partially privatized firms by introducing private investors.<sup>34</sup> This process has culminated in the rise of a new breed of multinational SOEs that focus more intently on the global arena. Coinciding with this development, new modes of sovereign investment through SWFs, holding companies, and development banks holding stakes in private firms also have emerged.<sup>35</sup> Accordingly, state ownership has evolved into a complex, multifaceted phenomenon characterized by an array of distinct models pursued by governments around the globe.<sup>36</sup> Further, the recent rise of state ownership affirms that state shareholders continue to command enormous economic power both domestically and internationally.

### C. Regulation of State Ownership

Law, whether national, regional, or international, has not remained indifferent to these changes. The internationalization of state ownership under the current wave of state capitalism, in particular, has prompted

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30. *Id.*

31. See Cuervo-Cazurra et al., *supra* note 14, at 938.

32. From the contemporary perspective, it is easy to forget that “[b]y the 1960s, the momentum of history appeared to be carrying the entire world toward a reliance on state-owned ventures . . . .” Galambos & William Baumol, *Conclusion: Schumpeter Revisited*, in *THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD*, *supra* note 21, at 306.

33. For case studies focusing on governance arrangements in national oil companies, see *OIL AND GOVERNANCE: STATE-OWNED ENTERPRISES AND THE WORLD ENERGY SUPPLY* (David G. Victor et al. eds., 2012).

34. See Cuervo-Cazurra et al., *supra* note 14, at 922.

35. See *id.* at 922–23.

36. MUSACCHIO & LAZZARINI, *supra* note 23, at 282.



a variety of responses. Most visibly, many governments have been hesitant to allow for large-scale investment by foreign SOEs. In extreme cases, national FDI review mechanisms have been used to block suspicious investments by SOEs or SWFs.<sup>37</sup> In a similar vein, merger control has been used to investigate the composition of large emerging market SOEs' ownership structures on a regional level.<sup>38</sup> At the international level, the proliferating state ownership has been tackled by trade,<sup>39</sup> investment,<sup>40</sup> and soft law regimes.<sup>41</sup> Significantly, the treatment of state ownership occupied a central position in negotiations for the Trans-Pacific Partnership (TPP) treaty,<sup>42</sup> culminating in a separate chapter in the final agreement.<sup>43</sup> Likewise, the ongoing negotiations for the Transatlantic Trade and Investment Partnership (TTIP) treaty between the United States and the European Union are specifically intended to provide "a joint platform of rules which could be used in other agreements/forums to address concerns raised by the development of state capitalism."<sup>44</sup>

Various legal regimes share several common traits, as they utilize

37. See, e.g., Mark A. Clodfelter & Francesca M. S. Guerrero, *National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level*, in SOVEREIGN INVESTMENT: CONCERNS AND POLICY, *supra* note 6, at 173, 180–86.

38. See, e.g., Angela Huyue Zhang, *The Single-Entity Theory: An Antitrust Time Bomb For Chinese State-Owned Enterprises?*, 8 J. COMPETITION L. & ECON. 805 (2012) (criticizing the European Commission's analysis of EU Merger Regulations).

39. See, e.g., United States-Singapore Free Trade Agreement, U.S.-Sing., art. 12.3, May 6, 2003, KAV 6376; Energy Charter Treaty art. 22, Dec. 17 1994, [http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994\\_ECT.pdf](http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf); North American Free Trade Agreement art.1503, Dec. 17, 1992, U.S.-Can.-Mex., 108 Stat. 5134, 32 I.L.M. 289; see also Ming Du, *China's State Capitalism and World Trade Law*, 63 INT'L & COMP. L.Q. 409 (2014).

40. See, e.g., Claudia Annacker, *Protection and Admission of Sovereign Investment Under Investment Treaties*, 10 CHINESE J. INT'L L. 531 (2011).

41. See, e.g., OECD, *supra* note 7; International Working Group of Sovereign Wealth Funds [IWG], *Sovereign Wealth Funds: Generally Accepted Principles and Practices: "Santiago Principles"* (Oct. 2008), available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>; see also Larry Catá Backer, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 GEO. J. INT'L L. 425 (2010).

42. See Tsuyoshi Kawase, *Trans-Pacific Partnership Negotiations and Rulemaking to Regulate State-Owned Enterprises*, RES. INST. ECON., TRADE & INDUS. (Apr. 22, 2014), <http://www.rieti.go.jp/en/special/policy-update/053.html>.

43. Trans-Pacific Partnership ch. 17, Feb. 4, 2016, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-State-Owned-Enterprises-and-Designated-Monopolies.pdf>.

44. EU Textual Proposal: Possible Provisions on State Enterprises and Enterprises Granted Special or Exclusive Rights or Privileges (EC), EU-US TTIP Negotiations of 14-18 July 2014, available at [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153030.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf).

the regulatory rationales developed in the course of dismantling the heavy state ownership structures from the late 1970s onward. Most importantly, they attempt to mitigate the market distortions emanating from the “inefficient” and “political” interface between state shareholders and their investee corporations. The most extreme views have highlighted the end of the free market economy in the hands of state capitalists,<sup>45</sup> but the dominant approach is usually deployed from the perspective of wholly-owned SOEs as being inefficient, trade-hindering, tariff-protected behemoths prone to political rent-seeking.<sup>46</sup> Summarizing the fears shared by many, one recent commentator has emphasized that

State Enterprise will hardly be independent from the state. The decision-making bodies will not be such because their decisions will presumably follow the directions of the state. The “directing mind and will” of the company will be, in essence, the government, who, more likely than not, will prioritize its own (political, electoral, etc.) interests over the company’s . . . . [T]he hallmarking features of independence, accountability and efficiency, which are supposed to be in on any ordinary company, are all compromised, if not neglected.<sup>47</sup>

The picture becomes more nuanced, however, when the changes in the internationalizing scope and the institutional architecture of state ownership are taken into account. When an increasing number of states acquire equity stakes in foreign companies through SWFs or when redesigned, transnationally operating SOEs are involved in massive FDI projects beneficial to the host country’s economy, state ownership in general gathers greater acceptance and approval.<sup>48</sup> To date, the most important legal technique used to espouse changes in the world

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45. See, e.g., IAN BREMMER, *THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS?* (2010).

46. SOEs have been approached as “a pathology of organizational failure.” AMSDEN, *supra* note 20, at 215; see also Shapiro & Globerman, *supra* note 6, at 114–25.

47. ALBERT BADIA, *PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION* 11 (2014).

48. See Anne van Aaken, *Blurring Boundaries Between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution*, in *IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM* 131, 131–33 (Anne Peters et al. eds., 2014). For example, the United Kingdom has been noted as “the most welcoming economy in the world for government-related agencies to invest in . . . .” Sophia Grene, *Sovereign Wealth Funds Choose the UK*, *FIN. TIMES*, June 23, 2014, at 1.

economy has been to treat investment by various state-owned entities as if it were private commercial activity.<sup>49</sup> As argued by China in recent proceedings at the World Trade Organization (WTO), the presumption in dealing with state ownership should be “that the SOEs . . . [are] private bodies.”<sup>50</sup> The same argument is visible in corporate law and governance,<sup>51</sup> antitrust law,<sup>52</sup> and investment law,<sup>53</sup> and it builds on the effect of a robust regulatory structure which has, since the 1970s, turned state-owned entities more efficient and independent through improved internal governance and external regulation.

As a corollary, state shareholders have also purposely distanced themselves from the entrepreneurial and redistributive roles of state ownership.<sup>54</sup> Instead, states often have assumed the role of a shareholder that, along with other private shareholders, exercises its influence over the company using its formal control rights in the course of market transactions.<sup>55</sup> In particular, states often are encouraged to participate actively in the functioning of their investee companies in a shareholder capacity if influencing follows a transparent ownership policy. In the Santiago Principles, for example, this is reflected in Principle 21: “SWFs view shareholder ownership rights as a fundamental element of their equity investments’ value. If an SWF

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49. See, e.g., ASEAN Comprehensive Investment Agreement art. 2(d)–(e), Feb. 26, 2009, available at <http://www.asean.org/documents/FINALSIGNED-ACIA.pdf>. For a close parallel with the law of state immunities, see XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 446–53 (2012) (describing the work of the U.N. International Law Commission and the debate in the U.N. General Assembly Sixth Committee surrounding the question of legal distinction between a State and certain of its entities in respect of State Immunity).

50. Appellate Body Report, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 44, WT/DS379/AB/R (Mar. 11, 2011).

51. See generally MICHAEL J. WHINCOP, CORPORATE GOVERNANCE IN GOVERNMENT CORPORATIONS (2005) (describing strong governance practice in corporatized government organizations); Ginka Borisova et al., *Government Ownership and Corporate Governance: Evidence from the EU*, 36 J. BANKING & FIN. 2917 (2012); Zhaofeng Wang, *Corporate Governance Under State Control: The Chinese Experience*, 13 THEORETICAL INQUIRIES L. 487 (2012).

52. See, e.g., Council Non-Opposition to Notified Concentration Case COMP/M.6082, 2011 O.J. (C 274) 7 (EC).

53. See, e.g., Charles H. Brower, II, *Corporations as Plaintiffs Under International Law: Three Narratives About Investment Treaties*, 9 SANTA CLARA J. INT’L L. 179 (2011); Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT’L L. 142 (2010).

54. See Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 99–119, 148–49 (2008) (discussing SWFs in the broader contexts of regulatory interests and state capitalism).

55. This process has been noted to have eradicated many of the agency problems at the roots of the privatization programs. See MUSACCHIO & LAZZARINI, *supra* note 23, at 288.

chooses to exercise its ownership rights, it should do so in a manner that is consistent with its investment policy and protects the financial value of its investments.”<sup>56</sup> Similarly, the Organisation for Economic Co-operation and Development (OECD) Guidelines on Corporate Governance of State-Owned Enterprises emphasize that “the state should act as an informed and active owner.”<sup>57</sup>

In sum, legal response to the new rise of state ownership has followed the precedent set by the privatization experience since the 1970s. Target states occasionally have been hesitant to let in SOEs’ FDI and SWF investments due to fears of conflation between public and private aims behind the actions of companies and their state shareholders. At the same time, SOEs’ home states have repeatedly emphasized a tight separation and independence of “their” SOEs from undue governmental influence. Instead, both the companies and their state shareholders are portrayed as operating through private market actor identities and mechanisms, such as shareholder power used within the limits set by national corporate law and international best practices. Consequently, the destabilization brought about by the rise of state ownership mostly has been contained through regulatory techniques developed in the course of privatization.

#### *D. The Missing Link: United Nations and Human Rights?*

Significantly, these most recent regulatory techniques seem to evade the core U.N. forums entirely. Historically, however, the United Nations has served as a key node in coming to terms with the effects of state ownership. Intense discourses on permanent sovereignty over natural resources and decolonization-era nationalizations, for example, usually included a strong state ownership component.<sup>58</sup> Similarly, the efforts to negotiate multilateral instruments, such as the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices<sup>59</sup> and the—ultimately failed—Code of Conduct on Transnational Corporations,<sup>60</sup> often turned to the question of SOEs. In

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56. IWG, *supra* note 41, at 22.

57. OECD, *supra* note 7, at 13.

58. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 38–41 (3d ed. 2010).

59. United Nations Conference on Restrictive Business Practices, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, Apr. 22, 1980, U.N. Doc. TD/RBP/CONF/10 (1980).

60. See generally Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 *J. WORLD INV. & TRADE* 11 (2015) (explaining the origin and underlying interest situations behind the negotiations for the United Nations Code of Conduct on Transnational Corporations).

particular, major disagreement between developed, developing, and socialist states remained over the applicability of the proposed rules to SOEs.<sup>61</sup> More recently, state ownership has been discussed prominently in drafting the Convention on Jurisdictional Immunities of States and Their Property.<sup>62</sup> Despite these examples, the core U.N. institutions have increasingly yielded their influence in SOE-related matters, as in other branches of economic law and policy, to specialized organizations and regimes such as the WTO, the OECD, and various bilateral trade and investment treaty systems.<sup>63</sup>

Beyond the diminishing significance of the United Nations as a forum for regulating economic activity, the U.N. human rights system has traditionally paid scant attention to state ownership. Some human rights treaty bodies have made limited interventions in SOE questions but, until recently, human rights implications of state ownership rarely have been featured in the United Nation's policy or regulatory actions.<sup>64</sup> While the rationales and practices of using direct state ownership as a tool for social policy to improve the welfare of citizens do have a historical connection to the economic development aims of the United Nations, they generally are not discussed in the terminology of human rights.<sup>65</sup> Nevertheless, the growing significance of state-owned entities and state shareholders in the global economy frequently affects the realization of human rights, both domestically and at the international level.

In the emerging business and human rights literature, SOEs often are presented as a special case of corporate human rights obligations.<sup>66</sup>

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61. See U.N. Ctr. on Transnational Corps., *Transnational Corporations in World Development: Third Survey*, UN Doc. ST/CTC/46 (1983).

62. See YANG, *supra* note 49, at 446–53.

63. See generally Margot E. Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, 62 INT'L & COMP. L. Q. 31, 46–47 (2013) (explaining how the larger international economic and legal orders of the globe have disadvantaged the poor).

64. See, e.g., U.N. HUM. RTS. COMM., *SELECTED DECISIONS UNDER OPTIONAL PROTOCOL*, at 124, UN. DOC. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985) (examining *Leo Hertzberg et al. v. Finland*).

65. See generally MUSACCHIO & LAZZARINI, *supra* note 23, at 60–62 (exploring the social aspects of state capitalism). For a critique of SOEs' social functions, see Joseph Heath & Wayne Norman, *Stakeholder Theory, Corporate Governance and Public Management: What Can the History of State-Run Enterprises Teach Us in the Post-Enron Era?*, 53 J. BUS. ETHICS 247, 255–61 (2004).

66. See, e.g., Surya Deva, *Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 78, 95–96 (Surya Deva & David Bilchitz eds., 2013); CAMILLA WEE, *INT'L COMM'N OF JURISTS, REGULATING THE HUMAN RIGHTS IMPACT OF STATE-OWNED ENTERPRISES: TENDENCIES OF CORPORATE ACCOUNTABILITY AND STATE RESPONSIBILITY* (2008), <http://198.170.85.29/State-owned-enterprises-Oct-08.pdf>; see also ANTENOR HALLO DE WOLF, *RECONCILING*

Further, human rights have started to emerge as a specific subgroup within the wider corporate social responsibility (CSR) movement, which increasingly targets SOEs.<sup>67</sup> Broadening the focus from individual SOEs, state ownership also is discussed in functional terms that are more responsive to the new forms of state ownership arrangements. While the scholarship is diverse, ranging from the use of sovereign wealth in promoting human rights abroad<sup>68</sup> to downplaying the possibility of sovereign investment triggering state responsibility,<sup>69</sup> these interventions still see the internationalization of state ownership as a regulatory space opened by the changing economic realities.<sup>70</sup> As such, the emerging “human rights turn” in conceptualizing the limits of state shareholder power may be indicative of a larger shift in the ways state ownership is understood. The current reinvigoration and reinvention of state ownership, together with the attempts to develop human rights checks and balances in state ownership policies, both challenges and augments the traditional regulatory vision, which has, since the late 1970s onward, emphasized the democratic and economic perils associated with the open intervention of the state. The remainder of this article discusses human rights dimensions of state ownership in a range of law and policy discourses and, then, in the practice of the U.N. human rights system.

## II. HUMAN RIGHTS DIMENSIONS OF STATE OWNERSHIP

The previous section described the rise and reinvention of modern state ownership as a reinvigorated site of state power. This section introduces a more general view on societal effects of state ownership

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PRIVATIZATION WITH HUMAN RIGHTS (2011) (addressing the issues of accountability for the conduct of entities exercising governmental functions).

67. See, e.g., Anne Welle-Strand & Monica Vlaicu, *Business and State Balancing International Development Agendas – The Case of Norwegian CSR*, 6 J. POL. & LAW 103 (2013); Juliet Roper & Michèle Schoenberger-Orgad, *State-Owned Enterprises: Issues of Accountability and Legitimacy*, 25 MGMT. COMM. Q. 693 (2011).

68. See generally 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. 1 (2013) (explaining that SOEs operate in a new area of international law that implicates human rights).

69. See, e.g., Bruno Demeyere, *Sovereign Wealth Funds and (Un)Ethical Investment: Using ‘Due Diligence’ to Avoid Contributing to Human Rights Violations Committed by Companies in the Investment Portfolio*, in HUMAN RIGHTS, CORPORATE COMPLICITY AND DISINVESTMENT 183, 220–21 (Gro Nystuen et al. eds., 2011).

70. In the context of human rights governance, the term “regulatory space” is derived from Christine Parker & John Howe, *Ruggie’s Diplomatic Project and Its Missing Regulatory Infrastructure*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 273, 283–85 (Radu Mares ed., 2012).

and submits that viewing state ownership through the lenses of peril, potential, and specialty teases out the human rights dimensions behind the surging state ownership. Using diverse examples, such as the U.N. Security Council's asset freeze imposed on the Qaddafi regime in Libya,<sup>71</sup> this section also posits that the coupling of state ownership and human rights reflects the critiques mounted against state ownership since the 1970s.

#### A. *The Perils of State Ownership*

For the past forty years, state ownership has often been associated with a number of perils such as economic inefficiency and rent-seeking.<sup>72</sup> As a corollary, state ownership also has been noted to contribute to a number of adverse societal impacts. Consider, for example, the way the Security Council developed a thorough sanctions regime with the aim to oust the Libyan autocratic leadership from power in 2011.<sup>73</sup> As a part of the regime, the Security Council froze the assets of various Libyan SOEs, including the Libyan National Oil Corporation and several SWFs. Based on the formal connections of these entities with the leadership or their alleged connections with certain notable persons belonging to the Qaddafi family, the rationale behind the designations was to stop these SOEs from funding the Libyan government.<sup>74</sup> Consequently, in the Libyan case, the sanctioned entities appeared as instrumentalities of oppression, even if their function was limited to providing financial stability for the regime.<sup>75</sup> As such, the perils of state ownership were brought about by the exploitative relationships between national wealth and its extended control and accumulation by a small elite group detrimental to the human rights of the Libyan people at large.

Similar peril narratives are the most prevalent forms of connecting

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71. See, e.g., Evan J Criddle, *Humanitarian Financial Intervention*, 24 EUR. J. INT'L L. 583, 606–614 (2013).

72. See Shapiro & Globerman, *supra* note 6, at 114–25.

73. See generally Giorgio Sacerdoti & Pia Acconci, *The Security Council's Asset Freeze Against Gaddafi's Libya and Its Implementation in Italy*, 21 ITALIAN Y.B. INT'L L. 61, 62–71 (2011) (detailing the United Nation's boycott of Libyan SOEs to protest Qaddafi's human rights violations).

74. See U.N. Panel of Experts on Libya, Rep., transmitted by Letter dated 17 February 2012 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council, annex II, U.N. Doc. S/2012/163 (Feb. 17, 2012).

75. Cf. Juan Pablo Bohoslavsky & Mariana Rulli, *Corporate Complicity and Finance as a 'Killing Agent': The Relevance of the Chilean Case*, 8 J. INT'L CRIM. JUST. 829, 839–46 (2010).

state ownership with human rights.<sup>76</sup> In the most common account, state ownership appears as a domestic policy tool that is used to develop certain areas or industries, regardless of its adverse impacts.<sup>77</sup> Thus, in extreme conditions, state ownership appears to appropriate public resources for private gain without due consideration of the human rights outcomes.<sup>78</sup>

Another good example of such a narrative is the construction of the Baku-Tbilisi-Ceyhan (BTC) oil pipeline, a major resource development project in the early 2000s.<sup>79</sup> Because of intense international scrutiny, an independent advisory panel was established to assess its environmental and social impacts, including its human rights impacts.<sup>80</sup> In the course of its work, the panel focused on the activities of the Turkish state-owned company BOTAŞ. The panel's assessment stated that "BOTAS and its contractors might feel pressure to cut corners on environmental, social, and technical standards to remain on schedule and under budget" and that "senior officials in key government ministries . . . openly expressed their view that the environmental and

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76. See, e.g., Steven Globerman, *Host Governments Should Not Treat State-Owned Enterprises Differently than Other Foreign Investors* (Columbia FDI Perspectives, Perspectives on Topical Foreign Direct Investment Issues No. 138, Jan. 5, 2015), available at <http://ccsi.columbia.edu/files/2013/10/No-138-Globerman-FINAL1.pdf>.

77. This narrative surfaces particularly well in claims brought under the Alien Tort Claims Act in the United States, with cases probing the relationship between private Western developers and state-owned entities pursuing the policy of authoritarian regimes. *Doe v. Unocal*, for example, concerned the company turning a blind eye on Myanmar Oil and Gas Enterprise's and Myanmar's military's use of forced labor in early 1990s. See *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), vacated, 403 F.3d 708 (9th Cir. 2005). *Presbyterian Church of Sudan v. Talisman* conveys a similar story with a Canadian developer's involvement in a consortium with Sudanese SOE casting a shadow over the company. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

78. See, e.g., *Yukos Universal Ltd. v. The Russian Fed'n*, Case No. AA 227 (Perm. Ct. Arb. 2014). For discussion of *Yukos*, see Eric De Brabandere, *Yukos Universal Limited (Isle of Man) v The Russian Federation: Complementarity or Conflict? Contrasting the Yukos Case Before the European Court of Human Rights and Investment Tribunals*, 30 ICSID REV. 345, 352–55 (2015).

79. The example is drawn from Annie Dufey & Rasmiya Kazimoza, *Project Finance Arrangements for the Baku-Tbilisi-Ceyhan Project: Human Rights and Sustainable Development Implications*, in GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT 364 (Sheldon Leader & David Ong eds., 2011).

80. See CASPIAN DEV. ADVISORY PANEL, REPORT ON TURKEY AND PROJECT-RELATED SECURITY AND HUMAN RIGHTS ISSUES IN AZERBAIJAN, GEORGIA, AND TURKEY 81–85 (2003), [http://www.bp.com/content/dam/bp-country/en\\_az/pdf/CDAP-reports/CDAP Turkey Report Final.pdf](http://www.bp.com/content/dam/bp-country/en_az/pdf/CDAP-reports/CDAP Turkey Report Final.pdf) (explaining the Caspian Development Advisory Panel's concerns regarding the environmental, social, and human rights responsibilities of BOTAŞ, the state-owned Turkish pipeline construction company that designed and constructed the Baku-Tbilisi-Ceyhan oil pipeline).



other standards in the . . . Agreement and EIA [Environmental Impact Assessment] were too stringent and should be relaxed.”<sup>81</sup> Consequently, in the panel’s view, the regulatory environment in which BOTAS operated had been loosened, and the company was allowed to impose additional harm on individuals due to the strong economic incentives both the company and the state had in the issue.<sup>82</sup>

Here, the peril narrative warned of a skewed regulatory environment, which is, by itself, a major feature of the traditional critiques mounted against state ownership. In short, state ownership stood out as a form of privilege: SOEs may not need to provide information on their performance, thus undermining effective external oversight; ample opportunities are created for corruption and political manipulation; and the government’s ability to combine the ownership of SOEs with regulatory powers can further insulate SOEs from the normal market forces, for example with regard to the pressure from potential creditors.<sup>83</sup> This narrative holds even in the absence of official regulation and oversight, as SOEs often are well protected from the normal market pressures that would otherwise discourage mainstream MNCs from carrying out human rights abuses.<sup>84</sup> Additionally, it is interesting to note the independent panel’s recommendations to alleviate the structural problems relating to BOTAS. In its view, the responsibility to correct abusive practices lay with the project’s main developer, British Petroleum (BP), which was advised “to use its leverage, including (if necessary) stoppage of work, to ensure that BOTAS fulfills the commitments BP and BTC have made in the EIA.”<sup>85</sup>

In BOTAS, the peril narrative was confined within national borders.<sup>86</sup> However, following the rise of internationally-oriented state ownership,<sup>87</sup> cross-border implications, whether in the form of multinational SOEs’ activities or sovereign investment more generally, have become more pertinent. In this connection, the perils of state ownership often are approached as economic nationalism that, at best, pays scant attention to the labor conditions in host countries, and, at worst, exacerbates the existing conflicts, immiserating already

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81. *Id.*

82. *Id.* at 84–85; *see also* Dufey & Kazimoza, *supra* note 79, at 385–87.

83. International commercial arbitration and international investment arbitration are full of these examples. *See* BADIA, *supra* note 47, at 1–16.

84. *See* Globerman, *supra* note 76, at 2.

85. CASPIAN DEV. ADVISORY PANEL, *supra* note 80, at 85 (italics omitted).

86. *See id.*

87. *See* discussion in sections I.B. and I.C., *supra*.

marginalized groups.<sup>88</sup> With regard to Chinese FDI, these peril narratives take a number of forms, from Chinese unconcern for workplace safety in the form of hard hats<sup>89</sup> to charges of contribution to genocide when “the economic power of CNPC [Chinese National Petroleum Company] and the military power of the PLA [People's Liberation Army]” are welded together with “the international political power of the government in Beijing.”<sup>90</sup>

### *B. The Potentials of State Ownership*

Similar to peril narratives, understanding state ownership through the lens of potential also is grounded in seeing ownership as an instrumentality.<sup>91</sup> In the case of the sanctions regime against Libya, for example, the potential narrative surfaced in the context of the Security Council establishing the conditions under which the sanctions on SOEs could be lifted. The aim of the regime was to sever the previous exploitative relationships between the Libyan national wealth and its extended control by an autocratic elite. In this connection, the Security Council highlighted the “importance of making these assets available in a transparent and responsible manner in conformity with the needs and wishes of the Libyan people.”<sup>92</sup> As such, the potential narrative appears to be embedded in a view of state ownership as part and parcel of social development in the public interest.<sup>93</sup>

Concentrating on the human rights potential of state ownership yields, naturally, a more focused potential narrative, which has recently embraced the transnational scope of ownership activity. Unlike the peril discourse, which sees the rise of state capitalism as economic statecraft detrimental to human rights, the potential narrative underscores that the financial leverage of states can also have positive effects on the enjoyment of human rights globally. This narrative takes the formal

88. See Helle Abelvik-Lawson, *Sustainable Development for Whose Benefit? Brazil's Economic Power and Human Rights Violations in the Amazon and Mozambique*, 18 INT'L J. HUM. RTS. 795, 807–12 (2014).

89. See May Tan-Mullins & Giles Mohan, *The Potential of Corporate Environmental Responsibility of Chinese State-Owned Enterprises in Africa*, 15 ENV'T. DEV. SUSTAINABILITY 265, 277 (2013); see also Du, *supra* note 6, at 1136.

90. Michael J. Kelly, *Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan*, 90 OR. L. REV. 414, 423 (2011) (italics omitted).

91. The idea of human rights potential is derived from Patrick J. Keenan & Christiana Ochoa, *The Human Rights Potential of Sovereign Wealth Funds*, 40 GEORG. J. INT'L L. 1151 (2009).

92. S.C. RES. 2009, preamble, U.N. DOC. S/RES/2009 (Sept. 16, 2011).

93. See MUSACCHIO & LAZZARINI, *supra* note 23, at 60–62.

rights of control granted to state shareholders as its starting point.<sup>94</sup> Taking note of the ownership policies in various states, SOEs often are expected to become model employers, for example by taking their human rights impacts into account throughout their supply chains. More broadly, state ownership is conceived as generating a general financial leverage that has the ability to contribute to a positive change in the conduct of the investee companies beyond traditional wholly-owned SOEs.<sup>95</sup> The most discussed example of the human rights potential of sovereign investment is the investment activity pursued by the Norwegian Pension Fund Global (“the Fund”).<sup>96</sup> With a dedicated supervisory Council of Ethics, the Fund has been involved in a number of human rights-based divestments globally. On this reading, the Fund, commanding equivalent to 1.3 percent of the equities of every publicly-listed company in the world, may invoke its shareholder power to civilize corporations through the international markets.<sup>97</sup>

This form of the potential narrative meshes well with the rise of modern state ownership structures that steer away from wholly-owned SOEs and, instead, toward heterogeneous ownership structures. In this case, the human rights potential is sought by imposing on investee companies human-rights-oriented policies stemming from the power of

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94. Cf. Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World*, 18 IND. J. GLOBAL LEGAL STUD. 665, 692–98 (2011) (“[D]irect state participation in business may allow for greater leverage over corporate activity in the public interest, at least in relation to enterprises from accountable, democratic countries.”).

95. See Eva Van Der Zee, *Sovereign Wealth Funds and Socially Responsible Investment: Dos and Don'ts*, 9 EUR. CO. L. 141, 148–49 (2012). The specialty of SOEs often was emphasized in the 20th century state ownership experience. In France, nationalized corporations also were seen as enlighteners or model employers; Renault, for example, was considered a laboratory of “industrial relations.” Emmanuel Chadeau, *The Rise and Decline of State-Owned Industry in Twentieth-Century France*, in THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD, *supra* note 21, at 185, 201.

96. See generally Gro Nystuen, *Disinvestment on the Basis of Corporate Contribution to Human Rights Violations: The Case of the Norwegian Government Pension Fund*, in HUMAN RIGHTS, CORPORATE COMPLICITY AND DISINVESTMENT, *supra* note 69, at 16 (discussing the Ethical Guidelines of the Norwegian Government Pension Fund); Anna Gelpern, *Sovereignty, Accountability, and the Wealth Fund Governance Conundrum*, 1 ASIAN J. INT'L L. 289 (2011) (discussing the Norwegian Pension Global Fund in the contexts of public, private, domestic, and external accountability); Gurneeta Vasudeva, *Weaving Together the Normative and Regulatory Roles of Government: How the Norwegian Sovereign Wealth Fund's Responsible Conduct Is Shaping Firms' Cross-Border Investments*, 24 ORG. SCI. 1662 (2013) (arguing that the Norwegian Pension Global Fund has societal implications that transcend international borders).

97. See *The Fund*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/the-fund> (last visited Dec. 10, 2015).

shareholder action. This allows for a state to project its power, in the form of shareholder power, beyond jurisdictional limits.<sup>98</sup> In some accounts, this type of shareholder activism by governments has been considered one of the few “effective tools left to address legal or ethical violations, since hard power tools such as economic sanctions have . . . largely failed.”<sup>99</sup>

### C. *The Specialty Narrative*

In the peril and potential narratives, state ownership appears either as an instrument of oppression or as an instrument of turning companies into responsible corporate citizens. Both of these views are grounded in the special connection between investee companies and their state shareholders.<sup>100</sup> The domestic elements of state ownership form the core of the specialty narrative. This was the main thrust of the Libyan sanctions regime, where the “importance of making . . . assets available . . . with the needs and wishes of the Libyan people” was emphasized, as is the case with human-rights-sensitive sovereign investment as a public institution distributing national wealth.<sup>101</sup> As such, the specialty of state ownership is usually determined by the fact that the distributed resources are public money “with ramifications for their citizen-beneficiaries.”<sup>102</sup> While the human rights implications of state ownership often are discussed, the narrative usually is framed in terms of the responsible use of sovereign wealth. Therefore, the potential of state ownership rarely is understood as an obligation under constitutional or human rights law and more often as a policy preference stemming from state shareholders being capable of

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98. See Backer, *supra* note 68, at 28–30 (discussing the role of the Ethics Council in the dispute process).

99. Salar Ghahramani, *Governments, Financial Markets, and International Human Rights: The State's Role as Shareholder*, 6 YALE J. INT'L AFF. 85, 93 (2011).

100. In this article, “specialty” refers to accountability mechanisms and legal techniques through which the use of sovereign wealth is exposed to human rights governance instruments. Due to their human rights commitments, state investors have “special” responsibilities under international law to respect human rights in view of their public funding and public duties that extend to their ownership policies. Naturally, there are numerous other accountability mechanisms that affect the governance of public wealth. For an extended case study of a national accountability matrix, see Kankaanpää et al., *supra* note 29, at 414–19.

101. S.C. RES. 2009, *supra* note 84, at preamble; see also Angela Cummine, *Ethical Sovereign Investors: Sovereign Wealth Funds and Human Rights*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 163, 164–69 (Juan Pablo Bohoslavsky & Jernej Letnar Čerňič eds., 2014).

102. Cummine, *supra* note 101, at 164.

sustaining longer investment horizons.<sup>103</sup> In some accounts, “SWFs are in a unique position and, therefore, have a higher responsibility towards respecting human rights and protecting the environment,”<sup>104</sup> but usually the specialty of state ownership emerges in broader political terms.

Following the rise of internationally deployed state ownership, however, the connection between national wealth and the focus on citizen-beneficiaries has changed.<sup>105</sup> The traditional view of state ownership as bringing about public goods for a given polity has less purchase when the coupling of popular benefit to state ownership policies expands from the domestic sphere to the international. Simultaneously, state ownership has evolved from wholly-owned SOEs to minority-owned organizations operating in competitive markets. As a consequence, state ownership policies increasingly impact individuals at the global level, while the influence that the states have over the operating entities has gradually eroded to the mere formal exercise of shareholder rights.<sup>106</sup> When a state has been transformed into “just another” shareholder with powers and information not substantially different from those of private investors, the specialty narrative is also transformed. In this mode, the limits of state shareholder power are emphasized, suggesting that state shareholders assume passive or “quiet” roles, especially in the context of human-rights-sensitive shareholder activism and corporate governance in general.<sup>107</sup> Accordingly, the specialty narrative increasingly reflects the ways that state shareholders and SOEs are accommodated in the dominant regulatory infrastructure, which privileges the tightly separated roles, and the distinct public and private identities, of regulator and market

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103. *Id.* at 164, 172–74. Other factors to consider are the various institutional pressures affecting state ownership policies. See generally Gelpern, *supra* note 88. For a Chinese case study, see Glen Whelan & Judy Muthuri, *Chinese State-Owned Enterprises and Human Rights: The Importance of National and Intra-Organizational Pressures*, BUS. & SOC’Y (forthcoming), available at <http://ssrn.com/abstract=2441113>.

104. Van Der Zee, *supra* note 95, at 147.

105. *C.f.* Backer, *supra* note 41, at 491 (contrasting the substantive differences between the public Norwegian Fund and the private TIAA-CREF fund).

106. Further, both corporate governance and international soft law regimes actively encourage states to use their influence options as shareholders, provided they do so in a transparent and predictable way. See OECD, *supra* note 7, at 11–12; see also IWG, *supra* note 41, at 22–23.

107. See Rose, *supra* note 54, at 119; Bernardo Bortolotti et al., *Quiet Leviathans: Sovereign Wealth Fund Investment, Passivity, and the Value of the Firm* 9 (Oct. 25, 2010), available at [http://www.baffi.unibocconi.it/wps/allegatiCTP/SWF-paper-RFS-Final-oct25\\_2010.pdf](http://www.baffi.unibocconi.it/wps/allegatiCTP/SWF-paper-RFS-Final-oct25_2010.pdf). It has, however, been suggested that sovereign investment increasingly is turning toward activist tendencies. See Bader Alhashel, *Sovereign Wealth Funds: A Literature Review*, 78 J. ECON. & BUS. 1, 10 (2015).

participant.<sup>108</sup>

Each of the three narratives described above offers a distinct perspective on coupling state ownership and human rights. The peril narrative transfers privatization-era regulatory “common sense” to the realm of the societal impacts of state ownership. The potential narrative proposes a policy entry point where shareholder power is used to civilize corporate actions beyond states’ jurisdictional confines. The specialty narrative embeds the realization of human rights within responsible use of sovereign wealth in an era where state ownership increasingly is going abroad. Together, they suggest that state ownership matters greatly for a general human rights enterprise. The following section interrogates more focused human rights governance instruments through these narratives.

### III. STATE OWNERSHIP IN THE UNITED NATIONS HUMAN RIGHTS GOVERNANCE INSTRUMENTS

The previous section drew connections between state ownership and human rights using the narratives of peril, potential, and specialty. This section interrogates the ways in which these narratives surface in three U.N. human rights governance instruments: the Guiding Principles on Business and Human Rights (GPs), implementing the “Protect, Respect and Remedy” framework (Framework); the Committee of the Rights of the Child (CRC) General Comment No. 16 (CRC Comment 16); and the Global Compact’s Human Rights and Business Dilemmas Forum’s treatment of SOEs (GCDF). I argue that the instruments recognize the proliferation of state ownership, reflect its importance and dimensions, and identify state ownership as an effective site of human rights governance. Taken together, the U.N. instruments expose a more general tendency to treat the market as the most important site for advancing the business and human rights agenda.

#### *A. Introduction to the U.N. Human Rights Governance Instruments*

The social impacts of companies have been on the U.N. agenda for decades. Prominent since the 1970s, a number of regulatory interventions have been proposed, ranging from the emphasis on states’ right to regulate corporate activity in their jurisdiction to nonbinding

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108. See Danny Nicol, *Business Rights as Human Rights*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 229 (Tom Campbell et al. eds., 2011) (arguing that no compelling basis exists on which business rights can be disentangled from classic political human rights).

codes of conduct. Often grouped under the umbrella of the CSR movement, the U.N. discussion has adopted a distinct human rights approach to corporate regulation since the 1990s.<sup>109</sup> Over some twenty-five years, various U.N. bodies have attempted to conceptualize the status of multinational enterprises (MNEs) in international law and the ways for alleviating their most adverse human rights impacts. In recent years, the efforts mostly have taken individual rights holders as their starting point. While the concrete approaches have varied from corporate self-regulation to a greater articulation of the extraterritorial human rights obligations of states, the international human rights system has remained a central focus in the United Nation's efforts to "civilize globalization"<sup>110</sup> and to bring about "just business."<sup>111</sup>

An early example of the U.N. efforts was the Global Compact (GC).<sup>112</sup> Intended as a "practical framework for the development, implementation, and disclosure of sustainability policies and practices,"<sup>113</sup> the GC consists of principled initiatives in the areas of human rights, labor, the environment, and anticorruption. With over 12,000 corporate participants and other stakeholders from over 145 countries, it is the largest voluntary corporate responsibility initiative in the world.<sup>114</sup> As a part of the GC's practical focus, the initiative supports a variety of multistakeholder forums for sharing best practices in sustainability policies.<sup>115</sup> One of the more recent issues raised in these Human Rights and Business Dilemma Forums has been the case of SOEs.<sup>116</sup>

While the GC remains a voluntary initiative in its human rights orientation, the United Nations also has probed more binding solutions. In 2003, for example, the Sub-Commission on the Promotion and

109. See generally JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* (2006) (examining the CSR movement in the context of international law).

110. See generally DAVID KINLEY, *CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY* (2009) (analyzing the manner in which human rights intersect with different facets of global economic relations).

111. See generally JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* (2013) (examining the road map for the 2005 U.N. Guiding Principles, which ensured responsible global corporate practices).

112. See generally THE UNITED NATIONS GLOBAL COMPACT: *ACHIEVEMENTS, TRENDS AND CHALLENGES* (Andreas Rasche & Georg Kell eds., 2010) (reflecting on the U.N. Global Compact's implications for human rights and corporate behavior).

113. *The United Nations Global Compact*, GLOBAL COMPACT CITIES PROGRAMME, <http://citiesprogramme.com/aboutus/the-un-global-compact> (last visited Dec. 10, 2015).

114. *Id.*

115. *Id.*

116. See *Working with SOEs*, HUMAN RIGHTS AND BUSINESS DILEMMAS FORUM, <http://human-rights.unglobalcompact.org/dilemmas/working-soe> (last visited Dec. 3, 2014).

Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which sought to extend the broad human rights duties to companies.<sup>117</sup> Even though these failed to gain traction, the United Nations has continued to interrogate the interface between human rights protection and corporate operations. Culminating in the unanimous endorsement of the Framework and the GPs on June 16, 2011, by the U.N. Human Rights Council (HRC), the instrument devised by the Special Representative of the Secretary-General (SRSG), John Ruggie, has been heralded as one of the most important attempts to sketch a transnational regulatory framework to counter the adverse human rights impacts caused by business enterprises.<sup>118</sup> While not binding, the Framework and the GPs have enjoyed considerable purchase with governments, international organizations, and the business sector. For example, a number of national and international instruments and policy documents recently have been revised to correspond with the GPs.<sup>119</sup>

The governance template epitomized by the Framework and the GPs positions corporate conduct in the context of liberalized and globalized trade, addresses the governance gaps that enable corporate human rights abuses, and deems existing regulatory responses ineffective for containing alleged corporate human rights impacts.<sup>120</sup>

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117. See United Nations, Econ. & Soc. Council, Comm. on Hum. Rts., Sub-Comm. on the Promotion & Protection of Hum. Rts., Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). See generally David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447 (2006) (addressing whether the Norms serve as the correct framework to account for corporate human rights abuses at the international level).

118. See, e.g., John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION, *supra* note 70, at 51, 61–69; Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. DEV. L. J. 101, 107–13 (2011).

119. See, e.g., OECD, *OECD Guidelines for Multinational Enterprises* 12 (2011), available at [http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises\\_9789264115415-en](http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en); Int'l Fin. Corp., *IFC Performance Standards on Environmental and Social Sustainability* (2012), available at [http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES).

120. See U.N. Special Rep. of the Secretary-General, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on*



The end result of the mandate, the Framework and the GPs, rests on three equally important sections, or pillars: (i) states have a duty to protect against human rights abuses committed by third parties, including business enterprises; (ii) business enterprises have a responsibility to respect human rights; and (iii) victims of business-related human rights abuses need greater access to effective remedies.<sup>121</sup>

Since then, different U.N. organs and treaty bodies have built on the Framework and the GPs in their attempts to operationalize and apply them in the course of human rights monitoring. Of these, CRC Comment 16 constitutes the first systematic attempt by a U.N. treaty body to apply the lessons drawn from the SRSG's mandate to a specific branch of human rights law.<sup>122</sup> Therefore, it is the first U.N. attempt of its kind to elaborate how state duties and corporate responsibilities align in human rights law and what kind of positive actions state parties ought to take under the Convention on the Rights of the Child.<sup>123</sup>

While obviously not conclusive, a careful reading of the GCDF, the Framework and the GPs, and CRC Comment 16 is sufficient to establish the core tenets of the U.N. human rights governance in the sphere of corporate activity. In the following sections, these instruments will be analyzed with regard to their treatment of state ownership.<sup>124</sup> In the case of the Framework and the GPs, all the reports leading to the culmination of the SRSG's mandate are analyzed. By contrast, the GCDF and CRC Comment 16 will be treated in a more concise way, emphasizing the practical orientation of the former, as well as the close connection to the human rights system of the latter.

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*the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter *2006 Interim Report*].

121. See Special Rep. of the Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶¶ 17–26, 88, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *2008 Framework Report*].

122. See Comm. on the Rts. of the Child, *General Comment 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, 62d Sess., Jan. 14–Feb. 1, 2013, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013) [hereinafter CRC].

123. For discussion positioning CRC Comment 16 within the Framework, the GPs, and the international human rights system, see Paula Gerber et al., *General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What Is its Standing, Meaning and Effect?*, 14 MELB. J. INT'L L. 93 (2013); see also Tara M. Collins, *The Relationship Between Children's Rights and Business*, 18 INT'L J. HUM. RTS. 582 (2014).

124. In previous scholarship, the relationship between the Framework and SOEs has been discussed at some length. See SURYA DEVA, *REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS* 110–11 (2012); Deva, *supra* note 66, at 96; Backer, *supra* note 118, at 163–64.

The human rights governance instruments investigated here are diverse but complementary. The Framework and the GPs form the backbone of the contemporary U.N. human rights governance, which is functional in its outlook. CRC Comment 16 emanates more clearly from the U.N. human rights system, as it pays heed to the doctrinal aspects of human rights law. The GCDF, on the other hand, is deployed from the perspective of business self-regulation. It is the only instrument with a practical orientation, probing real-world circumstances in which state ownership and human rights surface.

### *B. How Do the U.N. Instruments Understand State Ownership?*

As discussed above,<sup>125</sup> state ownership raises a number of complex economic, legal, and policy questions. For this reason, this section attempts to distinguish the various ways in which the U.N. instruments conceptualize state ownership prior to addressing the peril, potential, and specialty narratives.

As a general rule, the U.N. instruments approach state ownership primarily through the lens of individual SOEs. In the Framework and the GPs, for example, states are advised to “take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State.”<sup>126</sup> In CRC Comment 16, “all State-owned enterprises” are instructed to undertake child-rights due diligence.<sup>127</sup> In the GCDF, a number of individual SOEs are singled out as examples of perilous conduct.<sup>128</sup>

Against this backdrop, it is interesting that, despite numerous references, none of the instruments provides a clear definition of what constitutes an SOE. Questions, such as whether only wholly- or majority-owned corporations qualify as SOEs or whether a specified statutory function or public policy purpose is needed, are not thoroughly entertained.<sup>129</sup> Further, varying uses of SOEs in different regions is

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125. See discussion in sections I.B. and I.C., *supra*.

126. See U.N. Special Rep. of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, at 9–10 (Mar. 21, 2011) (by John Ruggie) [hereinafter *2011 GPs Report*].

127. CRC, *supra* note 122, ¶ 64.

128. See *Working with SOEs*, *supra* note 116.

129. Compare with the position of the UNCTAD whereby SOEs are understood as corporations of which government has a controlling interest. Control is defined as a stake of 10 percent or more of the voting power, Transnational Corporations (TNC), UNCTAD, [http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx) (last visited March 12, 2016), or where the government is the largest single shareholder, UNCTAD,

hinted at, but their status as strategic instruments employed by emerging economies is not pursued at length.<sup>130</sup> Finally, no references are made to existing regulatory responses or to the extensive state ownership literature in the fields of corporate governance, competition law, trade law, or investment law.

Despite this starting point, there is a great deal of flexibility in positioning the narratives over a range of actors. In particular, there are at least three instances where the U.N. instruments depart from the SOE perspective and adopt a more functional approach. First, the instruments point out that neither the entities' nor states' influence potential is monolithic. Instead, when discussing how states were to approach SOEs, the SRSG held that the "senior management in SOEs is typically appointed by and reports to State entities"<sup>131</sup> and that "[a]ssociated government departments have greater scope for scrutiny" in their actions.<sup>132</sup> This was also the impetus behind CRC Comment 16.<sup>133</sup> The GCDF also addressed a range of avenues through which "States can exercise different degrees of control over SOEs," including holding sole or majority shareholder positions and their ability to appoint directors, and to oblige SOEs to directly report to state agencies.<sup>134</sup>

Second, the instruments recognize the connection between SWF investments and state oversight of SOE activities. Switching the lens to state responsibility, in its 2008 report the SRSG claimed that

the State itself may be held responsible under

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*World Investment Report 2012: Towards a New Generation of Investment Policies* (2012), available at [http://unctad.org/en/PublicationsLibrary/wir2012\\_embargoed\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf).

130. See U.N. Special Rep. of the Secretary-General, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 81, U.N. Doc. A/HRC/4/035, (Feb. 9, 2007) [hereinafter *2007 Mapping Report*].

131. *2008 Framework Report*, *supra* note 121, ¶ 32; see also Special Representative of the Secretary-General, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, ¶ 79, 4th Sess. Hum. Rts. Council, U.N. Doc. A/HRC/4/35/Add.1 (Feb. 13, 2007) [hereinafter *2007 Addendum Report*].

132. Special Rep. of the Secretary-General, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶ 27, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie) [hereinafter *2010 Further Steps Report*].

133. See CRC, *supra* note 122, ¶ 64.

134. *Working with SOEs*, *supra* note 116 (under the "Common Dilemma Scenarios" tab).



international law for the internationally wrongful acts of its SOEs if they can be considered State organs or are acting on behalf, or under the orders, of the State. . . . Much the same is true of sovereign wealth funds and the human rights impacts of their investments.<sup>135</sup>

The SRSG noted increasing state activity in the investment sphere and hinted at the possibility of an SWF investment in a corporation committing human rights violations leading to state responsibility. Accordingly, the SRSG did not consider only traditional public purpose SOEs or SOEs operating internationally in human-rights-sensitive fields under heightened human rights expectations. Instead, even minimal investment activity was considered a possible source for triggering state responsibility.<sup>136</sup> Consequently, the focus shifted from SOEs as individual agents to a more comprehensive view on managing the state-corporation relationship. The proposal made in CRC Comment 16, calling state-owned enterprises to assume a leadership position in conducting children's-rights due diligence, resonates with this view.<sup>137</sup>

Third, the instruments make a distinct attempt to define state ownership in the context of overall state involvement in the market sphere. The GCDF, for example, discussed the possibility of state ownership being “used to support the human rights of citizens in a way that goes beyond commercial considerations” in the market.<sup>138</sup> Likewise, one of the SRSG's major points was that “the state's role as an economic actor is a key—but under-utilized—leverage point in promoting corporate human rights awareness and preventing abuses.”<sup>139</sup> This was even more pronounced where the state itself was “involved in the

135. *2008 Framework Report*, *supra* note 121, ¶ 32.

136. The relationship between SWF investments and human rights occasionally has been discussed in the literature. For example, Van Der Zee has suggested that many SWFs can be considered state organs and, consequently, have a higher responsibility to protect human rights in their investments, despite their separate legal identity. *See* Van Der Zee, *supra* note 95, at 147–48. Demeyre has contested this view, arguing that links of attribution are too weak, tenuous and far removed to accommodate any “investment liability responsibility” as a legal obligation. *See* Demeyre, *supra* note 63, at 207. Similar discussions have also emerged in international investment law. *See, e.g.,* M. Sornarajah, *Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments*, 1 *ASIAN J. INT'L L.* 267, 278–84 (2011); *see also* 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, 17–34 (2011). Nevertheless, the SRSG did explicitly emphasize the ease of state attribution in SOE context. *See 2008 Framework Report*, *supra* note 121, ¶ 32.

137. *See* CRC, *supra* note 122, ¶ 64.

138. *Working with SOEs*, *supra* note 116 (under the “What is the Dilemma?” tab).

139. *2010 Further Steps Report*, *supra* note 132, ¶ 32.

business venture - whether as owner, investor, insurer, procurer, or simply promoter.”<sup>140</sup> In this context, SOEs were discussed only as a single forum for corporate human rights promotion. Especially in the GPs, state ownership was considered to be only one aspect of the state-business nexus.<sup>141</sup> CRC Comment 16 reinforced this notion by discussing the human rights potential of SOEs together with policies such as “those provided by an export credit agency, development finance and investment insurance . . . .”<sup>142</sup>

In sum, the approach of the U.N. instruments to state ownership was already mixed at the definitional level. Often, individual state-owned companies with their individual human rights perils and potential formed the primary lens through which to examine state ownership. Regardless, the instruments also made room for a more functional perspective on state ownership. Most importantly, the U.N. instruments clearly recognized changes in the modes of modern state ownership and sought to approach new economic realities and new forms of state shareholder power from a human rights perspective.

### *C. State Ownership as Peril*

Each of the U.N. business and human rights governance instruments is somehow rooted in the peril narrative. Most commonly, the perils of state ownership appear either as detrimental economic statecraft pursued by autocratic regimes or as overall inefficiency, depriving resources from the human rights enterprise. Beyond that, however, the peril narrative also is embodied by a more nuanced interrogation of the actual activities of SOEs both domestically and internationally.

The U.N. instruments ground the peril narrative in the revitalization of state ownership. The SRSG’s treatment discussed state ownership already in the first report, which stressed that

ways must be found to engage State-owned enterprises in addressing human rights challenges in their spheres of operation. They are becoming increasingly important players in some of the most troubling industry sectors yet appear to operate beyond many of the external sources of scrutiny to which commercial firms are

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140. Special Rep. of the Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, ¶ 16, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) [hereinafter *2009 Towards Report*].

141. See *2011 GPs Report*, *supra* note 126, at 9–10, 12.

142. CRC, *supra* note 122, ¶ 64.

subject.<sup>143</sup>

The rationale was that the growing influence of certain SOEs in some industry sectors should be reflected in the supervision of their human rights performance.<sup>144</sup> It was further noted that SOEs often operated beyond normal regulatory mechanisms.<sup>145</sup>

A similar approach continued in the SRSG's later reports. In 2007, the SRSG claimed that "[e]vidence suggests that firms operating in only one country and state-owned companies often are worse offenders than their highly visible private sector transnational counterparts."<sup>146</sup> Additionally, SOEs from emerging economies, in particular, had not associated themselves with voluntary CSR initiatives.<sup>147</sup> For the SRSG, this was an indication of a "mounting concern in the public space about human rights protection and State-owned enterprises."<sup>148</sup>

In the GCDF, state ownership was framed by highlighting the increasing importance of SOEs from emerging economies, leading to the "emergence of state-owned TNCs [transnational corporations]."<sup>149</sup> CRC Comment 16, however, did not reflect on the realities of the increasing state-owned capital flows in a similar way. Instead, it focused on inefficiencies associated with the mismanagement of government revenues from state-owned businesses that, in turn, jeopardized sufficient resource allocations for the realization of children's rights.<sup>150</sup>

Even though grounded in the increasing economic influence of state ownership globally, the peril narrative emerged strongly in relation to the domestic operations of SOEs. In particular, the SRSG and the GCDF highlighted structural deficiencies of the state-owned sector. Apart from the possibility of impunity, highlighted in the SRSG's treatise, the skewed regulatory environment emerged as the chief concern.<sup>151</sup> SOEs were considered to be plagued by "having limited

143. *2006 Interim Report*, *supra* note 120, ¶ 80.

144. *Id.*

145. *Id.*

146. *2007 Mapping Report*, *supra* note 130, ¶ 3.

147. *See id.* ¶ 81; *see also* Rae Lindsay et al., *Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles*, 6 J. WORLD ENERGY L. & BUS. 2, 32–33 (2013).

148. *2007 Addendum Report*, *supra* note 131, ¶ 78.

149. *Working with SOEs*, *supra* note 116 (under the "What is the Dilemma?" tab); *see, e.g., id.* (under the "Examples of Emerging Economy Scenarios" tab).

150. *Compare* CRC, *supra* note 122, ¶ 55, *with* CHRISTOPHER MCCRUDDEN, *BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, & LEGAL CHANGE* 115–28 (2007) (discussing arguments against and in favor of linkage and government spending).

151. *See 2006 Interim Report*, *supra* note 120, ¶¶ 79–80 (discussing the policy instruments available to states and external sources of scrutiny to which firms are subject).

accountability other than to their ‘parent’ governments” and limited transparency concerning their activities, resulting in market domination, favorable regulatory treatment, and substantial balance sheets.<sup>152</sup> Accordingly, the perilous conduct of SOEs was aggravated by their minimal need to respond to “outside pressure . . . with respect to their human rights performance.”<sup>153</sup>

In sum, the peril narrative stood out strongly in the U.N. instruments. The instruments, especially the Framework, the GPs, and the GCDF, framed the perils of state ownership, embodied by SOEs, in multiple ways. State ownership of the internationally-operating corporations was revitalized, human rights treaty bodies were observed to pay closer attention to SOEs, and the influence of states on SOEs in regulatory and shareholder capacities was noted. SOEs were particularly active in the human-rights-sensitive sectors; their influence was increasing faster than that of MNEs; and they were not participants in the same voluntary CSR schemes as private corporations. There was mounting evidence of their adverse human rights impacts. Simultaneously, SOEs often could evade public scrutiny, enforcement, and market discipline in a way private MNEs could not. Finally, it also was noted that state ownership was prone to mismanagement of government revenues, leading to insufficient resources devoted to the overall human rights enterprise.

#### *D. State Ownership as Potential*

The U.N. instruments, in general, note the growing economic significance of state ownership in the global economy. Accordingly, they also reflect on its potential for advancing the business and the human rights agenda. In the SRSG’s treatise, in particular, the overall approach changed from peril to potential as the mandate progressed, and state ownership started to emerge primarily as an instrument to civilize corporate behavior using market mechanisms. Most importantly, SOEs started to be seen as a group of corporations that showed the greatest short-term promise in integrating human rights considerations.

The move from peril to potential was already discernible in the SRSG’s 2008 report introducing the Framework. Here, state ownership issues were grouped under the state’s ability to influence corporate cultures, and the SRSG suggested that engaging SOEs was different from privately owned companies. The view was that “in principle,

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152. *Working with SOEs*, *supra* note 116 (under the “Common Dilemma Scenarios” tab).

153. *Id.*

inducing a rights-respecting corporate culture should be easier to achieve in State-owned enterprises.”<sup>154</sup> This was because “[s]enior management in SOEs is typically appointed by and reports to State entities.”<sup>155</sup> CRC Comment 16 shared this view, calling states to “lead by example, requiring all State-owned enterprises to undertake child-rights due diligence and to publicly communicate their reports on their impact on children’s rights.”<sup>156</sup>

The SRSG also noted that some states were already starting to push policies for a greater “respect for human rights” in SOE operations.<sup>157</sup> In this connection, the SRSG suggested that, in order to open up the human rights potential of state ownership, one must realize that “the state’s role as an economic actor is a key—but under-utilized—leverage point in promoting corporate human rights awareness and preventing abuses.”<sup>158</sup> Where the state was involved with any kind of commercial entities, its human rights obligations and wide policy margin dictated that additional, human-rights-based supervision was warranted. Thus, SOEs as separate entities started to disappear from the SRSG’s vision, and state ownership was understood to be part of a greater set of economic policy measures.<sup>159</sup>

Elsewhere in the GPs, the SRSG again emphasized that state ownership and control offered the most effective means to ensure that relevant policies, legislation, and regulations regarding respect for human rights were implemented.<sup>160</sup> CRC Comment 16 shared this view, advising states to make “public support and services, such as those provided by an export credit agency, development finance and investment insurance conditional on businesses carrying out child-rights due diligence.”<sup>161</sup> Its prescriptions, however, were more closely embedded in the existing human rights treaty system and state obligations than the SRSG’s policy-coherence-influenced intervention. CRC Comment 16 made this clear by stating that “States should not invest public finances and other resources in business activities that violate children’s rights” as a part of their obligation to respect human

154. *2008 Framework Report*, *supra* note 121, ¶ 32.

155. *Id.*

156. CRC, *supra* note 122, ¶ 64.

157. *2010 Further Steps Report*, *supra* note 132, ¶ 28.

158. *Id.* ¶ 32.

159. *See, e.g., 2011 GPs Report*, *supra* note 126, at 9–10, 12; *2009 Towards Report*, *supra* note 140, ¶ 16.

160. *See 2011 GPs Report*, *supra* note 126, at 9–10 (discussing, in the Commentary to Principle 4, that States have greater means within their powers when they own or control business enterprises).

161. CRC, *supra* note 122, ¶ 64.



rights.<sup>162</sup>

Deviating from the GPs and CRC Comment 16, the GCDF probed the mechanisms through which private MNEs were able to influence SOEs. Because the GCDF focused primarily on the skewed market conditions, the potential narrative was deployed from the perspective of civilizing state ownership through market mechanisms.<sup>163</sup> For example, the instrument emphasized that private companies should use their shareholder leverage to make sure that “no abuses take place” in joint ventures with SOEs.<sup>164</sup> The GCDF did, however, recognize the possibility of “SOEs used to support the human rights of citizens in a way that goes beyond commercial considerations.”<sup>165</sup> Furthermore, the GCDF referred to a more general argument when it addressed the social policy functions pursued by SOEs:

SOEs have been used in both developed and emerging markets to promote broader societal goals, including higher levels of employment, the avoidance of mass layoffs in times of economic difficulty or the provision of affordable food and energy to the local population. Whilst this can make SOEs economically unsustainable without government support – it can do much to further a range of human rights.<sup>166</sup>

In sum, the argumentation of the SRSG regarding state ownership concentrated originally on SOEs and evolved from focusing on their significance, their adverse human rights impacts, and the perceived structural deficiencies in their regulation to their human rights potential. The SRSG eventually discarded this approach toward SOEs as individual companies with greater-than-average human rights

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162. *Id.* ¶ 27; *see also id.* ¶ 26.

163. *Compare Working with SOEs*, *supra* note 116 (under the “Suggestions for Responsible Business” tab), *with* Shapiro & Globerman, *supra* note 6, at 114–24, and OECD, *SOEs Operating Abroad: An Application of the OECD Guidelines on Corporate Governance of State-Owned Enterprises to the Cross-Border Operations of SOEs* ¶¶ 4–9 (2009), available at <http://www.oecd.org/dataoecd/46/20/44215438.pdf>.

164. *Working with SOEs*, *supra* note 116 (under the “Suggestions for Responsible Business” tab).

165. *Id.* (under the “What is the Dilemma?” tab).

166. *Id.* (under the “Common Dilemma Scenarios” tab). In this connection, the GCDF considered state ownership as a form of social policy taking human rights as its reference point. *Compare id.*, *with* Hans Christiansen, BALANCING COMMERCIAL AND NON-COMMERCIAL PRIORITIES OF STATE-OWNED ENTERPRISES 10–11 (OECD, Corporate Governance Working Papers No. 6, 2013), available at <http://dx.doi.org/10.1787/5k4dkhztkp9r-en> (last visited Jan 22, 2015).

footprints and started to emphasize general state ownership as a promising tool for promoting a business and human rights agenda. The approach of CRC Comment 16 was more tightly focused on setting up the actual parameters of using state wealth to secure realization of states' human rights obligations under Convention on the Rights of the Child. The GCDF, on the other hand, probed the conditions in which private companies might be used to bring about better human rights governance in SOE operations.

### *E. The Specialty of State Ownership*

While the peril narrative emphasizes the detrimental qualities of the power state holds over companies, the potential narrative seeks to transform that influence to promote the business and human rights agenda. In doing so, both narratives fall back on the special relationship between state and SOEs as mediated by states' ownership function. In the U.N. instruments, the specialty narrative operates on two different levels. First, the specialty of state ownership is approached as a question of public policy. Second, particularly the Framework and CRC Comment 16 seek to translate the question of state ownership into a more specific question of state responsibility under international law.

The SRSG's treatise, in particular, framed the specialty narrative and was initially in extralegal vocabulary that emphasized policy considerations. In the 2008 report introducing the Framework, for example, the SRSG claimed that "[b]eyond any legal obligations, human rights harm caused by SOEs reflects directly on the State's reputation, providing it with an incentive in the national interest to exercise greater oversight."<sup>167</sup> In later reports, the SRSG continued to underline the "strong policy reasons for home States to encourage their companies to respect rights abroad, especially if a State itself is involved in the business venture."<sup>168</sup> Specifically, the SRSG made a strong connection between sovereign wealth and human rights promotion, stating that "the closer an entity is to the State, or the more it relies on statutory authority or taxpayer support, the stronger is the State's policy rationale for ensuring that the entity promotes respect for human rights."<sup>169</sup> As such, the initial basis for both detrimental and progressive human rights impacts of state ownership sprung primarily from domestic policy considerations.

However, the SRSG also pointed out that international law provided

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167. 2008 Framework Report, *supra* note 121, ¶ 32.

168. 2009 Towards Report, *supra* note 140, ¶ 16.

169. 2010 Further Steps Report, *supra* note 132, ¶ 26.

multiple avenues for triggering state responsibility over the actions of an SOE. While the SRSG generally anchored the responsibility for corporations' human rights violations in the state duty to protect against human rights abuse by third parties, SOEs were discussed more prominently with regard to the state duty to respect human rights and attribution of human rights violations to the state.<sup>170</sup> Early on, the SRSG emphasized that

States can also be found to breach the duty to respect if State-owned or controlled enterprises or other companies exercising public functions (in situations where their acts may be attributed to the State) do not refrain from abuse or if the State has laws or policies which facilitate abuse by business enterprises.<sup>171</sup>

While the discussion of state responsibility is, in general, slightly ambiguous, when the SRSG addressed SOEs separately they were clearly differentiated from private corporations.<sup>172</sup> In particular, the SRSG stressed that

When the treaty bodies do discuss State-owned enterprises, they hold States responsible for abuse carried out by such enterprises even where the State argues that it has minimum control over the enterprise's daily decision-making. What is less clear is whether the treaty bodies consider the State's responsibility to stem from the duty to protect (in situations where the enterprises may [*sic*] considered in the same way as private businesses) or from the duty to respect (if State-owned enterprises are considered State organs or agents).<sup>173</sup>

The SRSG noted that it was not clear whether the source of this responsibility lay primarily with the duty to respect or with the duty to

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170. See *2007 Addendum Report*, *supra* note 131, at 2–3.

171. *Id.* ¶ 10.

172. In multiple reports, the SRSG hesitated in taking a firm position on attribution under human rights law. See *2007 Addendum Report*, *supra* note 131, ¶¶ 78, 80; *2007 Mapping Report*, *supra* note 130, ¶ 81. For an overview of customary international law on attribution, see BADIA, *supra* note 47, at 163–96; JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 161–65 (2013); Feit, *supra* note 53, at 144–68.

173. *2007 Addendum Report*, *supra* note 131, ¶ 79 (internal citation omitted).

protect.<sup>174</sup> Ultimately, however, this distinction made no difference, as

it appears that the State is responsible for ensuring State-owned enterprises do not abuse human rights, either as part of the obligation to respect (if State-owned enterprises are considered State organs) or as part of the obligation to protect (if they are considered private businesses).<sup>175</sup>

In CRC Comment 16, SOEs were grouped even more clearly under the state obligation to respect human rights. While CRC Comment 16 did not refer to attribution, it made numerous references to the “State as a whole, regardless of its internal structures [and decentralization of power]”<sup>176</sup> and to companies acting as state agents.<sup>177</sup> Further, state-led investment was framed as belonging under the obligation to respect human rights.<sup>178</sup>

Even though the SRSG’s treatise centered on the state duty to protect human rights from third-party violations, SOEs also were addressed under the second pillar of the Framework, the corporate responsibility to respect human rights. Potential additional responsibilities of SOEs were considered, especially in relation to privatized state functions: “More than respect may be required when companies perform certain public functions. . . . But it remains unclear what the full range of those responsibilities might be and how they relate to the State’s ongoing obligation to ensure that the rights in question are not diminished.”<sup>179</sup> The SRSG also suggested that certain corporations could be targeted with more extensive corporate human rights obligations.<sup>180</sup> For example, the SRSG made several references to SOEs performing limited public functions, claiming that SWFs and

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174. This distinction has been noted to disrupt some core assumptions of the SRSG’s conceptualization. For example, Backer has argued that the SRSG’s otherwise well-functioning division to conservative legalism of state duty to protect pillar and overarching functionalism of corporate responsibility to respect pillar breaks down in the case of entities that straddle the state-corporate divide. *See* Backer, *supra* note 118, at 164. In a more critical tone, Deva considers that the SRSG has created a conceptual anarchy because concepts of “respect” and “protect” have been conflated. His critique posits that, in the SOE context, the government would comply with its respect obligation but not the protect obligation in ensuring that an SOE does not violate human rights. *See* DEVA, *supra* note 124, at 110–11.

175. *2007 Addendum Report*, *supra* note 131, ¶ 80.

176. CRC, *supra* note 122, ¶ 10.

177. *See, e.g., id.* ¶¶ 5, 8.

178. *See id.* ¶¶ 26–27.

179. *2009 Towards Report*, *supra* note 140, ¶ 64.

180. *See id.* ¶ 89.

export credit agencies (ECAs) were prone to human rights risks and that they should monitor and control the human rights impacts of their investments.<sup>181</sup> Thus, at least some SOEs were clearly singled out as entities having potential for heightened corporate responsibilities to respect human rights under the second pillar in the early phase of the mandate. The finalized GPs did not, however, continue on this track. Instead, all enterprises were considered to have the same responsibility regardless of ownership structures.<sup>182</sup> This line of reasoning persisted in CRC Comment 16, but certain SOEs were still singled out. States were, for example, advised to ensure

agencies . . . such as export credit agencies, take steps to identify, prevent and mitigate any adverse impacts the projects they support might have on children's rights before offering support to businesses operating abroad and stipulate that such agencies will not support activities that are likely to cause or contribute to children's rights abuses.<sup>183</sup>

In the GPs, state ownership was ultimately discussed under the rubric of the state duty to protect. The duty prescription was distilled in Principle 4, "the State-business nexus":

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.<sup>184</sup>

The commentary referred to states as the primary duty-bearers under international human rights law and the proximity of a business enterprise to the state. Further, state ownership and control also offered the most effective means to ensure that relevant policies, legislation, and regulations regarding respect for human rights were implemented,

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181. See, e.g., *2008 Framework Report*, *supra* note 121, ¶ 39 (considering an example of the home State side).

182. Even in this context, the SRSG connects SOEs and the possibility of attribution. See U.N. Office of the High Comm'r for Hum. Rts., *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 21–22, HR/PUB/12/02 (2012).

183. CRC, *supra* note 122, ¶ 45(c).

184. *2011 GPs Report*, *supra* note 126, at 9.

including that the senior management of SOEs report to the state agencies and associated government departments that have greater scope for scrutiny and oversight.<sup>185</sup> Accordingly, the SRSG argued that states could and should influence corporations operating with statutory authority, taxpayer support, or in other cases where they were closely aligned with state functions.<sup>186</sup> The human rights commitments of states were to be made categorical when interacting with the market through state ownership. However, the demand was not articulated in legal terminology. Instead, the closer state involvement stemmed from arguments of policy coherence. Despite the earlier emphasis on easier attribution of SOE actions to the state, state responsibility was referred to only in passing.<sup>187</sup>

Overall, the specialty narrative focused little on state responsibility for the activities of SOEs in the SRSG's agenda. While the GPs retained the possibility that acts of state-owned companies could entail a violation of states' own international law obligations, the possibility of state attribution for SOE abuses was entertained mostly as an additional argument for greater policy coherence. By contrast, CRC Comment 16 was more explicit in tying state ownership to the existing human rights treaty system.<sup>188</sup> Thus, using state ownership instrumentally to nudge companies to being more sensitive toward their human rights impacts was framed as part of the state obligation to respect human rights and not as an ethically correct policy choice. Despite their differences, all U.N. instruments turned to the "special bond" between state shareholders and their investee companies. Most importantly, each instrument attempted to translate the often abstract coupling between universal human rights and domestically-drafted ownership policies into legal language by discussing state responsibility under customary international law or distinct human rights regimes. With CRC Comment 16 being more optimistic and the GCDF, the Framework, and the GPs being more skeptical, the instruments nevertheless attempted to make sense of both the perils and the potentials of state ownership by embedding it in the specialty narrative, either through policy argumentation or through state responsibility frameworks provided by international law.

#### *F. Summing Up the U.N. Experience*

The U.N. instruments portray an interesting vision of state

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185. *See id.*

186. *See id.*

187. *See id.* at 9–10.

188. *See CRC, supra* note 122, ¶ 26-27.

ownership. Of these three instruments, the approach of the SRSG on state ownership showed the greatest variation and exposed state ownership to the greatest variety of human-rights-relevant factors. CRC Comment 16, on the other hand, connected state ownership more concretely with the existing human rights treaty system and made a stronger case for the far-reaching duties of state ownership to achieve positive human rights ends. The practical focus of the GCDF exposed state ownership particularly well to its market-based critiques. Despite their differences, all three instruments connect state ownership and human rights through three distinct narratives. While none of the narratives explored here is discrete or clearly delineated, taken together they open up a human rights dimension in state ownership and illuminate the ways this dimension ought to be utilized as a regulatory space.

The peril narrative unfolds in a way that reflects the traditional critiques mounted against state ownership. In this narrative, state ownership is linked to the convolution of political and commercial agendas, private rent-seeking, cumbersome bureaucratic structures, and the privileged position of SOEs vis-à-vis private market participants. The U.N. instruments clearly connect these critiques to the business and human rights agenda and explore their practical consequences such as impunity, low interest in CSR, and suboptimal allocation of scarce resources.

The potential narrative stands out when states are advised to use corporate law structures in a shareholder capacity to promote corporate respect for human rights. In particular, the discussion on the special status of SOEs, the investment policies, and other wealth transfers through ECAs and SWFs connects state shareholder power with human rights promotion. CRC Comment 16 is the most explicit in this regard. According to CRC Comment 16, SOEs are expected to assume a position of leadership when it comes to conducting human rights due diligence. Accordingly, state shareholder power, as embedded in other human-rights-sensitive economic tools and policies, is portrayed as an effective space for human rights governance.

The specialty narrative is the most elusive of the three. It touches on both the peril and the potential narratives and is a primary vehicle for making the connection between state ownership and human rights in international law. While most potent in discussions of domestic policy and the responsible use of sovereign wealth, the specialty narrative also attempts the coupling between state responsibility and state ownership under international law. Here, the instruments take different routes. In the final vision of the Framework and the GPs, the specialty of state ownership is downplayed. Attempts to use sovereign wealth as leverage



is not motivated by the legal obligations of states under human rights law. Rather, the reasons for heightened duties stem from policy coherence and the avoidance of reputational risks.<sup>189</sup> While the GCDF shares the vision of the Framework and the GPs on the difficulties of triggering state responsibility, CRC Comment 16 is more willing to include state ownership in the general human rights duties imposed on states. The specialty narrative warrants a separate discussion precisely because of the coupling it makes between the human rights duties of states and the immense power that state shareholders command.

Beyond exposing state ownership as a governance space with pervasive, and so far undertheorized, human rights ramifications, the U.N. experience offers a vision of the regulatory techniques for the future. In particular, the ways in which U.N. instruments portray state ownership through perils, potentials, and specialty make significant use of private market mechanisms. In the peril narrative, the view of state ownership as an instrumentality of waste and oppression pays homage to the traditional critiques of state ownership focusing on the privileged position of SOEs in the market. In the potential narrative, the civilizing touch of the state is sought in the power of the state shareholder and of Western companies to gain leverage over SOEs from autocratic regimes. In the specialty narrative, the responsible use of sovereign wealth and the possibility of state responsibility are used to portray state ownership as a functionally-oriented tool for human rights governance.

As such, the market-based model preferred by the U.N. instruments reflects a more constitutive development where other bodies of law are increasingly exposed to the demands rising from the human rights system. As the pinnacle of this process, the U.N. business and human rights agenda seeks to integrate human rights considerations into the full range of economic law and policy discourses spanning corporate law, investment law, labor law, consumer protection, and many others.<sup>190</sup> State ownership embodies these developments because it causes states' market operations to be permeated by human rights ends. At the same time, however, the nascent human-rights-based regulation of state ownership also suggests a regulatory strategy that is not fundamentally different from more established regimes featuring the use of state

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189. The SRSG's narrow view both on law and legal responsibility and corresponding emphasis on policy arguments has been noted in various contexts including home state responsibility, direct human rights obligations of corporations, and limited approach to application of extraterritorial jurisdiction. 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, 275–80, 291–94 (Surya Deva & David Bilchitz eds., 2013).

190. See RUGGIE, *supra* note 111.



shareholder power. Instead, the U.N. experience may offer a vision of the future where realization of human rights is best sought by strategically attaching public ends to markedly private arrangements in the global markets.

#### CONCLUSION: STATE OWNERSHIP, HUMAN RIGHTS, AND THE TURN TO MARKET

State ownership and human rights can be coupled in a number of ways. At one end of the spectrum, human rights may illuminate the deficiencies in the ways states use their wealth. State ownership might reveal the appropriation of national wealth by a small elite group, expose failures of the rule of law, and enable states to export their abusive policy preferences abroad. At the other end, the coupling is presented as a continuation of the developmental state model where state ownership, channeled through the investee companies, appears as a vehicle for the realization of human rights. Rendered acute by the rise of globally-oriented state ownership, these opposite positions surface across the international legal and policy discourses as narratives detailing the perils and potentials of state ownership. The coupling between state ownership and human rights is further operationalized by the specialty narrative interrogating the basis of, and limits on, the responsible use of the sovereign wealth tied to corporate equities.

Historically, human rights law has not been utilized effectively in controlling the use of state shareholder power. Following the overall turn to human rights in international corporate regulation, recent U.N. instruments do, however, recognize the peril and potential of state ownership for the realization of human rights. In the peril narrative, state ownership appears as impunity, privilege, and misallocation of scarce resources. In the potential narrative, state ownership stands for a flexible use of private governance mechanisms to civilize corporate conduct regardless of territorial jurisdiction. While differing in their view on the specialty of state ownership, the U.N. instruments ground the responsible use of sovereign wealth in the international human rights system. In its weakest form, state ownership is discussed in terms of reputation and policy coherence. In its strongest interpretation, human-rights-sensitive state ownership takes the form of a legal obligation grounded in the state duty to respect human rights. In each case, however, the economic power of state shareholders appears as a human rights space. Importantly, this regulatory space has dimensions beyond the most vocally raised human rights concerns such as protection of private property against state actions, as displayed in much of international arbitration involving SOEs.



Concomitant with the evolution of SOEs in the global economy, the U.N. human rights governance instruments clearly recognize the significance of state ownership and its contemporary institutional arrangements. They depart from the traditional paradigm case, a wholly-owned state company, and view the current forms of internationalized state ownership as functional and flexible regulatory spaces. Most importantly, the U.N. instruments approach this regulatory space with a focus on private market transactions. Embodying the calls for states to “use their power, as owners and operators of SOEs, to control the tools of transnational economic ordering to enhance a new social corporate law,”<sup>191</sup> to utilize the market in exporting rule of law,<sup>192</sup> or to use the purchasing power of the state to pursue social ends,<sup>193</sup> the U.N. instruments portray the market sphere as a site for civilizing the ways in which states own corporations. In the peril narrative, the market sphere mediates the leverage of private companies in civilizing privileged SOEs. In the potential narrative, state shareholders employ the market sphere by using their formal control rights to introduce human-rights-sensitive policies in corporate operations.

Consistent with modern state ownership structures being framed as functionally separate and institutionally independent from the “visible hand” of the government, the U.N. instruments’ preference for market-based governance also exposes a general turn to private techniques in modern human rights governance. To some, adopting techniques that seek to further the realization of human rights in the market risks the subordination of social values to market logic. To others, the market represents an underutilized regulatory space that is capable of adjusting economic logic toward gaining better social outcomes. Based on the experience with state ownership in recent governance instruments, the U.N. human rights enterprise appears firmly embedded in the latter category. Whether it is exposing abusive SOEs to the market discipline of private actors or recalibrating sovereign investment in order to make private companies more sensitive to human rights claims, the contemporary U.N. human rights system views state ownership as a governance space where private shareholder power makes the greatest difference.

Ultimately, there are two key lessons to be drawn from the recent U.N. experience with state ownership. First, in an era when the U.N. is often sidelined as a key institution of international economic governance, the efforts of its human rights institutions to regulate and

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191. Muchlinski, *supra* note 94, at 705.

192. See Backer, *supra* note 68, at 5–6.

193. See, e.g., MCCRUDDEN, *supra* note 150.

define terms of state ownership policies signal a subtle rejuvenation of the United Nations as a meaningful forum. By imprinting international human rights ends onto domestic economic policies, the United Nations, and its human rights system in particular, demonstrates willingness to utilize emerging cracks and fissures in the global economic governance for broader institutional gain. Second, the preference for market-based techniques suggests an attempt to reclaim globalized and financialized markets to serve economic justice. The rise of globally-oriented state ownership has, at least momentarily, provided an opportunity to revisit and reconsider some of the key theoretical underpinnings of contemporary economic governance. Sensitive to changes in the architecture of state ownership and in the global economy, the U.N. instruments have primarily used this discursive space to embed states' shareholder power into human rights governance and to recalibrate *private* shareholder identity to align with *public* ends.<sup>194</sup> As such, the U.N. experience with state ownership may be indicative of a more constitutive shift in the ways the human rights impacts of corporate activity, or any economic activity, are approached in the future.

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194. Compare this with the concept of “publicization” introduced in Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285–90 (2003).



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