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Governing the Good State Shareholder

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Governing the Good State Shareholder: The Case of the OECD Guidelines on Corporate Governance of State-Owned Enterprises

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Abstract

The newly revised Guidelines on Corporate Governance of State-Owned Enterprises (2015) by the OECD are fast emerging as a new regulatory paradigm for administration of State-owned enterprises and organization of State ownership function. This article analyses the Guidelines' policy prescriptions, governance strategies and integration into global governance. Noting that the instrument operates by governing shareholder's internal make-up, decision-making and objective-setting, the article argues that the Guidelines amount to a robust model for ideal State shareholder – the Good State Shareholder. Efficient, engaged and accountable, the Good State Shareholder emerges as a critical actor in the contemporary global economy where States continue to amass and command immense shareholder power. However, when juxtaposed with recent attempts by the UN to adopt State ownership as an instrument of human rights governance, the fault lines of the Good State Shareholder model, as well as emerging techniques of shareholder governance, are exposed.

1 Introduction*

Public asset governance has emerged as a crucial policy issue in the post-Financial Crisis economic architecture. In an era characterized by faltering economic development and eroding tax bases, the efficient utilization of State-owned assets and State-owned enterprises (SOEs), in particular, has assumed new relevance in economic policy-making.¹ Coupled with growth of multinational SOEs hailing from the emerging economies, governance relationships between governments and their investee companies are increasingly viewed as key sites to achieve efficiency gains and to temper surging State capitalism.² Corporate governance, the system of rules, practices and processes through which a company's objectives and relationships between its stakeholders are managed, stands at the critical juncture in these exercises.³

Noting the growing attention to SOEs' financial footprint, this article analyses recent international governance efforts that seek to recalibrate processes through which States use their shareholder power. The article focuses on the Guidelines on Corporate Governance of State-Owned Enterprises (SOE Guidelines) by the Organisation for Economic Co-operation and Development (OECD), a soft law instrument revised in July 2015.⁴ Using the SOE Guidelines both as a descriptive and an analytical lens, the article outlines contemporary best practices in SOE governance and analyses the SOE Guidelines' framework of operationalization. The article further identifies the SOE Guidelines as a distinctive instrument that bridges corporate governance and global governance. Illustrative of the OECD's 'networked governance', the SOE Guidelines have been adopted in various global governance regimes spanning from international economic law to human rights. Simultaneously, however, the broad appeal of the SOE Guidelines draws attention to their normative underpinnings and, ultimately, to ideological struggles of SOE governance and State ownership in general.

The article makes two main arguments. First, it posits that, despite their name, the SOE Guidelines are best understood as an instrument that seeks to *govern shareholders*. Specifically, the SOE Guidelines underscore the key role of State shareholders in turning SOEs into efficient actors that contribute to optimal allocation of scarce public resources both locally and globally. To this end, they promise to channel State shareholder power towards principles of efficiency, transparency and

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¹ Dag Detter and Stefan Fölster, *The Public Wealth of Nations: How Management of Public Assets Can Boost or Bust Economic Growth* (Palgrave Macmillan 2015) 2–15.

² See e.g. Aldo Musacchio, Sergio Lazzarini and Ruth Aguilera, *New Varieties of State Capitalism: Strategic and Governance Implications* 29 *The Academy of Management Perspectives* 115 (2015).

³ See especially Mariana Pargendler, *State Ownership and Corporate Governance* 80 *Fordham Law Review* 2917 (2012) and Anna Grosman, Ilya Okhmatovskiy and Mike Wright, *State Control and Corporate Governance in Transition Economies: 25 Years on from 1989* 24 *Corporate Governance: An International Review* 200 (2016).

⁴ OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2015 Edition), available at <<http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>>.

accountability in the public interest. In the process, the SOE Guidelines devise a robust model for the Good State Shareholder which, akin to emerging shareholder stewardship codes, sets a framework for organization and behaviour of the ideal State shareholder. An example of the OECD's global governance capacities, the Good State Shareholder model forms a highly portable governance paradigm for administration of SOEs and State ownership function within and beyond the OECD area.

Against this backdrop, the article's second main argument suggests that the SOE Guidelines offer an incomplete account of State shareholders' public functions. In particular, the Good State Shareholder model sidelines international human rights as a source of checks and balances that should, and increasingly does, affect State Shareholder's ownership rationality. Somewhat ironically, however, the SOE Guidelines have been integrated as a crucial policy platform in the most recent practice by the UN business and human rights community. While it is argued that the wholesale adoption of the Good State Shareholder model in human rights governance misconstrues the SOE Guidelines' normative, strategic and practical tenets, the UN's deliberate utilization of the instrument nevertheless exposes the stakes in construing and defining the ideal State shareholder and, more fundamentally, in governing the soul of shareholder.⁵

Naturally, the SOE Guidelines are not the only governance instrument attempting to control State shareholder behaviour. On the contrary, the SOE Guidelines operate in a complex regulatory framework that spans national, regional and international regimes. On national level, administrative law, corporate law and specific ownership statutes often affect general parameters of State shareholding.⁶ On regional level, the European Union (EU) maintains a multi-layered structure, comprised of primary and secondary legislation, which regulates the conduct of States when they intervene in the market economy through shareholder positions.⁷ On international level, trade and investment law posit various requirements to State shareholders' relationship with their investee companies.⁸ Extensive regulation notwithstanding, this article maintains that the SOE Guidelines emerge as a crucial node in the regulatory matrix

⁵ Compare with Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (2nd edn, Free Association Books 1999) vii-xxv.

⁶ See, for example, the lively discussion on Federal ownership in the US after the Financial Crisis. Representative publications include Benjamin Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise* 62 *Administrative Law Review* 1127 (2010), Marcel Kahan and Edward Rock, *When the Government Is the Controlling Shareholder* 89 *Texas Law Review* 1293 (2011), and Steven Davidoff, *Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis* 95 *Minnesota Law Review* 1733 (2011).

⁷ In this regard, free movement of capital and State aid law are, perhaps, the key branches of EU law. See e.g. Francesco De Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013) and Carsten Gerner-Beuerle, *Shareholder between the Market and the State. The VW Law and Other Interventions in the Market Economy* 49 *Common Market Law Review* 97 (2012).

⁸ For trade law, see e.g. Ming Du, *China's State Capitalism and World Trade Law* 63 *International and Comparative Law Quarterly* 409 (2014) and Bart de Meester, *International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State* 20 *European Business Law Review* 779 (2009). For investment law, see e.g. Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Wolters Kluwer 2014).

due to their unique governance strategy. So far under-studied, the SOE Guidelines are highly relevant to a number of socio-legal research streams including comparative corporate governance, regulation studies, political economy and global governance. For this reason, this article also hopes to initiate a debate in which the significance of the SOE Guidelines could be comprehensively examined.

The article is structured as follows. First, section II briefly revisits conflicted history of State ownership, with an emphasis on rediscovered interest in SOEs' governance arrangements spurred by recent rise and internationalization of emerging economy SOEs. Section III introduces the SOE Guidelines and their substantive prescriptions. Section IV analyses the SOE Guidelines' governance strategies, arguing that the SOE Guidelines operate by forming a portable model of the Good State Shareholder identity – a practice which finds its closest counterpart from emerging shareholder stewardship movement. Finally, section V, juxtaposing the SOE Guidelines with business and human rights approach to State ownership, highlights the stakes and fault lines implicit in construing the model of the Good State Shareholder. Section VI concludes.

2 State-owned Enterprises in the World Economy

SOEs have been key components in the world economy throughout the 20th century. This section summarizes their significance in economic development, discusses their utilization as tools of regulation and describes the rise of the privatization movement to counter faults in SOE governance from the 1970s onwards. Next, the section underscores contemporary growth and internationalization of State ownership and briefly sketches regulatory responses prompted by rising State capitalism. Ultimately, this section provides a setting for further discussion on significance and governance of SOEs in the 21st Century world economy.

2.1 A Short History of Public Enterprise

SOEs have been integral parts of the economy throughout the modern era.⁹ Take the economic history of the 20th century Europe as an example. Already in the 1920s and 1930s, large European States had commenced massive nationalization programs which brought a huge number of companies and industries under direct State management. Thus, Britain, France, Italy and Germany all reconfigured their economic policies to revolve around State ownership of strategic sectors such as electricity, broadcasting and transport.¹⁰ After the Second World War, nationalizations accelerated and they were followed by establishment of new types of SOEs, such as financial holding companies enabling the development of new innovations, and even whole industry

⁹ For a historical treatise, see e.g. Pier Angelo Toninelli, *From Private to Public to Private Again: A Long-Time Perspective on Nationalization* 4 *Analise Social* 675 (2008).

¹⁰ Pier Angelo Toninelli, *The Rise and Fall of Public Enterprise: The Framework* in Pier Angelo Toninelli (ed), *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000) 14–21.

sectors.¹¹ In many instances, SOEs formed the backbone of the economy and they were often preferred actors in the economic architecture, dubbed ‘embedded liberalism’.¹² While the United States maintained skepticism towards SOEs, they were nevertheless used extensively both at Federal and State level.¹³ In the developing world, decolonization process was often accompanied by pervasive nationalizations, particularly in the energy sector.¹⁴

In general, the era from 1945 to 1980 has been described as the ‘golden age’¹⁵ of public enterprise, and it was marked by a developmental model that can be described as entrepreneurial State. Under this model, State ownership was used to overcome undeveloped capital markets, organize natural monopolies, produce public goods, account for strategic interests and pursue social policy.¹⁶ Vital for economic development, entrepreneurial State model had far-reaching ramifications also for other forms of public life. Majone, for instance, considers ‘public ownership ..., historically, the main mode of economic regulation in Europe’ as it enabled State ‘to impose a planned structure on the economy and at the same time to protect the public interest against powerful private interests’.¹⁷ In short, ownership was often used as regulatory instrument in the public interest.¹⁸

The results of the consolidation of economic power to State shareholders were significant. In Europe, again, the economic weight of SOEs amounted to 20 percent of the total GDP in France, 12 percent in Italy and Spain and, 11 percent in Germany and 10 percent in the UK already in the early 1960s.¹⁹ During the zenith of public enterprise in late 1970s and early 1980s, SOE output constituted approximately 7.2 percent of GDP in all developed countries.²⁰ While different countries followed their unique paths, there was a general consensus on the promise of interventionist government.²¹

¹¹ Aldo Musacchio and Sergio Lazzarini, *Reinventing State Capitalism. Leviathan in Business, Brazil and Beyond* (Harvard University Press 2014) 26–33.

¹² See John Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order* 36 International Organization 379 (1982). For analysis of SOEs within the system of embedded liberalism in Europe, see David Trubek, *The ‘Rule of Law’ in Development Assistance: Past, Present, and Future* in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (Cambridge University Press 2006) 95.

¹³ See e.g. Jerry Mitchell, *The American Experiment with Government Corporations* (Routledge 1999).

¹⁴ See e.g. Stephen Kobrin, *Foreign Enterprise and Forced Divestment in LDCs* 34 International Organization 65 (1980) and United Nations Centre for Natural Resources, Energy and Transport, *State Petroleum Enterprises in Developing World* (Pergamon 1980).

¹⁵ Robert Millward, *Public Enterprise in the Modern Western World: An Historical Analysis* 82 Annals of Public and Cooperative Economics 375 (2011), at 387.

¹⁶ Musacchio and Lazzarini, *supra* n 11, at 25–39. See also William Megginson, *The Financial Economics of Privatization* (Oxford University Press 2005) 11.

¹⁷ Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance* 17 Journal of Public Policy 139 (1997), at 144.

¹⁸ Ian Thynne, *Ownership as an Instrument of Policy and Understanding in the Public Sphere: Trends and Research Agenda* 32 Policy Studies 183 (2011), at 184–185.

¹⁹ Toninelli, *supra* n 10, at 21.

²⁰ Percentages are based on the World Bank’s estimates. Musacchio and Lazzarini, *supra* n 11, at 34.

²¹ For historical accounts, see e.g. Ulrich Wengenroth, *The Rise and Fall of State-Owned Enterprise in Germany* in Toninelli (ed), *supra* n 10; Franco Amatori, *Beyond State and Market: Italy’s Futile Search*

In Italy, for example, holding companies such as IRI, ENI and EFIM were deeply embedded in all facets of the Italian economy. According to some calculations, the three holding companies held approximately 40% of the capital of the 5 000 largest Italian companies.²² Thus, wide State shareholding was a pervasive feature of the Italian economic landscape and, for a brief period, a role model for economic development other European nations tried to replicate.²³ In sum, it was indeed as if '[b]y the 1960s, the momentum of history appeared to be carrying the entire world toward a reliance on state-owned ventures'.²⁴

By the late 1970s and early 1980s, however, the winds had changed. Oil crises, in particular, spurred a number of macroeconomic shocks that destabilized the foundations of State ownership and SOEs.²⁵ Faced with high inflation, price controls and increasing losses from SOEs, the entrepreneurial roles of States came under heavy criticism. SOEs were increasingly viewed as inefficient burdens for public finances, as barriers for flourishing private enterprise and as sites for rent-seeking and elite expropriation.²⁶ As a result of these new sensibilities among economists, policy makers and management scholars,²⁷ privatizations spread across the globe in the late 1980s and early 1990s onwards, leading to 'arguably the greatest transfer of ownership in the history of the corporation'.²⁸

Moreover, privatization was accompanied by a number of other initiatives that surfaced across management, finance, regulation and law. Crucial changes included corporatization of SOEs that were, in the past, often established as public law entities, separation of ownership and regulatory functions of the State and casting the relationship between an owner State and investee company in terms of principal-agent relations.²⁹ As a result, SOE as a form of organization was, by and large, approached as 'a pathology of organizational failure'.³⁰ Deemed as relics of history, SOEs were, at best, viewed as transitional organizations for developing economies prior to full espousal of free market mechanisms.³¹ Mostly positive privatization experiences ensured that they

for a *Third Way* in Toninelli (ed), *supra* n 10 and Robert Millward, *State Enterprise in Britain in the Twentieth Century* in Toninelli (ed), *supra* n 10.

²² Millward, *supra* n 15, at 384.

²³ Ibid. For an illustrative study on best practices of the day, see Stuart Holland, *State as Entrepreneur: I. R. I. State Shareholding Formula* (Littlehampton Book Services 1972).

²⁴ Louis Galambos and William Baumol, *Conclusion: Schumpeter Revisited* in Toninelli (ed), *supra* n 10, at 306.

²⁵ Musacchio and Lazzarini, *supra* n 11, 39–40.

²⁶ For an illustrative study see World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* (World Bank 1995).

²⁷ Compare with David Kennedy, *The 'Rule of Law,' Political Choices, and Development Common Sense* in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (Cambridge University Press 2006) 95.

²⁸ Bernardo Bortolotti and Mara Faccio, *Government Control of Privatized Firms* 22 *Review of Financial Studies* 2907 (2009), at 2907.

²⁹ Thynne, *supra* n 18, at 184–192.

³⁰ Alice Amsden, *The Rise of 'The Rest': Challenges to the West From Late-Industrializing Economies* (Oxford University Press 2001) 215.

³¹ See e.g. Garry Bruton, Mike Peng and Kehan Xu, *State-Owned Enterprises Around the World As Hybrid Organizations* 29 *The Academy of Management Perspectives* 92 (2015), at 97.

remained important policy tools in managing the State–company relationship also in the following decades.³²

2.2 Internationalizing State Ownership

Prevailing privatization processes notwithstanding, SOEs have persisted and even thrived during the past decades. In Asia, for example, SOEs remained integral parts of development paradigms throughout the initial privatization boom and they played important roles in the Asian economic miracle.³³ In South America, Brazil's neo-developmental policies featured strong SOE components.³⁴ Even in Europe, States often retained control rights in privatized entities through golden shares and other shareholder arrangements³⁵ – a practice that the EU Commission has vigorously tackled in its regulation of State aid and free movement of capital.³⁶

While the absolute number of SOEs has decreased over the past decades, SOE sector continues to display great diversity. Most of the world's largest listed SOEs, such as Industrial and Commercial Bank of China and China Construction Bank, operate in the finance sector.³⁷ Beyond financial companies, large State-owned companies span sectors from car and airplane manufacturing to telecommunications.³⁸ Energy sector is also SOE-dominated, and national oil companies still account over 60 % of global oil production.³⁹ In sectors where State ownership has traditionally been strong, public utilities such as water and energy networks continue to remain heavily dependent on SOEs.⁴⁰

³² See, in particular, Megginson, *supra* n 16.

³³ See generally Amsden, *supra* n 30. For a case study focusing on Singapore, see Chua Beng Huat, *State-Owned Enterprises, State Capitalism and Social Distribution in Singapore* 29 *The Pacific Review* 499 (2016).

³⁴ See e.g. Cornel Ban, *Brazil's Liberal Neo-Developmentalism: New Paradigm or Edited Orthodoxy?* 20 *Review of International Political Economy* 298 (2013).

³⁵ See generally Bortolotti and Faccio, *supra* n 28.

³⁶ For recent overviews, see e.g. Juan Jorge Piernas Lopez, *The Concept of State Aid Under EU Law: From Internal Market to Competition and beyond* (Oxford University Press 2015) and Tamas Szabados, *Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union* 16 *German Law Journal* 1099 (2015). See also Angela Huyue Zhang, *The Single-Entity Theory: An Antitrust Time Bomb For Chinese State-Owned Enterprises?* 8 *Journal of Competition Law and Economics* 805 (2012).

³⁷ Forbes, *The World's Biggest Public Companies* (2016), available at <<http://www.forbes.com/global2000/list/>>.

³⁸ UNCTAD, *World Investment Report 2015* iii, 17, available at <unctad.org/en/PublicationsLibrary/wir2015_en.pdf>.

³⁹ David Victor, David Hults and Mark Thurber, *Introduction and Overview* in David Victor, David Hults and Mark Thurber (eds), *Oil and Governance: State-owned Enterprises and the World Energy Supply* (Cambridge University Press 2012).

⁴⁰ See e.g. Sanford Berg, *Best Practices in Regulating State-Owned and Municipal Water Utilities (Economic Commission for Latin America and the Caribbean)* (2013), available at <http://repositorio.cepal.org/bitstream/handle/11362/4079/S2013252_en.pdf?sequence=1&isAllowed=y> and Alessandro Sterlacchini, *Energy R&D in Private and State-Owned Utilities: An Analysis of the Major World Electric Companies* 41 *Energy Policy* 494 (2012).

However, perhaps the most important trend in contemporary SOEs is their rapid internationalization. SOEs' substantial share of global flows of foreign direct investment (FDI),⁴¹ their position at the top of rankings for the world's largest companies⁴² and their relevance in solving the Financial Crisis⁴³ have all been taken to indicate the rise of globally-orientated State ownership, often described as State capitalism.⁴⁴ In a related process, Sovereign Wealth Funds (SWFs), state-owned investment vehicles acquiring substantial stakes in foreign companies, have grown in number and size over the past decades.⁴⁵

Quite naturally, rapid growth and internationalization of SOEs and sovereign investment through SWFs have prompted responses on multiple levels.⁴⁶ On global level, the rise of SOEs from emerging economies has been interpreted as reconfiguration of power in the world economy⁴⁷ and, occasionally, framed as somewhat poorly substantiated fearmongering targeted at the expansion of Chinese SOEs.⁴⁸ On national level, many States have retooled their FDI review mechanisms, but SOE investment and FDI projects are still only rarely rejected on national security grounds.⁴⁹ However, unlike in the past when SOEs were approached as 'a pathology of

⁴¹ UNCTAD, *World Investment Report 2014* 19–22, available at <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf>.

⁴² Przemyslaw Kowalski and others, *State-Owned Enterprises: Trade Effects and Policy Implications* (OECD Trade Policy Papers, No. 147, 2013) 18–23, available at <<http://dx.doi.org/10.1787/5k4869ckqk7l-en>>.

⁴³ See e.g. Davidoff, *supra* n 6 and Muiris MacCarthaigh, *Managing State-Owned Enterprises in an Age of Crisis: An Analysis of Irish Experience* 32 Policy Studies 215 (2011).

⁴⁴ See e.g. Przemyslaw Kowalski and Kateryna Perepechay, *International Trade and Investment by State Enterprises* (OECD Trade Policy Paper No. 184, 2015), available at <http://www.oecd-ilibrary.org/trade/international-trade-and-investment-by-state-enterprises_5jrtr9x6c48-en> and Andrew Karolyi and Rose Liao, *State Capitalism's Global Reach: Evidence from Foreign Acquisitions by State-Owned Companies*, Journal of Corporate Finance advance access (2016), available at <<http://linkinghub.elsevier.com/retrieve/pii/S0929119916300232>>.

⁴⁵ UNCTAD, *supra* n 38, at 15–16. For recent scholarship, see especially William Megginson and Veljko Fotak, *Rise of the Fiduciary State: A Survey of Sovereign Wealth Fund Research* 29 Journal of Economic Surveys 733 (2015).

⁴⁶ See e.g. Fabio Bassan, *Host States and Sovereign Wealth Funds, between National Security and International Law* 21 European Business Law Review 165 (2010) and Andreas Heinemann, *Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism?* 15 Journal of International Economic Law 843 (2012).

⁴⁷ See e.g. Andreas Nölke and others, *Domestic Structures, Foreign Economic Policies and Global Economic Order: Implications from the Rise of Large Emerging Economies* 21 European Journal of International Relations 538 (2015).

⁴⁸ For an egregious example, see Ian Bremmer, *The End of the Free Market: Who Wins the War Between States and Corporations?* (Portfolio 2010). For more reasoned critiques on SWF investments to Europe, see e.g. Daniele Gallo, *The Rise of Sovereign Wealth Funds (SWFs) and the Protection of Public Interest(s): The Need for a Greater External and Internal Action of the European Union* 27 European Business Law Review 459 (2016) and Stephan Liedtke, *Chinese Energy Investments in Europe: An Analysis of Policy Drivers and Approaches*, Energy Policy advance access (2016), available at <<http://linkinghub.elsevier.com/retrieve/pii/S0301421516305043>>.

⁴⁹ See e.g. Gil Lan, *Foreign Direct Investment in the United States and Canada: Fractured Neoliberalism and the Regulatory Imperative* 47 Vanderbilt Journal of Transnational Law 1261 (2014). See also Lauge Skovgaard Poulsen, *States as Foreign Investors: Diplomatic Disputes and Legal Fictions* 30 ICSID Review (2016).

organizational failure' because of their inefficiency and cost to taxpayer,⁵⁰ current SOEs are increasingly viewed as threats to a global level playing field.⁵¹ Whether this is a valid concern is debatable,⁵² but it is clear that SOEs have, again, emerged as global actors that policy makers, regulators and other market participants have to take seriously.

Macro level developments aside, perhaps the greatest changes have taken place on company level. SOEs' ownership structures and governance arrangements, in particular, have been transformed when compared to traditional SOEs organized in the 1960s style. On the one hand, the level of State ownership has changed as governments have, in general, relinquished their sole or majority stakes in favor of non-controlling minority positions.⁵³ On the other hand, ownership arrangements have coincided with pervasive governance reforms.⁵⁴ The combined effect of these changes has radically improved the efficiency of modern SOEs and exposed substantial changes in the organization of State shareholders.⁵⁵ In general, *State ownership as regulation* has been turned into *regulation of State ownership*, and entrepreneurial States has transformed into shareholder States.⁵⁶ Crucially, management, public choice, economic policy, corporate governance and legal scholars have only recently begun to examine these developments in greater detail.⁵⁷ A clear research gap notwithstanding, there is an emerging consensus suggesting that modern SOEs, and their State shareholders, are very different from their predecessors.⁵⁸

Drawing the above discussion together, the overall ecology of the current SOE sector is sharply divided. On the one hand, following the privatization stream, sales of State-owned entities have continued across the globe.⁵⁹ On the other hand, many governments, usually hailing from emerging economies, have actively supported the internationalization of their State-owned national champions and also acquired massive equity stakes in private foreign companies through SWFs.⁶⁰ In both instances, corporate governance arrangements and the regulatory framework shaping the relationship between State and its investee companies emerges as a crucial element to

⁵⁰ Amsden, *supra* n 30, at 215.

⁵¹ Kowalski and Perepechay, *supra* n 44, at 25-26.

⁵² See e.g. Ming Du, *When China's National Champions Go Global: Nothing to Fear but Fear Itself?* 48 *Journal of World Trade* 1127 (2014). For a recent – highly skeptical – US perspective, see US China Economic and Security Review Commission, *Report to Congress* (2016), available at <[http://origin.www.uscc.gov/sites/default/files/annual_reports/Executive Summary 2016.pdf](http://origin.www.uscc.gov/sites/default/files/annual_reports/Executive%20Summary%202016.pdf)>.

⁵³ Musacchio and Lazzarini, *supra* n 11, at 45-53.

⁵⁴ *Ibid.*

⁵⁵ Musacchio, Lazzarini and Aguilera, *supra* n 2, at 116.

⁵⁶ Thynne, *supra* n 18, 184–185.

⁵⁷ See e.g. Dettler and Fölster, *supra* n 1, at 196–198, Musacchio, Lazzarini and Aguilera, *supra* n 2, at 115-118, Bruton, Peng and Xu, *supra* n 31, at 94-98 and Lu Wang and Norah Gallagher, *Introduction to the Special Focus Issue on State-Owned Enterprises* 31 *ICSID Review* 1 (2016).

⁵⁸ See Bruton, Peng and Xu, *supra* n 31 and Alvaro Cuervo-Cazurra and others, *Governments as Owners: State-Owned Multinational Companies* 45 *Journal of International Business Studies* 919 (2014).

⁵⁹ Megginson and Fotak, *supra* n 45, at 734.

⁶⁰ *Ibid.*

facilitate SOEs' contribution to economic growth and to protect international markets from governmental interference. At the same time, however, the rise of State capitalism has revitalized the debate on the merits of interventionist government in facilitating economic development.⁶¹

3 The SOE Guidelines: Substance and Significance

Against this backdrop, the revised SOE Guidelines arrive at a fortunate time. This section introduces the SOE Guidelines' normative goals and their substantive policy prescriptions. The section underscores how the SOE Guidelines attempt to resolve both classic SOE pathologies, such as organizational encumbrance and inefficiency, and more recent concerns over a global level playing field simultaneously. To this end, the instrument's governance framework designs mechanisms that enhance the efficiency and accountability of State owners. These mechanisms bring about an ideal model for organizing State ownership function – the Good State Shareholder.

3.1 Introduction to the SOE Guidelines

The SOE Guidelines constitute a set of recommendations on governance of individual SOEs, State ownership practices and the regulatory environment in which SOEs operate.⁶² They seek to support economic efficiency, sustainable growth and financial stability by rationalizing relationships between a company's management, board, shareholders and stakeholders. Addressed to 'government officials that are charged with the ownership of enterprises',⁶³ the majority of the SOE Guidelines offer practical guidance on how to design corporate governance arrangements that alleviate governance issues that are common wholly or partially State-owned companies.⁶⁴ Primarily outlining best practices so as to behaviour of the State as a shareholder, the SOE Guidelines are, perhaps counterintuitively, less about how *SOEs* ought to act and more about how *States owners* ought to act.⁶⁵

⁶¹ For recent publications emphasizing the potential of state ownership, see e.g. Andrew Cumbers, *Reclaiming Public Ownership. Making Space for Economic Democracy* (Zed Books 2012) and Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Anthem Press 2014). For a more mainstream approach based on multiple case studies, see OECD, *State-Owned Enterprises in the Development Process* (OECD Publishing 2015).

⁶² OECD, *supra* n 4, at 15

⁶³ *Ibid* 15.

⁶⁴ See e.g. Michael Whincop, *Corporate Governance in Government Corporations* (Ashgate 2005) 6-14 and Daniel Shapiro and Steven Gliberman, *The International Activities and Impacts of State-Owned Enterprises* in Karl Sauvant, Lisa Sachs and Wouter Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (Oxford University Press 2012) 114–124, 133–140.

⁶⁵ Few exceptions aside, the SOE Guidelines outsource specific corporate governance advice to the G20/OECD Principles of Corporate Governance, an instrument revised and approved simultaneously with the SOE Guidelines. See OECD, *G20/OECD Principles of Corporate Governance* (2015), available at <<http://dx.doi.org/10.1787/9789264236882-en>>. Accordingly, the SOE Guidelines are 'fully compatible' with the G20/OECD Principles, and the 'state should strive toward full implementation of the OECD Principles of Corporate Governance when it is not the sole owner of SOEs, and of all relevant sections when it is the sole owner of SOEs'. OECD, *supra* n 4, at 13, 24.

Substantively, the SOE Guidelines cover a variety of concerns ranging from competitive neutrality and equitable treatment of minority shareholders to the responsibilities of SOE boards. Formally, they operate as a set of non-binding best practices that governments are recommended to adhere to. In terms of scope, the SOE Guidelines aim to cover ‘all SOEs pursuing economic activities’ that are ‘under the control of the state’.⁶⁶ Judged against the change of international SOE ecology described in the previous section, the last point is crucial. As is well known, defining a SOE is an arduous task where a number of conflicting domestic and international criteria coexist.⁶⁷ As an example, the United Nations Conference on Trade and Development (UNCTAD) defines SOEs as companies where the State has ‘a stake of 10 per cent or more of the voting power, or where the government is the largest single shareholder’.⁶⁸ Compared to this definition, the SOE Guidelines opt for stricter standards when understanding ‘control of the state’ to ‘the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control’.⁶⁹ Accordingly, the instrument’s focus is on SOEs in which the State is able to exercise meaningful control over the company’s decision-making.⁷⁰

To a great extent, the SOE Guidelines build on policy prescriptions contained in the instrument’s earlier version that was launched in 2005 (2005 Guidelines).⁷¹ The 2005 Guidelines already emphasized a level-playing field, a clear, consistent and active consistent ownership policy, transparency and independent boards. Further, the instrument’s core policy proposals ‘explicitly oriented to issues that ... take the perspective of the state as an owner, focusing on policies that would ensure good corporate governance’.⁷² In particular, the 2005 Guidelines attempted to find remedies for both ‘undue hands-on and politically motivated ownership interference’ and ‘totally passive or distant ownership by the state’.⁷³ Reflecting this approach, most of the instrument’s suggestions revolved around separating State’s ownership function from ‘other state functions ... particularly ... market regulation’, establishing a centralized

⁶⁶ OECD, *supra* n 4, at 15.

⁶⁷ Compare with Curtis Milhaupt and Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm* 103 *Georgetown Law Journal* 665 (2015).

⁶⁸ UNCTAD, *World Investment Report 2011*, available at <<http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>> 28. See also Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007) 70-72.

⁶⁹ OECD, *supra* n 4, at 15-16.

⁷⁰ Important from the perspective of growing SWF investments, the SOE Guidelines expressly exclude ‘[e]ntities in which the government holds equity stakes of less than ten percent’ from the scope of the instrument. *Ibid.* 15-16.

⁷¹ OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2005 Edition), available at <<http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>>.

⁷² *Ibid.* 9.

⁷³ *Ibid.* 10. For discussion, see Aldo Musacchio and Sergio Lazzarini, *Chinese Expectationism or New Global Varieties of State Capitalism* in Benjamin Liebman and Curtis Milhaupt (eds), *Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism* (Oxford University Press 2016) 404-411.

ownership entity that would exercise shareholder-based rights effectively, recognizing the rights of minority shareholders and solidifying the position of the board.⁷⁴

In short, the 2005 Guidelines intended to insulate SOEs institutionally from day-to-day political interference, and to steer permitted interaction with investee companies to professionalized ownership entities arranged along the best practices set by the private sector. Ultimately, the 2005 Guidelines sought to give States tools to define themselves as owners who should display great self-control when interacting with investee companies.⁷⁵ Building on the 2005 Guidelines' success,⁷⁶ the revised SOE Guidelines seek to continue on the same track.

3.2 The SOE Guidelines: Three Innovations

While the SOE Guidelines are mostly an iterative update, they contain three conceptual innovations that greatly expand the instrument's significance beyond technical governance advice. These innovations focus on growing and internationalizing SOE activity, on domestic accountability mechanisms in the form of increased public embeddedness and on greater emphasis placed on corporate social responsibility.

First, the SOE Guidelines are expressly aligned to control the growing influence of globally-orientated State ownership. Noting that in the past SOEs were 'principally engaged ... within their domestic markets', the SOE Guidelines reflect the contemporary position where 'SOEs are increasingly prominent actors in international markets' and their effective regulation is 'crucial to maintaining an open trade and investment environment that underpins economic growth'.⁷⁷ In the instrument's view, the reconfiguration of global investment flows and the strengthened position of SOEs and other 'state-owned investment vehicles' have turned 'the relationship between governments and the enterprises they own' more complex.⁷⁸ To manage this complexity, the applicability of the SOE Guidelines is extended to cover SOEs 'whether they operate domestically or internationally'.⁷⁹ As such, the SOE Guidelines are explicitly positioned to influence shareholder relationships between State owners and their investee companies which, increasingly, create global impacts.⁸⁰

⁷⁴ OECD, *supra* n 71, at 12-17.

⁷⁵ Ibid 23. The idea of self-control finds numerous counterparts in different fields of regulation. For parallels in EU law, see e.g. Larry Catá Backer, *Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law* 82 Tulane Law Review 1801 (2008), Wolf-Georg Ringe, *Company Law and Free Movement of Capital* 69 The Cambridge Law Journal 378 (2010) and Gerner-Beuerle, *supra* n 7.

⁷⁶ See *infra* n 174-179 and accompanying text.

⁷⁷ OECD, *supra* n 4, at 7, 11-12. See also Shapiro and Globerman, *supra* n 64, at 114-124, 133-140.

⁷⁸ OECD, *supra* n 4, at 11-12. For an overview of these 'problematic conceptual complexities', see Paul Blyschak, *State-Owned Enterprises in International Investment* 31 ICSID Review 5 (2016).

⁷⁹ OECD, *supra* n 4, at 15.

⁸⁰ This extension is likely informed by an earlier report that assessed the compatibility of the 2005 Guidelines against internationalizing state ownership activity. See OECD, *SOEs Operating Abroad: An Application of the OECD Guidelines on Corporate Governance of State-Owned Enterprises to the Cross-Border Operations of SOEs* (2010), available at

Second, the SOE Guidelines embed the administration of State ownership in a framework that emphasizes publicness.⁸¹ The key premise underpinning the instrument emphasizes that the ‘state exercises the ownership of SOEs in the interest of the general public’.⁸² Flowing from this relatively uncontroversial idea⁸³ – which, nevertheless, was not explicated in the 2005 Guidelines –, the SOE Guidelines identify a number of requirements and policies through which governments are expected to ‘consider and articulate’ how SOEs add ‘value to the members of the public that are its ultimate owners’.⁸⁴ To this end, the SOE Guidelines include a number of policy suggestions that revolve around mechanisms designed to enhance transparency and accountability in carrying out State ownership function. In the 2005 Guidelines, transparency recommendations were mostly confined to SOEs’ reporting responsibilities.⁸⁵ While the suggested ‘ownership entity’ was targeted with some transparency mechanisms already in the 2005 Guidelines,⁸⁶ the revised SOE Guidelines contain more thorough recommendations. In particular, the instrument constantly reminds that ‘[h]igh standards of transparency and accountability are needed to allow the public to assure itself that the state exercises its powers in accordance with the public’s best interest’.⁸⁷ Accordingly, setting the whole ownership policy is entrenched in ‘appropriate procedures of political accountability’, including ‘regular legislative approval’.⁸⁸ Moreover, the SOE Guidelines also open up accountability structures of ‘ownership entities’ to more direct public scrutiny.⁸⁹ SOE-level transparency is further embedded to state ownership function, as ‘the state as an owner should develop and communicate a coherent transparency and disclosure policy for the enterprises it owns’ to ensure ‘adequate accountability by SOEs to shareholders, reporting bodies and the broader public’.⁹⁰

Enhanced accountability and transparency are clear attempts to bring about more muscular mechanisms for concretizing ‘interest of the general public’.⁹¹ In this regard, the SOE Guidelines opt for a conceptual device borrowed from corporate law when they embed the responsibilities of those ‘who exercise ownership rights over SOEs’ to duties ‘not unlike the fiduciary duties of a board toward the shareholders’.⁹² In the view

<<http://www.oecd.org/dataoecd/46/20/44215438.pdf>>. See also Cuervo-Cazurra and others, *supra* n 58 and Jose Alvarez, *Sovereign Concerns and the International Investment Regime* 258 in Sauvant, Sachs and Jongbloed (eds), *supra* n 64.

⁸¹ OECD, *supra* n 4, at 12, 30.

⁸² *Ibid.* 19.

⁸³ For efficiency-based discussion on the topic, see Detter and Fölster, *supra* n 1, at 196–198. For discussion rooted in democracy theories, see Angela Cummine, *Citizens’ Wealth: Why (and How) Sovereign Funds Should Be Managed by the People for the People* (Yale University Press 2016) 55–66, 71–92.

⁸⁴ OECD, *supra* n 4, at 30–31.

⁸⁵ *Ibid.* 42–44.

⁸⁶ *Ibid.* 27, 41.

⁸⁷ *Ibid.* 30.

⁸⁸ *Ibid.* 32.

⁸⁹ *Ibid.* 39.

⁹⁰ *Ibid.* 44.

⁹¹ *Ibid.* 19.

⁹² *Ibid.* 30

of the SOE Guidelines, these ‘fiduciary duties’ to the public are discharged when the government sets a functioning ownership policy, assumes the role of an active owner and defines the roles and objectives of individual SOEs. The last requirement is further related to public policy objectives that often undergird the rationales for states to maintain SOEs in the first place. Here, the SOE Guidelines recognize that many SOEs pursue objectives beyond the ‘maximisation of profits and shareholder value’⁹³ but also draw attention to the reality where SOEs may be subject to a variety of ‘pressures given the interaction of business considerations with political and public policy ones’.⁹⁴

While the 2005 Guidelines had already drawn attention to active ownership as a remedy for both ‘undue hands-on and politically motivated ownership interference’ and ‘totally passive or distant ownership by the state’,⁹⁵ the SOE Guidelines conceptualize active ownership as an upshot of the instrument’s publicness.⁹⁶ Crucially, the instrument envisages, on multiple occasions, State shareholder ‘as any major shareholder’⁹⁷ who should, especially when there are minority shareholders in the company, communicate its expectations to the company through ‘the standard channels as a significant shareholder’.⁹⁸ When channeled this way, active ownership is considered vital to meet the interests of ‘broad segments of the population’ while simultaneously minimizing market distortions stemming from direct involvement in the market.⁹⁹ As such, active ownership, channeled properly, bridges between partly diverging national and global goals displayed in the SOE Guidelines.

Third, as one of the greatest substantive changes in the SOE Guidelines, new chapter on responsible business conduct greatly expands from the 2005 Guidelines.¹⁰⁰ In the original 2005 Guidelines, issues relating to corporate social responsibility (CSR), labor and other stakeholder relations and transparency were treated only briefly and they were mostly limited to a mandate given to boards ‘to develop, implement and communicate compliance programmes for internal codes of ethics’.¹⁰¹ As such, the relationship between a SOE and its wider societal footprint was mostly reduced to company-level initiatives. Unlike their predecessor, the SOE Guidelines are clear in marking CSR as a crucial issue both for SOEs and their state shareholders. Thus, building on the expansive outlook of publicness that underpins the SOE Guidelines, the instrument is explicit in stating that ‘SOEs should observe high standards of responsible business conduct’.¹⁰² Moreover, echoing recent trends towards longer

⁹³ Ibid. 16.

⁹⁴ Ibid. 60. See also Hans Christiansen, *Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises* (2013), available at <<http://dx.doi.org/10.1787/5k4dkhztgp9r-en>>.

⁹⁵ OECD, *supra* n 71, at 10.

⁹⁶ Compare with Andreas Follesdal, *Engagement, Divestment or Both? Conflicts and Interactions: The Case of the Norwegian Pension Fund* in J Bohoslavsky and J Letnar Černi (eds), *Making Sovereign Financing and Human Rights Work* (Hart 2014).

⁹⁷ OECD, *supra* n 4, at 40.

⁹⁸ Ibid. 42.

⁹⁹ Ibid.

¹⁰⁰ OECD, *supra* n 71, at IV.

¹⁰¹ Ibid.

¹⁰² OECD, *supra* n 4, at 25.

investment horizons,¹⁰³ the significance of ‘active stakeholder policy’ is cast as an issue of ‘the enterprise’s long term strategic goals and reputation’.¹⁰⁴ Firm position on heightened CSR considerations notwithstanding, the SOE Guidelines generally subsume CSR considerations under business-case models for monitoring non-financial risks. This orientation is particularly visible when the SOE Guidelines posit that ‘[l]ike private companies, SOEs have a commercial interest in minimizing reputational risks and being perceived as ‘good corporate citizens’.¹⁰⁵ Accordingly, the instrument is wary of developing notions where CSR would be used to ‘further goals which differ from those which apply to the private sector’.¹⁰⁶

From the perspective of the State as an owner, a State ownership policy ‘should fully recognise SOEs’ responsibilities towards stakeholders and request that SOEs report on their relations with stakeholders’.¹⁰⁷ While the change in tone is partly due to increased general attention to CSR, additional impetus behind the SOE Guidelines’ reformed position can also be traced to increasing absolute economic weight of State ownership.¹⁰⁸ Emphasizing their leadership potential, SOEs are further seen to ‘play an important role in setting the business tone of the country’,¹⁰⁹ and their actions are accordingly seen to be ‘guided by relevant international standards’.¹¹⁰ Thus, unlike their predecessor, the SOE Guidelines recognize that SOEs, and their State shareholders, are placed at the center of many emerging issues relating to responsible business and that shareholders hold crucial leverage over their investee companies’ CSR practices. However, the SOE Guidelines’ position towards distinctive human rights-based CSR,¹¹¹ both on the level of an individual SOE and the State shareholder, is much more restricted. Detailed discussion on this issue is reserved for the section V, where the SOE Guidelines’ CSR propositions are juxtaposed with recent efforts of the UN human rights community.

¹⁰³ For a SWF perspective, see Gordon Clark and Eric Knight, *Temptation and the Virtues of Long-Term Commitment: The Governance of Sovereign Wealth Fund Investment* 1 Asian Journal of International Law 321 (2011). For institutional investor perspective, see e.g. Raffaele Della Croce, Fiona Stewart and Juan Yermo, *Promoting Longer-Term Investment by Institutional Investors* OECD Journal: Financial Market Trends 145 (2011).

¹⁰⁴ OECD, *supra* n 4, at 58.

¹⁰⁵ Ibid. Generally, compare with Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk* 41 The Journal of Corporation Law 647 (2014).

¹⁰⁶ Ibid. 58. See also Joseph Heath and 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 Journal of Business Ethics 247 (2004) and Musacchio and Lazzarini, *supra* n 73, at 421, who support the idea that SOEs’ ‘social objectives could be rolled into corporate social responsibility programs’.

¹⁰⁷ Ibid.

¹⁰⁸ In particular, the SOE Guidelines note that ‘[a]s a dominant shareholder, the state may control corporate decision making and be in a position to take decisions to the detriment of stakeholders. It is therefore important to establish mechanisms and procedures to protect stakeholder rights’. Ibid 59.

¹⁰⁹ Ibid. 60.

¹¹⁰ Ibid 61.

¹¹¹ See e.g. Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide* 22 Business Ethics Quarterly 739 (2012).

3.3 Summing up: The SOE Guidelines as a Policy Blueprint

Ultimately, the SOE Guidelines revolve around three normative, strategic and practical tenets. On normative level, the SOE Guidelines aim for two parallel goals, efficient utilization of public wealth and protection of a level playing field. These goals provide an overarching framework where further strategic and practical initiatives are embedded. On strategic level, echoing the privatization policy mindset, the SOE Guidelines maintain a sharp distinction between ownership and regulation. This distinction surfaces across the instrument, such as in relation to SOEs' position in the market and their public policy objectives. In both instances, the SOE Guidelines posit that SOEs should neither accrue undue advantages, say, due to preferential access to finance, nor disadvantages such as uncompensated public policy objectives. On practical level, the SOE Guidelines emphasize enhanced accountability mechanisms and active ownership. The accountability mechanisms are embodied both as increased democratic control of public assets for the benefit of a national polity and as accountability towards efficient global markets. As the key to sustainable balance between partly diverging 'accountabilities',¹¹² the SOE Guidelines build on effective exercise of ownership rights 'as any major shareholder' would 'typically conduct'.¹¹³ Thus, the SOE Guidelines construe State, first and foremost, as a shareholder.

Consistent with their intended audience, 'government officials that are charged with the ownership',¹¹⁴ the SOE Guidelines are 'recommendations to governments on how to ensure that SOEs operate efficiently, transparently and in an accountable manner'.¹¹⁵ Each of the instrument's policy recommendations, as well as conceptual innovations introduced in the revision process, attest to and need to be understood in the light of these rationales. Efficiency, transparency and accountability penetrate State shareholder function whether the specific governance advice aims to protect a level playing field in the market, enhance democratic control over public assets or expand ownership rationales to cover wider sustainability concerns.

Accordingly, the SOE Guidelines are best conceived of as a policy blueprint for States to devise institutions that are able to use public resources tied to corporate equities in a way that ensures SOEs' 'positive contribution to economic efficiency and competitiveness'.¹¹⁶ Global in their outlook, the SOE Guidelines view themselves as '*the* internationally agreed standard for how governments should exercise the state ownership function to avoid the pitfalls of both passive ownership and excessive state intervention [emphasis added]'.¹¹⁷ As a part of 'the internationally agreed standard', the instrument operates by detailing a governance scheme for the organization of State

¹¹² Compare with Anna Gelpern, *Sovereignty, Accountability, and the Wealth Fund Governance Conundrum* 1 Asian Journal of International Law 289 (2011), at 294–307.

¹¹³ OECD, *supra* n 4, at 40.

¹¹⁴ Ibid. 15.

¹¹⁵ Ibid. 7.

¹¹⁶ Ibid. 11.

¹¹⁷ Ibid.

shareholder function. Explicating how States should own companies, the SOE Guidelines intend to insulate SOEs institutionally from day-to-day political interference, temper their public policy objectives and to steer permitted interaction with SOEs to professionalized and formalized corporate governance relationships. Moreover, the SOE Guidelines display new kind of public embeddedness which, primarily, entails prudent asset management aimed at maximum profitability where those using State shareholder power are identified as ‘trustees’ of the public and subjected to enhanced accountability and transparency mechanisms.¹¹⁸ To this end, the SOE Guidelines sketch a powerful governance framework where State ownership can, allegedly, operate without waste, undue political interference and mixing of political and economic prerogatives. Ultimately, these governance rationales and policy prescriptions present a robust ideal model for organizing State ownership function. They outline a model for the Good State Shareholder.

4 The Good State Shareholder: From Corporate Governance to Global Governance

In a changed global economy where the absolute weight of State ownership is rapidly increasing, the SOE Guidelines offer a particular vision on interests, rationales and practices that shape the ownership function of the State. This section analyses how the SOE Guidelines, formally a soft law instrument, operate by recalibrating behaviour of State shareholders to match with their normative goals. Part of a wider trend towards increasing shareholder engagement, the SOE Guidelines construe a model outlining the Good State Shareholder – one that is efficient, active and accountable. This governance scheme is further used to illustrate and exemplify strategies that define the OECD’s global governance capacity. These governance capacities, in turn, underscore the broad appeal, portability and significance of the Good State Shareholder model. Ultimately, the experience with the SOE Guidelines draws attention to processes through which corporate governance assumes distinctive global governance dimensions.

4.1 Governing the Good State Shareholder: Insights from the UK Stewardship Code

The SOE Guidelines constitute a timely shareholder governance instrument that promises to channel State shareholder power towards principles of efficiency, transparency and accountability in the public interest. They underscore the key role of State shareholders in turning SOEs into efficient actors that, for their part, contribute to optimal allocation of scarce public resources.¹¹⁹ To this end, the SOE Guidelines

¹¹⁸ Ibid. 30.

¹¹⁹ Already the first principle of the SOE Guidelines reads: ‘The ultimate purpose of state ownership of enterprises should be to maximise value for society, through an efficient allocation of resources’. Ibid 19. See also Detter and Fölster, *supra* n 1, at 5–15.

operate by portraying the Good State Shareholder – an idealized shareholder that is able to balance between ownership and regulation, active and passive engagement, and accountability and efficiency. The Good State Shareholder model encompasses of a number of governance rationalities, including wider accountability mechanisms, active ownership and sharp distinction between the ownership function and the regulatory function of the State. Moreover, the Good State Shareholder remains, simultaneously, sensitive both to efficient use of national wealth and to a global level playing field.

As its primary framework of operationalization, the Good State Shareholder model builds on one of the key developments that has shaped corporate life over the past decades: the increased role of shareholders in corporate governance.¹²⁰ Even though the SOE Guidelines are obviously sensitive to balance ‘undue hands-on’ ownership interference and ‘totally passive or distant’ ownership,¹²¹ the instrument is, by and large, consistent with the idea of enhanced shareholder governance as a suitable fix for various corporate malpractices and broader systemic risks.¹²² After the Financial Crisis, large institutional shareholders, in particular, have been singled out as market actors whose inactivity in controlling their investee companies contributed to the meltdown of the financial sector and subsequent welfare losses to the society as a whole.¹²³ Even though there are only a few international or domestic SOE-related governance templates similar to the SOE Guidelines,¹²⁴ the proclivity of the instrument to develop a set best practices for the arrangement of the State shareholder function finds evident counterparts in the developing shareholder engagement movement.

While the Financial Crisis and earlier corporate scandals have inspired a flurry of regulatory responses highlighting shareholder responsibilities in Europe¹²⁵ and the US,¹²⁶ perhaps the most visible shareholder-focused instrument has been the UK Stewardship Code, a set of governance guidelines operating on comply-or-explain

¹²⁰ See e.g. Lucian Bebchuk, *The Case for Increasing Shareholder Power* 118 Harvard Law Review 833 (2005). For a critical review, see William Bratton and Michael Wachter, *The Case Against Shareholder Empowerment* 158 University of Pennsylvania Law Review 653 (2010). For a recent review, see Terry McNulty and Donald Nordberg, *Ownership, Activism and Engagement: Institutional Investors as Active Owners* 24 Corporate Governance: An International Review 346 (2016).

¹²¹ OECD, *supra* n 4, at 12.

¹²² See e.g. OECD, *Corporate Governance and the Financial Crisis: Key Findings and Main Messages* (2009), available at <<http://www.oecd.org/daf/ca/corporategovernanceprinciples/43056196.pdf>> 47-54.

¹²³ See e.g. Jonathan Mukwiri and Mathias Siems, *The Financial Crisis: A Reason to Improve Shareholder Protection in the EU?* 41 Journal of Law and Society 51 (2014).

¹²⁴ See, however, World Bank, *Corporate Governance of State-Owned Enterprises: A Toolkit* (2014), available at <<https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf?sequence=1>>.

¹²⁵ See e.g. Amendments adopted by the European Parliament on 8 July 2015 on the proposal for a directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement (COM(2014)0213 – C7-0147/2014 – 2014/0121(COD)).

¹²⁶ See e.g. Larry Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002* 28 Journal of Corporation Law 1 (2002).

basis.¹²⁷ Issued in 2010 and updated in 2012, the Stewardship Code maintains that institutional investors ought to assume the role of stewards in corporate governance in order to ‘promote the long term success of companies in such a way that the ultimate providers of capital also prosper’.¹²⁸ In the instrument’s view, ‘[i]nvestors ... play an important role in holding the board to account for the fulfilment of its responsibilities’. Thus, ‘[e]ffective stewardship benefits companies, investors and the economy as a whole’.¹²⁹ To this end, institutional investors ‘should monitor their investee companies’ according to publicly disclosed policy where they detail ‘how they will discharge their stewardship responsibilities’, how they manage ‘conflicts of interest in relation to stewardship’ and ‘how they will escalate their stewardship activities’ also in the case of ‘risks arising from social and environmental matters’.¹³⁰

Addressed to investment managers, the Stewardship Code is, to a great extent, an attempt to nudge institutional investors’ investment culture to a direction that ‘promotes beneficial consequences for a wide range of constituents that would benefit from a healthy corporate sector’.¹³¹ When read together with the report by the Ownership Commission,¹³² an independent UK government-appointed research body, the notion of stewardship opens up as combination of governance rationalities that encompass encouragement for institutional investors to engage with their investee companies and to assume accountability for such engagement.¹³³ Accordingly, stewardship is perhaps best understood ‘as a concept, which transcends the private dimensions of fiduciary duties in the investment relationship ... and which addresses the public interest of investment’.¹³⁴ In the process, the Stewardship Code effectively ‘subsumes its implicit interest in the public interest of “stewardship” under the well-established legal frameworks for investment management and corporate governance which are essentially private in nature’.¹³⁵ In sum, the Stewardship Code targets the internal make-up, decision-making processes and objective-setting of large institutional shareholders, via their investment managers, and seeks institute a paradigm shift in their investment culture.

¹²⁷ Financial Reporting Council, *The UK Stewardship Code* (2012), available at <<https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Stewardship-Code-September-2012.pdf>>. For a critical introduction, see Brian Cheffins, *The Stewardship Code’s Achilles’ Heel* 73 *The Modern Law Review* 1004 (2010).

¹²⁸ Financial Reporting Council, *supra* n 127, at 1.

¹²⁹ *Ibid* 1–2.

¹³⁰ *Ibid*. Principle 1, 2, 3 and 4.

¹³¹ Iris Chiu, *Turning Institutional Investors into ‘Stewards’: Exploring the Meaning and Objectives of ‘Stewardship’* 66 *Current Legal Problems* 443 (2013), at 463.

¹³² The Ownership Commission, *Plurality, Stewardship & Engagement* (2012), available at <http://www.kellogg.ox.ac.uk/wp-content/uploads/2015/05/ownership_commission_2012.pdf>.

¹³³ Chiu, *supra* n 131, at 457.

¹³⁴ *Ibid*. 456.

¹³⁵ *Ibid*. 464. As such, ‘[t]he concept of “stewardship” manifests an ideological struggle between its roots in private paradigms such as fiduciary duties and corporate governance and its vision of serving the wider public interest’. *Ibid*. 457.

The Stewardship Code resonates strongly with the SOE Guidelines' prescriptions of active and shared governance where shareholders, together with the investee company's board and management, strive at long-term and sustainable corporate performance for the benefit of the company and its investors but also the society in general. Another similarity between the instruments is their focus on particular groups of investors. Neither the Stewardship Code nor the SOE Guidelines attempt to establish shareholder duties or responsibilities that would cover all types of shareholders.¹³⁶ Instead, they focus on exceptionally large shareholders, such as pension funds and States, whose conduct is more likely to prompt a meaningful reaction in their investee companies.¹³⁷ Moreover, both instruments have attracted international attention and inspired highly similar responses across national and transnational governance regimes. While the diffusion of the SOE Guidelines is discussed below in section IV.C, the Stewardship Code has stimulated comparable shareholder-centric governance instruments in a host of national jurisdictions as well as in the EU.¹³⁸ Finally, both the SOE Guidelines and the Stewardship Code seem to operate by setting best practices centered on the idea of large shareholders as active stewards with great governance capacity¹³⁹ and by utilizing intermediate parties such as investment managers and 'government officials ... charged with the ownership' as proxies.¹⁴⁰

From a governance strategy perspective, the last point is crucial. In particular, it is striking that both the Stewardship Code and the SOE Guidelines are deliberately framed as instruments of governing shareholder behaviour. In the Stewardship Code, this goal is pursued by recalibrating investment culture within large institutional investors. In the SOE Guidelines, ownership entities and individual government officials are cast as medium for reaching the instrument's normative targets. Thus, unlike most contemporary corporate governance instruments that focus explicitly on formalizing governance function of shareholders within companies, usually measured by analysing the impact of shareholders' voting preferences on corporate decision-

¹³⁶ Compare with Serdar Çelik and Mats Isaksson, *Institutional Investors as Owners: Who Are They and What Do They Do?* (OECD Corporate Governance Working Papers, No. 11, 2013) 7–20, available at <<http://dx.doi.org/10.1787/5k3v1dvmfk42-en>>.

¹³⁷ The heterogeneity of institutional investors, both with regard to size and investment strategy as well as country of origin, has been pointed out as a weakness of the Stewardship Code. See Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?* 15 *Journal of Corporate Law Studies* 217 (2015), at 246–247. From this perspective, the SOE Guidelines clearly focus on a more limited shareholder universe.

¹³⁸ See e.g. Iris Chiu and Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?* (2016), available at <<http://ssrn.com/abstract=2731241>>.

¹³⁹ Chiu, *supra* n 131, at 473.

¹⁴⁰ OECD, *supra* n 4, at 15.

making,¹⁴¹ the SOE Guidelines and the Stewardship Code seek to govern shareholder rationality.¹⁴²

Crucially, both the Stewardship Code and the SOE Guidelines operate by defining what an ideal shareholder ought to resemble.¹⁴³ Whereas the SOE Guidelines portray the Good State Shareholder as one that is able to balance between ownership and regulation, active and passive engagement, and accountability and efficiency, the Stewardship Code builds the image of an institutional investor from the notion of enlightened shareholder value, which is seen to undergird the contemporary UK company law.¹⁴⁴ In particular, the Stewardship Code's ideal 'enlightened shareholder' is a 'hypothetical shareholder who is interested in the long-term well-being and performance of the company and its social and environmental impact'.¹⁴⁵ Accordingly, both the Stewardship Code and the SOE Guidelines opt for similar governance techniques when they attempt to shape the internal organization and objective-setting processes – identity, soul – of a particular shareholder to overcome dysfunctional elements in the behaviour of its investee companies.

While the reception of pleas for shareholders' enhanced roles has been mixed,¹⁴⁶ it is likely that large institutional investors will accrue greater governance responsibilities in the future.¹⁴⁷ Whether these responsibilities take the form of industry self-regulation or binding compliance mechanisms is still unknown.¹⁴⁸ In any case, instruments governing shareholder behaviour can be seen to illustrate, and perhaps even spearhead, more constitutive developments in regulation of the post-Financial Crisis economic architecture.¹⁴⁹ Corporate governance codes, in general, have already been

¹⁴¹ Compare e.g. with Tao Hsien Dolly King and Min Ming Wen, *Shareholder Governance, Bondholder Governance, and Managerial Risk-Taking* 35 *Journal of Banking and Finance* 512 (2011) and Vicente Cuñat, Mireia Gine and Maria Guadalupe, *The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value* 67 *Journal of Finance* 1943 (2012).

¹⁴² This governance structure bears close resemblance to modern banking regulation. See, especially, Mika Viljanen, *Making Banks on a Global Scale: Management-Based Regulation as Agencement* 23 *Indiana Journal of Global Legal Studies* 425 (2016), at 443–447.

¹⁴³ Chiu, *supra* n 131, at 463–464.

¹⁴⁴ Generally, see Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013). See also Iris Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK* (2013) 38 *Delaware Journal of Corporate Law* 983, 1012–1015.

¹⁴⁵ Chiu, *supra* n 131, at 463–464.

¹⁴⁶ For critical insights see e.g. Edward Rock, *Institutional Investors in Corporate Governance* in Jeffrey Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press 2015). For a more radical account, see Lorraine Talbot, *Why Shareholders Shouldn't Vote: A Marxist-Progressive Critique of Shareholder Empowerment* 76 *The Modern Law Review* 791 (2013).

¹⁴⁷ See Chiu and Katelouzou, *supra* n 138. In particular, Chiu and Katelouzou identify 'hardening' of the 'soft law of shareholder stewardship' in several jurisdictions both on national and regional level.

¹⁴⁸ The Stewardship Code has been criticized for opting out from regulatory approach. Chiu, *supra* n 131, at 477–481. In this regard, the SOE Guidelines can already rely on a multi-layered regulatory structure. See *infra* n 153.

¹⁴⁹ Compare with Peer Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective* 38 *Journal of Law and Society* 50 (2011), at 57–63.

identified as crucial sites for ‘transnational law-making’ and as illustrative examples of ‘dramatic changes with regard to the actors involved and the nature’ of norm-setting.¹⁵⁰ However, judged against the rise of agency capitalism¹⁵¹ and State ownership,¹⁵² the Stewardship Code and the SOE Guidelines emerge as governance instruments that necessitate shifting the analytical lens from corporate governance to shareholder governance. Their robust models of the ‘enlightened shareholder’ or the Good State Shareholder function as powerful instruments shaping shareholder rationalities that, in turn, prompt governance impacts.

Viewed against existing national, regional and international structure that regulates and maintains general parameters of State shareholder activity,¹⁵³ the SOE Guidelines, in particular, form a subtle but critical pivot in the governance matrix. However, they are not the sole governance instrument that attempts to recalibrate behaviour of State shareholders. Instead, there are also other broadly comparable international instruments that operate in similar fashion. For example, the governance framework erected to manage increasing SWF activity has demonstrated the significance of ‘soft’ global standards.¹⁵⁴ Generally Accepted Principles and Practices, known as Santiago Principles, by the International Monetary Foundation’s (IMF) International Working Group of Sovereign Wealth Funds are a case in point.¹⁵⁵ Like the SOE Guidelines, the Santiago Principles emphasize that SWF managers need to be isolated from direct political influence and that their investment decisions have to be based on economic rather than political considerations, with possible exceptions clearly formulated and published beforehand.¹⁵⁶ As such, the Santiago Principles are also best understood as an attempt to shape the parameters of State shareholder function, although they focus primarily on internationally-oriented portfolio investment where shareholder activism is viewed with suspicion.¹⁵⁷

¹⁵⁰ Ibid. 56-58, 61.

¹⁵¹ See e.g. Ronald Gilson and Jeffrey Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights* 113 Columbia Law Review 863 (2013).

¹⁵² See *supra* section II.B.

¹⁵³ See e.g. works cited in *supra* n 6, 7 and 8. In this regard, the private investor principle, developed within the EU State aid law regime, is perhaps the most sophisticated – but also contested – tool in affecting State shareholder rationality. See, in particular, Matthew Parish, *On the Private Investor Principle* 28 European Law Review 70 (2003), Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 240–260 and De Cecco, *supra* n 7, at 81.

¹⁵⁴ See e.g. Ashby Monk, *Recasting the Sovereign Wealth Fund Debate: Trust, Legitimacy, and Governance* 14 New Political Economy 451 (2009), at 457–458.

¹⁵⁵ International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices (Santiago Principles)*, available at <<http://www.iwg-swf.org/pubs/gapplist.htm>>. For an introduction to the instrument’s governance scheme, see Joseph Norton, *The ‘Santiago Principles’ for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes* 13 Journal of International Economic Law 645 (2010). For a critical reading, see Cummine, *supra* n 83, at 210-217.

¹⁵⁶ Santiago Principles, *supra* n 155, at Principles 6, 8, 9, 14, 19.

¹⁵⁷ Ibid. Principle 21, according to the which: ‘If an SWF 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’.

In any case, emergence of instruments akin to the Stewardship Code, the SOE Guidelines and the Santiago Principles suggest that, in addition to corporate governance codes, *shareholder governance codes* form increasingly important pieces in regulation of the global economic architecture.¹⁵⁸ Against this background, the following subsections discuss the practice of the OECD in using corporate governance as a tool of global governance, as well as the significance of disseminating the Good State Shareholder model across different regimes of international economic governance.

4.2 The OECD: Ruling with Information

The SOE Guidelines are not an exceptional instrument in the OECD's policy arsenal. On the contrary, the SOE Guidelines exemplify strategies that define the organization's global governance capacity. While the OECD does maintain a few binding treaty regimes, it governs mostly through research, policy setting and consensus-building.¹⁵⁹ Unlike other key economic governance institutions, such as the IMF and the World Trade Organization, the OECD steers away from coercive powers. Instead, it seeks to influence the direction of policy, either through member governments' domestic processes or through setting international agendas that may take binding form in other ways.¹⁶⁰ Thus, instruments like the SOE Guidelines disseminate global 'best practices', 'principles', or 'international standards' to persuade policy-makers to utilize their practices and concepts in solving domestic problems. Often deployed from privileged locations such as Ministries of Finance, the OECD's governance instruments further infiltrate and frame national debates.¹⁶¹

Even though the OECD operates without 'carrots or sticks', it has been markedly efficient in crafting, setting and transferring policies across its member governments and beyond.¹⁶² Another important OECD instrument, the OECD Principles of Corporate Governance, known as 'G20/OECD Principles' since their last revision in 2015, serves as an excellent example.¹⁶³ Ever since the G20/OECD Principles were first issued in 1999, their inclusion in economic governance instruments and their overall impact on national corporate governance schemes has been studied from a variety of

¹⁵⁸ Compare with Chiu and Katelouzou, *supra* n 138, who speculate that the 'law of shareholder stewardship' might be emerging.

¹⁵⁹ Generally, see Rianne Mahon and Stephen McBride (eds), *The OECD and Transnational Governance* (UBC Press 2008). For an illustrative example in the field of education policy, see Armin von Bogdandy and Matthias Goldmann, *The Exercise of International Public Authority through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument* 5 *International Organization Law Review* 241 (2008).

¹⁶⁰ See e.g. Robert Kudrle, *Governing Economic Globalization: The Pioneering Experience of the OECD* 46 *Journal of World Trade* 695 (2012).

¹⁶¹ Rianne Mahon and Stephen McBride, *Standardizing and Disseminating Knowledge: The Role of the OECD in Global Governance* 1 *European Political Science Review* 83 (2009), at 98.

¹⁶² For a review of recent developments, see e.g. Jan Wouters and Sven van Kerckhove, *The OECD and the G20: An Ever Closer Relationship* 43 *George Washington International Law Review* 345 (2011).

¹⁶³ For the relationship between the SOE Guidelines and the G20/OECD Principles, see *supra* n 65.

angles.¹⁶⁴ Comparative corporate governance studies, for example, have identified the G20/OECD Principles as key vehicles for globalization of corporate law.¹⁶⁵

As an example of the OECD's 'networked governance' strategy, the G20/OECD Principles are included in the IMF's and the World Bank's Reports on the Observance of Standards and Codes (ROSCs).¹⁶⁶ ROSCs are a benchmark for assessing national legislation's adoption and implementation of internationally agreed standards particularly with regard to fiscal practices, monetary and financial policy transparency, banking supervision and securities market regulation.¹⁶⁷ As a part of the benchmark, the G20/OECD Principles are understood to prompt harmonization in the realm of minimum corporate law and governance standards.¹⁶⁸ In more radical accounts, the process is seen as an uneven promotion tool for strict shareholder-orientated 'Anglo-American corporate governance in the South'.¹⁶⁹ Recent studies, however, suggest that, instead following an Anglo-American model, 'transnational issuers' such as the OECD are gearing towards 'a more general global governance model' when instituting corporate governance codes.¹⁷⁰ Accordingly, the G20/OECD Principles, like many other OECD instruments, are perhaps better viewed as distinctive global governance tools that transcend national practices. Crucially, the success of such governance instruments hinges on their ability to align with and penetrate into other 'networked' governance regimes.¹⁷¹ In this regard, the OECD clearly functions as an important node in the 'emergence of a transnational law of corporate governance'.¹⁷² However,

¹⁶⁴ For a national case studies, see e.g. Lena Tsipouri and Manolis Xanthakis, *Can Corporate Governance Be Rated? Ideas Based on the Greek Experience* 12 *Corporate Governance: An International Review* 16 (2004), Victor Chen, Jing Li and Daniel Shapiro, *Are OECD-Prescribed 'Good Corporate Governance Practices' really Good in an Emerging Economy?* 28 *Asia Pacific Journal of Management* 115 (2011) and Christopher Robertson, Abdulhamid Diyab and Ali Al-Kahtani, *A Cross-National Analysis of Perceptions of Corporate Governance Principles* 22 *International Business Review* 315 (2013). For an organizational perspective, see Andrew Baker, *The 'Public Interest' Agency of International Organizations? The Case of the OECD Principles of Corporate Governance* 19 *Review of International Political Economy* 389 (2012).

¹⁶⁵ Alan Dignam and Michael Galanis, *The Globalization of Corporate Governance* (Ashgate 2009) 141–143. See also Zumbansen, *supra* n 149, at 57–59, 62 and Francesca Cuomo, Christine Mallin and Alessandro Zattoni, *Corporate Governance Codes: A Review and Research Agenda* 24 *Corporate Governance: An International Review* 222 (2016), at 236.

¹⁶⁶ Mathias Siems and Oscar Alvarez-Macotella, *The OECD Principles of Corporate Governance in Emerging Markets: A Successful Example of Networked Governance?* in Mark Fenwick, Steven Van Uytsel and Stefan Wrba (eds), *Networked Governance, Transnational Business and the Law* (Springer 2014) 259–262.

¹⁶⁷ See IMF, *Standards and Codes: The Role of the IMF* (2016), available at <<http://www.imf.org/About/Factsheets/Sheets/2016/08/01/16/25/Standards-and-Codes?pdf=1>> and World Bank, *Reports on the Observance of Standards and Codes*, available at <<http://www.worldbank.org/en/programs/rosc>>.

¹⁶⁸ Dignam and Galanis, *supra* n 165, at 141–143.

¹⁶⁹ Susanne Soederberg, *The Promotion of 'Anglo-American' Corporate Governance in the South: Who Benefits from the New International Standard?* 24 *Third World Quarterly* 7 (2003), at 24.

¹⁷⁰ Ruth Aguilera and Alvaro Cuervo-Cazurra, *Codes of Good Governance* 17 *Corporate Governance: An International Review* 376 (2009), at 385.

¹⁷¹ Compare with Siems and Alvarez-Macotella, *supra* n 166, at 259–263.

¹⁷² Zumbansen, *supra* n 149, at 72.

the experience with the SOE Guidelines suggests that the organization is also emerging as a pioneer in shareholder governance.

4.3 Diffusion of The Good State Shareholder Model

Compared to the G20/OECD Principles, the SOE Guidelines have attracted strikingly little attention. However, existing research is mostly consistent with experiences of the G20/OECD Principles' impact.¹⁷³ For example, it has been noted that a number of governments had already streamlined the exercise of ownership, altered SOE disclosures, and enhanced independence and integrity of SOE directors following the issuance of the 2005 Guidelines.¹⁷⁴ Beyond domestic policy changes, the 2005 Guidelines have also been used as a normative and substantive basis for other regulatory initiatives,¹⁷⁵ as a benchmark against which prospective members' regulatory frameworks are assessed¹⁷⁶ and in more general investment climate ratings.¹⁷⁷ Moreover, a number of OECD countries have acknowledged the instrument's recommendations either on the level of State ownership policy¹⁷⁸ or directly in legislation.¹⁷⁹

Significant research gap notwithstanding, there is clear indication that the SOE Guidelines already influence and direct State ownership policies in the OECD countries and beyond.¹⁸⁰ Similar developments have been noted also with regard to other OECD instruments that investigate government interventions in the economy. In a major recent study on subsidies, for example, it is argued that the 'OECD-based export credit Arrangement shows how a formally non-binding mechanism can give rise to a transnational legal order that permeates national law and practices' and can certainly 'provide discipline'.¹⁸¹ More fundamental changes are also possible. Analysing the OECD's governance mechanisms, Porter and Webb have noted how the OECD's 'best

¹⁷³ It should be noted that existing research is mostly generated within the OECD in a follow-up process for assessing implementation and impact of the original 2005 Guidelines. See *infra* n 174.

¹⁷⁴ OECD, *Corporate Governance of State-Owned Enterprises: Change and Reform in OECD Countries since 2005* (OECD Publishing 2010) 7–9, available at <http://www.oecd-ilibrary.org/governance/corporate-governance-of-state-owned-enterprises_9789264009431-en>.

¹⁷⁵ World Bank, *supra* n 124.

¹⁷⁶ Héctor Lehoué, *Colombian SOEs: A Review Against the OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Corporate Governance Working Papers, No. 12, 2013), available at <<http://dx.doi.org/10.1787/5k3v1ts5s4f6-en>>.

¹⁷⁷ U.S. Department of State, Investment Climate Statement: Burma (2015), available at <<http://www.state.gov/documents/organization/241914.pdf>> 20.

¹⁷⁸ See, for example, Swedish ownership policy. Regeringskansliet, *Statens Ägarpolicy Och Riktlinjer För Företag Med Statligt Ägande* (2014) 3–4, available at <<http://www.regeringen.se/contentassets/b1b0024ec35d40329e4446bf0ddcb770/statens-agarpolicy-och-riktlinjer-for-foretag-med-statligt-agande-2014>>.

¹⁷⁹ See, for example, the recent Finnish government proposal on amending the State Shareholdings and Ownership Steering Act, HE 233/2016 vp 3, available at <<http://www.finlex.fi/fi/esitykset/he/2016/20160233.pdf>>.

¹⁸⁰ Compare with Fabrizio De Francesco, *Transnational Policy Innovation: The OECD and the Diffusion of Regulatory Impact Analysis* (ECPR Press 2013).

¹⁸¹ Gregory Shaffer, Robert Wolfe and Vincent Le, *Can Informal Law Discipline Subsidies?* 18 *Journal of International Economic Law* 711 (2015), at 739–741.

practice' becomes part of the identity of the ideal modern state' and how the organization 'engages deliberately in this identity-defining'.¹⁸² Seen under this light, the SOE Guidelines emerge as an attempt to define a modern shareholder State through the Good State Shareholder model.

Indicative of the OECD's global governance capacity, the Good State Shareholder model is robust, authoritative and highly portable. As such, it resonates with wider schemes of global economic governance.¹⁸³ The broad appeal of the SOE Guidelines' prescriptions is best illustrated with the experiences from emerging international trade and investment treaty regimes, particularly the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).

In the TTIP process, for example, the EU proposal for a SOE chapter explicitly stated that '[t]he EU's main objective for including SOE-related disciplines in the TTIP is to develop a joint platform of rules which could be used in other agreements/forums to address concerns raised by the development of state capitalism'. Crucially, as a part of the 'joint platform of rules' the EU has suggested a provision in which '[t]he Parties shall ensure that enterprises ... shall observe high standards of transparency and corporate governance in accordance with the OECD Guidelines on corporate governance of state owned enterprises [sic]'.¹⁸⁴ Likewise, during the TPP process, the Obama administration emerged as a vocal proponent in setting additional disciplines on SOEs.¹⁸⁵ Crucially, the US position clearly considered the TPP process and the revision of the SOE Guidelines as a joint enterprise. In this regard, Secretary of State Hillary Clinton stated explicitly that the US is 'working to include a chapter on state-owned enterprises in the Trans-Pacific Partnership and to finalize new OECD guidelines'.¹⁸⁶

While there are currently strong doubts as to implementation of the TTIP and the TPP, particularly due to forthcoming Trump administration's ostensible reluctance to enter

¹⁸² Tony Porter and Michael Webb, *Role of the OECD in the Orchestration of Global Knowledge Networks* in Mahon and McBride (eds), *supra* n 159, at 44. For a similar discussion from the perspective of the G20/OECD Principles, see Siems and Alvarez-Macotella, *supra* n 166, at 262.

¹⁸³ In more radical accounts, it has been suggested to amount to a distinct 'state-owned enterprise model that is being promoted by developed countries through the OECD', see Jane Kelsey, *The Risks of Disciplines on State-owned Enterprises in the Proposed Trans-Pacific Partnership Agreement* (2013), available at <<http://www.itsourfuture.org.nz/wp-content/uploads/2013/09/Kelsey-TPP-SOE-paper.pdf>> 1.

¹⁸⁴ European Union, 'Textual Proposal: Possible Provisions on State Enterprises and Enterprises Granted Special or Exclusive Rights or Privileges in EU-US TTIP Negotiations' (2015), available at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf>. Compare with EU - Viet Nam Free Trade Agreement, 'Chapter 10: State Owned Enterprises, enterprises granted special rights or privileges and monopolies' (2015) Article 5.1.

¹⁸⁵ Julien Sylvestre Fleury and Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership* 19 *Journal of International Economic Law* 445 (2016), at 447-450.

¹⁸⁶ Hillary Clinton, Economic Statecraft: Speech at Economic Club of New York (14 October 2011), available at <<http://www.state.gov/secretary/20092013clinton/rm/2011/10/175552.htm>>.

multilateral trade deals,¹⁸⁷ the drafting processes illustrate how well the SOE Guidelines enmesh with contemporary international economic law. Even if the most recent Mega-Regional trade and investment treaties would fizzle, they have, nevertheless, exposed a number of new legal techniques through which the governance of SOEs is likely to be arranged in the future.¹⁸⁸ Even though formal adoption of the SOE Guidelines in some of these instruments could transform the instrument's informal rules into binding legal disciplines,¹⁸⁹ the broader significance of the OECD's instrument lies in policy diffusion and creation of shared epistemologies that construe and define the Good State Shareholder. The inclusion of the SOE Guidelines in recent economic governance instruments merely underscores the broad appeal and portability of this governance model.

5 Fault Lines of the Good State Shareholder: The SOE Guidelines and Human Rights Governance

International economic law is not the only governance regime where the SOE Guidelines have been elevated as a crucial policy platform and a normative benchmark. Instead, the instrument has recently been espoused by the UN human rights community as 'essential to build on' for 'better governance and accountability of State-owned enterprises in order to enhance the management of their human rights impacts'.¹⁹⁰ Against this backdrop, this section discusses compatibility of the Good State Shareholder model with normative projects that go beyond efficient utilization of public resources and preservation of a level playing field. In particular, the section argues that the adoption of the SOE Guidelines as an instrument of human rights governance highlights the fault lines and stakes implicit in construing the Good State Shareholder model.

5.1 State Ownership in Human Rights Governance

While the discussion surrounding the growing impact of SOEs and their State owners has mostly concentrated in the realm of economic policy and governance, macro level changes in the world economy have also been registered elsewhere. Perhaps surprisingly, one of the most active forums in this regard has been the international

¹⁸⁷ See e.g. FT, *Trump Vows to Renounce Pacific Trade Deal on First Day in Office* (22 November 2016), available at <<https://www.ft.com/content/dd98598a-b044-11e6-a37c-f4a01f1b0fa1>>.

¹⁸⁸ Sylvestre Fleury and Marcoux, *supra* n 185, at 450–464.

¹⁸⁹ For critique of SOE disciplines TPP and TTIP, see Ines Willems, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?* 19 *Journal of International Economic Law* 657 (2016). For another skeptical position, see Tu-Anh Vu-Thanh, *Does WTO Accession Help Domestic Reform? The Political Economy of SOE Reform Backsliding in Vietnam*, *World Trade Review* advance access (2016), available at <<https://doi.org/10.1017/S1474745616000409>>.

¹⁹⁰ HRC, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc A/HRC/32/45 (2016) 38.

human rights system.¹⁹¹ Usually discussed under an umbrella term ‘business and human rights’, various international human rights organizations, treaty bodies and broader human rights community have been drawing attention to multiple connections between business activity and the realization of human rights over the past decades.¹⁹² The rise of State ownership and the emergence of globally-operating SOEs resonates with this normative project because State ownership provides a strong link between State-centric human rights system and human rights performance of corporations.¹⁹³ Accordingly, human rights policies at national, regional and international levels emphasize the interconnectedness between State duties stemming from international human rights law and the ways in which states use their shareholder power. In sum, State ownership is increasingly recast as a space, and SOEs as proxies, of human rights governance.¹⁹⁴

While the practice of human rights treaty bodies regarding State ownership predates the emergence of business and human rights movement,¹⁹⁵ increased attention to State ownership arrangements is best illustrated by the introduction of the UN Guiding Principles on Business and Human Rights (GPs),¹⁹⁶ the most authoritative and the most widely spread governance template for managing human rights impacts of corporations.¹⁹⁷ During the drafting of the GPs, SOEs and State ownership quickly became a regular concern. For example, the very first report leading to the GPs noted that ‘ways must be found to engage State-owned enterprises in addressing human

¹⁹¹ See e.g. Mikko Rajavuori, *State Ownership and the United Nations Business And Human Rights Agenda: Three Instruments, Three Narratives* 23 *Indiana Journal of Global Legal Studies* 665 (2016).

¹⁹² See e.g. David Kinley and Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law* 6 *Human Rights Law Review* 447 (2006) and John Ruggie, *Business and Human Rights: The Evolving International Agenda* 101 *American Journal of International Law* 819 (2007).

¹⁹³ See 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 *Indiana Journal of Global Legal Studies* 665 (2011), at 692-698, 704-705. See also The Institute for Human Rights and Business, *State of Play: Human Rights in the Political Economy of States: Avenues for Application* (2014), available at <http://www.ihrb.org/pdf/2014-03-18_State-of-Play_HR-Political-Economy-States.pdf>. For a parallel with institutional investors, see Rory Sullivan and Nicolas Hachez, *Human Rights Norms for Business: The Missing Piece of the Ruggie Jigsaw – The Case of Institutional Investors in Radu Mares (ed), The UN Guiding Principles on Business and Human Rights* (Martinus Nijhoff 2011).

¹⁹⁴ See Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-Sensitive State Ownership Function* 26 *European Journal of International Law* 727 (2015), at 744–746. Compare with Musacchio and Lazzarini, *supra* n 11, at 60-62 where the authors detail a ‘social view’ of State ownership. See also Heath and Norman, *supra* n 106.

¹⁹⁵ See e.g. CESCR, General Comment 14, *The Right to Highest Attainable Health*, UN Doc. E/C.12/2000/4 (2000) 34.

¹⁹⁶ HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc A/HRC/17/31. (2011).

¹⁹⁷ For a brief introduction, see e.g. Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress* in Mares (ed), *supra* n 193. For a recent review, see John Ruggie, *Global Governance and ‘New Governance Theory’: Lessons from Business and Human Rights* (2014) 20 *Global Governance* 5, at 10–15.

rights challenges in their spheres of operation'.¹⁹⁸ In the same vein, further reports compared SOEs with private companies and drew attention to multiple channels through which States could influence their investee companies.¹⁹⁹ Building on the broad coverage on SOEs, the GPs included a specific piece of policy advice on the treatment of State ownership. According to Principle 4, titled 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'.²⁰⁰

Since the adoption of the GPs, the connections between human rights and state ownership arrangements have been integrated in the practice of various human rights treaty bodies both within²⁰¹ and beyond the UN system.²⁰² In the most comprehensive analysis, the Committee on the Rights of the Child's (CRC) has understood conduct of the role of the State as an owner to be caught by the 'obligation to respect... [which] implies that a State should not engage in, support or condone abuses of children's rights when it has a business role itself'. This includes investing 'public finances and other resources in business activities that violate children's rights'.²⁰³

Beyond these articulations, various States have brought State ownership policies on the same constellation with business and human rights.²⁰⁴ Out of the few States that already have a National Action Plan²⁰⁵ on business and human rights in place, the

¹⁹⁸ Commission on Human Rights, Interim Report of the Special-Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc E/CN.4/2006/97 (2006) 79–80.

¹⁹⁹ See e.g. HRC, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc A/HRC/4/035. (2007) 3 and HRC, Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc A/HRC/8/5. (2008) 30.

²⁰⁰ HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc A/HRC/17/31. (2011) Principle 4.

²⁰¹ See e.g. CRC, Concluding Observations: Myanmar, UN Doc CRC/C/MMR/CO/3–4 (2012) 21 and CESCR, General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/GC/23 (2016) 58.

²⁰² In the system of the Council of Europe, see Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business (2 March 2016) 22.

²⁰³ CRC, General Comment 16, State Obligations Regarding the Impact of the Business Sector on Children's Rights, UN Doc CRC/C/GC/16. (2013) 27, 64.

²⁰⁴ In the EU, actions taken under GPs' Principle 4 fall into the competence of the Member States. See EU Commission, Implementing the UN Guiding Principles on Business and Human Rights - State of Play (2015), available at <<http://data.consilium.europa.eu/doc/document/ST-10947-2015-INIT/en/pdf>>.

²⁰⁵ See e.g. Damiano de Felice and Andreas Graf, *The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights* 7 Journal of Human Rights Practice 40 (2015).

UK,²⁰⁶ Sweden,²⁰⁷ and Finland²⁰⁸ specifically target the relationship between State shareholders and their investee companies. Further, State ownership appears as a driver for additional human rights and CSR considerations in other ownership policies. For example, Chinese guidelines on SOEs' fulfilling corporate social responsibilities reflect growing interest in the social potential of State ownership.²⁰⁹ Cumulatively, surging international, regional and national human rights practice suggests that State ownership arrangements and human rights performance of SOEs are increasingly viewed as crucial sites for bringing about positive human rights outcomes.²¹⁰

The latest development in this process is the adoption of the SOE Guidelines in the practice of the UN Working Group on Business and Human Rights (WG), a thematic special procedures body of the UN Human Rights Council (HRC). In particular, the SOE Guidelines are seen to form a building block for '[g]overnmental departments and entities tasked with exercising State ownership ... to act in a manner that is compatible with the overall human rights obligations of the State'.²¹¹ Thus, in the WG's vision, the SOE Guidelines are considered as a 'robust template for governance of State-owned enterprises'²¹² and they 'should be implemented in a mutually reinforcing manner' with the GPs.²¹³ To this end, they are positioned 'to the core of how the State should behave as an owner and the ways in which its ownership model is consistent with its international human rights obligations',²¹⁴ informing both broad normative parameters of State ownership function and practical methods of engaging with investee companies.²¹⁵ More specifically, the OECD's instrument affects the scope of

²⁰⁶ UK Government, Good Business: Implementing the UN Guiding Principles on Business and Human Rights (2013), available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf>.

²⁰⁷ Sweden, Action plan for business and human rights (2015), available at <<http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>>.

²⁰⁸ Finland, National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights (2014), available at <https://www.tem.fi/files/41214/TEMjul_46_2014_web_EN_21102014.pdf>.

²⁰⁹ SASAC, Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities (2008), available at <<http://www.sasac.gov.cn/n2963340/n13933222/14125651.html>>. Moreover, Chile, Ghana, France and Switzerland recognize special responsibilities of the State to safeguard human rights through SOEs. See HRC, *supra* n 190, at 47-51.

²¹⁰ Rajavuori, *supra* n 194, at 744-746. For similar developments relating to human rights or climate change activism by SWFs, see Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets* 29 American University International Law Review 1 (2013) and Danyel Reiche, *Sovereign Wealth Funds as a New Instrument of Climate Protection Policy? A Case Study of Norway as a Pioneer of Ethical Guidelines for Investment* 35 Energy Policy 3569 (2010).

²¹¹ HRC, *supra* n 190, at 27.

²¹² Ibid. 38.

²¹³ Ibid. 44, 99.

²¹⁴ Ibid. 88.

²¹⁵ For a recent analysis, see Larry Catá Backer, *Between State, Company, and Market: A Preliminary Engagement on the Business and Human Rights Obligations of States and State Owned Enterprises (SOEs)* (2016), available at <<https://ssrn.com/abstract=2869944>>.

the WG's report ('focuses only on State-owned enterprises in the traditional sense'²¹⁶), its primary target ('entities tasked with exercising State ownership'²¹⁷), its governance strategy ('clarify the role and responsibilities of the State as owner'²¹⁸) and its practical aspects ('[a]ctive ownership is at the core of these guidelines',²¹⁹ 'exercising ownership offer a particularly useful avenue as they include functions and tools for implementing the State's requirements of State-owned enterprises'²²⁰).

The adoption of the SOE Guidelines in human rights governance attests to their broad appeal, to their portability across different governance regimes and to their success in crafting the Good State Shareholder model that resonates with diverse governance initiatives. The WG, a key special procedures body developing the UN business and human rights agenda, seems to fully embrace the Good State Shareholder model and to utilize it extensively to bring about human rights-sensitive State shareholder function. By recalibrating 'how the State should behave as an owner'²²¹ to emphasize human rights ends, the WG, quite deliberately, casts its distinctive normative orientation on the OECD's governance template.

In doing so, however, the WG seems to diverge significantly from the SOE Guidelines' normative, strategic and practical underpinnings. On a closer analysis, these divergences prompt two sets of questions. First, questions arise so as to the SOE Guidelines' compatibility with the State ownership model pursued by the WG in system of international human rights governance. Second, and more fundamentally, the tensions that emerge when the SOE Guidelines' treatment of CSR is compared to the business and human rights approach expose ideological struggles contained in the Good State Shareholder model. Against this background, the following subsections discuss human rights omissions – and broader fault lines – in the SOE Guidelines.

5.2 The Good State Shareholder through a Human Rights Lens

In section III.B. it was asserted that one of the most significant substantive changes in the SOE Guidelines relates to greater emphasis on CSR issues such as worker safety, stakeholder holder relations and sustainability reporting. Considering that the SOEs, by and large, lag behind in CSR practices when compared to wholly private companies,²²² the addition of broad sustainability considerations is well-founded and

²¹⁶ Ibid.19.

²¹⁷ Ibid. 27.

²¹⁸ Ibid. 42.

²¹⁹ Ibid.

²²⁰ Ibid. 55.

²²¹ Ibid 88.

²²² For recent scholarship, usually based on Chinese data, see Haidong Zheng and Yue Zhang, *Do SOEs Outperform Private Enterprises in CSR? Evidence from China* 10 Chinese Management Studies 435 (2016) and Qinghua Zhu, Junjun Liu and Kee-hung Lai, *Corporate Social Responsibility Practices and Performance Improvement among Chinese National State-Owned Enterprises* 171 International Journal of Production Economics 417 (2015). See also Manuel Pedro Rodríguez Bolívar, Raquel Garde Sánchez and Antonio López Hernández, *Managers as Drivers of CSR in State-Owned Enterprises* 568 Journal of Environmental Planning and Management 1 (2014). For a business and human rights

it offers CSR advocates an increasingly hospitable environment. Thus, the SOE Guidelines seem to strike a progressive note when they emphasize the public character of State ownership and highlight various legal and moral requirements it creates for ‘government officials that are charged with the ownership of enterprises’ in relation to responsible business conduct.²²³ Moreover, the SOE Guidelines portray SOEs as having ‘commercial interest in minimizing reputational risks and being perceived as ‘good corporate citizens’ – a category that explicitly includes human rights.²²⁴ Thus, the SOE Guidelines clearly make the connection between the Good State Shareholder model and turning SOEs into ‘good corporate citizens’ that would also stay mindful to their human rights impacts.²²⁵

Despite the increased attention to responsible business conduct, CSR and human rights, in particular, pose a number of difficult questions for the SOE Guidelines. With an explicit aim to streamline the administration of public wealth and to assign clear and measurable objectives for SOEs, the SOE Guidelines obviously struggle to integrate various competing interests that, together, form ‘the best interest of the enterprise and the general public who constitute its ultimate shareholders’.²²⁶ In general, the SOE Guidelines manage this complexity by arguing that the public interest is best served ‘by maximising long-term value’,²²⁷ where non-financial interests are accounted as a part of ‘commercial interest’.²²⁸ Thus, the approach of the SOE Guidelines on social policy or human rights are, at best, approached as legitimate objectives provided they are contained in the relationship between a State shareholder and an individual SOE. At worst, however, they are considered as a smokescreen ‘to further goals which differ from those which apply to the private sector’.²²⁹

Crucially, human rights, in general, belong with the ‘further goals’,²³⁰ and closer analysis of the SOE Guidelines reveals that their normative, strategic and practical tenets severely impair human rights from influencing State shareholder behaviour. Human rights omissions are particularly visible in two instances. First, regardless of the increased public embeddedness and accountability pursued by the SOE Guidelines, human rights are not positioned as constitutive or even potential components in setting broader State ownership policies. In particular, the SOE Guidelines are careful in speaking about ownership policies recognizing SOEs’, and not States’, ‘responsibilities towards stakeholders’.²³¹ Second, the SOE Guidelines opt for a restrained integration of human rights in the actual communication between a State

perspective, see Rae Lindsay and others, *Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles* 6 The Journal of World Energy Law & Business 2 (2013).

²²³ OECD, *supra* n 4, at 15.

²²⁴ Ibid. 61.

²²⁵ Ibid.

²²⁶ Ibid. 12.

²²⁷ Ibid. 31.

²²⁸ Ibid. 61.

²²⁹ Ibid. 58.

²³⁰ Ibid. 58.

²³¹ Ibid. 25.

shareholder and its investee companies. While human rights are occasionally referred to as a part of best practices on responsible business conduct,²³² they are nevertheless positioned only as possible ‘expectations’²³³ that ownership entities ‘can communicate’ to SOEs.²³⁴

The lack of clearly-defined human rights-based rationales and practices for State ownership is surprising when judged against earlier institutional practice of the OECD.²³⁵ In this regard, the most important frame of reference are the OECD Guidelines for Multinational Enterprises (MNE Guidelines), last updated in 2011, which are firmly based on the foundational legal principle undergirding international human rights law according to which States have the duty to protect human rights.²³⁶ As such, the MNE Guidelines are clear in rooting their policy rationale on the existing state-based structure of international human rights law.²³⁷ Furthermore, while the MNE Guidelines operate under the premise that ‘State-owned multinational enterprises are subject to the same recommendations as privately-owned enterprises’, they nevertheless point out that ‘public scrutiny is often magnified when a State is the final owner’ and that need to consider human rights-based policies also in their ownership-based relationships with companies.²³⁸ Similarly, in the case of export credit, the OECD Council notes that ‘Members have existing obligations to protect human rights and fundamental freedoms, and that business enterprises have the responsibility to respect human rights’.²³⁹ In sum, compared to the OECD’s earlier practice, the SOE Guidelines are construed in a way that effectively detaches human rights from affecting State ownership policies and tones down their importance in shareholder communication.

While this choice may be understandable from the perspective of the OECD’s general aims and its explicit aim to temper ‘social’ or ‘public policy’ functions of SOEs, it is curious that an instrument which targets the State as a major economic actor and which explicitly frames the policy discourse through public embeddedness and accountability fails to base at least a part of the ownership rationales on State duties under human rights law. Thus, while the Good State Shareholder may consider transforming SOEs into ‘good corporate citizens’ under business-case approaches to CSR,²⁴⁰ turning them

²³² Ibid. 61, 65, 71.

²³³ Ibid. 25.

²³⁴ Ibid. 61.

²³⁵ John Ruggie and Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* 22 *The Brown Journal of World Affairs* 99 (2015), at 111–117.

²³⁶ OECD, Guidelines for Multinational Enterprises (2011 Edition), available at <http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en> IV.

²³⁷ It has, however, been argued that the MNE Guidelines show how governments are in fact requiring ‘more of business than they are demanding of themselves’. See Ruggie and Nelson, *supra* n 235, at 123.

²³⁸ OECD, *supra* n 236, at 22.

²³⁹ OECD, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, TAD/ECG(2012)5, at 2.

²⁴⁰ OECD, *supra* n 4, at 61.

into human rights actors that would spearhead more extensive corporate human rights responsibilities is not part of the Good State Shareholder's ownership rationale.

5.3 The Struggle for the Soul of the Good State Shareholder

While the Good State Shareholder model pursued by the SOE Guidelines is distinctively embedded in public interest, fortified with a range of accountability mechanisms and injected with broad CSR mandates, it produces an incomplete account of State ownership. Notably, publicness advocated by the SOE Guidelines does not extend to human rights obligations of States under international law. In general terms, the Good State Shareholder model omits any meaningful integration of the State's role as a shareholder and the State's role as a human rights duty-bearer. Moreover, the SOE Guidelines privatize the – already diluted – human rights function of the State to individual corporate governance relationships.²⁴¹ Against this backdrop, the WG's reliance on the SOE Guidelines as 'fully compatible with ... the respect of human rights' and as 'useful anchor for implementing human rights requirements'²⁴² in State ownership function appears problematic on normative, strategic and practical levels.²⁴³

On normative level, the SOE Guidelines aim for efficient utilization of public wealth and protection of a level playing field. By contrast, the human rights perspective is informed by a narrower set of normative goals, to 'protect against human rights abuses by business enterprises that are owned or controlled by the State'.²⁴⁴ In particular, the WG's report is based on instrumental use of the SOE Guidelines' normative base so as to use changes in SOEs' human rights practices to gain momentum for more fundamental respect for human rights in the corporate sector.²⁴⁵ In the light of business and human rights, efficient utilization of public wealth and protection of a level playing field are merely means to an end.²⁴⁶

On strategic level, the SOE Guidelines maintain a sharp distinction between ownership and regulation. Under the human rights reading, however, the ownership function of the State approaches the regulatory function of the State. The WG, echoing the rationale of the GPs, maintains that 'in relation to the State duty to protect [human rights], States should do more than simply treat State-owned enterprises as any other business enterprise'.²⁴⁷ As such, in the human rights approach, the State is understood

²⁴¹ See Musacchio and Lazzarini, *supra* n 73, at 421.

²⁴² HRC, *supra* n 190, at 41, 43, 94.

²⁴³ The problems arising from utilization of the SOE Guidelines in the WG's approach are also pointed out by Catá Backer, *supra* n 215, at 7-9, 11, 14, 18-19. For Catá Backer, the OECD 'framework is altogether too strongly grounded in European historicism and ignores the robust development of a new form of SOE and SOE-state relationship'.

²⁴⁴ HRC, *supra* n 190, at 2.

²⁴⁵ *Ibid.* 28.

²⁴⁶ Compare, however, with CRC, *supra* n 203, at 55: '...corruption and mismanagement of government revenues from, among others, State-owned businesses ... can limit the resources available for the fulfilment of children's rights in accordance with article 4 of the Convention'.

²⁴⁷ HRC, *supra* n 190, at 22.

as an economic actor whose shareholder power is at all times permeated and constrained by obligations stemming from international human rights law. Against this conceptual backdrop, ‘exercising ownership’ provides ‘a particularly useful avenue ... for implementing the State’s requirements of State-owned enterprises’.²⁴⁸ In essence, ownership becomes a vehicle for imprinting public human rights ends through private corporate governance arrangements. In the process, the boundaries between the ownership function and the regulatory function of the State are destabilized in a way that is alien to the SOE Guidelines.

On practical level, the SOE Guidelines emphasize enhanced accountability mechanisms and active ownership. The human rights approach takes these initiatives as given. Thus, the SOE Guidelines recommendations on ‘how to ensure that SOEs operate efficiently, transparently and in an accountable manner’ are ‘very much in line with the GPs, when ‘accountability [is] being understood ... with reference to human rights impacts’.²⁴⁹ Accordingly, the SOE Guidelines’ accountability mechanism, which emphasizes democratic control of public assets for the benefit of a national polity and accountability towards efficient markets, is taken out of its original context and cast as a mechanism towards distinctive human rights accountability.²⁵⁰ In relation to active ownership, the WG further considers it to be ‘fully compatible with and necessary for the respect of human rights’ and in ‘no tension between respecting the autonomy of the enterprise’s management, on the one hand, and ensuring that State-owned enterprises respect human rights and responsible business conduct standards’.²⁵¹ In this regard, the SOE Guidelines are clearly more cautious towards active role of State shareholders particularly when they assume the role of a dominant shareholder capable of ‘pursuing objectives that are not in the interest of the enterprise’.²⁵²

In sum, these normative, strategic and practical incompatibilities suggest that recent efforts by the WG to supplant the SOE Guidelines’ accountability structures and shareholder engagement with a State ownership model more sensitive towards the international human rights system face an uphill battle. Crucially, the SOE Guidelines are structured in a way that relegates human rights obligations of the State to a secondary role in economic decision-making. As an upshot of the instrument’s publicness, the SOE Guidelines make it clear that those wielding State shareholder power are expected to pursue prudent asset management aimed at maximum profitability.²⁵³ When combined with their conservative approach to human rights considerations, the SOE Guidelines’ vision of ‘accountability’ seems to leave little room for a human rights-sensitive State ownership function outlined by the WG and mandated by the UN human rights system.

²⁴⁸ Ibid. 55.

²⁴⁹ Ibid. 39.

²⁵⁰ Compare with Gelpert, *supra* n 112, at 294–307.

²⁵¹ HRC, *supra* n 190, at 43.

²⁵² OECD, *supra* n 4, at 53

²⁵³ Ibid. 11, 19, 30–31.

Due to the SOE Guidelines' well-established institutional position in international economic governance, its rationale on splitting human rights from State ownership policies will likely expand and transfer well beyond the OECD area. In this diffuse 'networked governance' matrix, the WG's deliberate utilization of the SOE Guidelines, and the idea that State ownership would operate in legal framework partly influenced by State duties to respect, protect and fulfill human rights risks, will unlikely penetrate into the core of the Good State Shareholder model.²⁵⁴

Ultimately, the SOE Guidelines and the UN business and human rights agenda portray competing visions on how States should own companies in the global economy. The recent adoption of the SOE Guidelines in the WG's practice does not seem to offer a sustainable workaround that would bridge these normative, strategic and practical divergences. On the one hand, the Good State Shareholder, regardless of its promotion of 'good corporate citizens', does not seem a good fit for the international human rights project. On the other hand, the way the WG frames the SOE Guidelines' policy prescriptions as prudent human rights governance seems to misconstrue the basic tenets of the SOE Guidelines: accountability towards national polity and international markets, separation of regulation and ownership, and active ownership interested in maximizing long-term value. While there are clear normative tensions between the instruments, as well as inconsistencies that emerge when the SOE Guidelines are aligned with the UN's business and human rights project, governance of State shareholders reflects an important lesson. In particular, the WG's attempt to subsume the OECD's powerful governance template in human rights governance exposes the stakes in play when planning the organization of State shareholder function, making corporate governance arrangements and designing a regulatory framework mediating – seemingly – public interventions in – seemingly – private markets.

In contemporary world economy where State ownership matters again, the rationales and forms of State ownership also matter. In such a setting, governance strategies that affect processes through which State shareholders organize themselves, communicate their priorities and remain responsive to a range of external pressures emerge as crucial global governance mechanisms. Over the past decades, a complex framework encompassing national, regional and international regulation has given shape and means of enforcement for governance rationales developed in the course privatization and new public management.²⁵⁵ This regulatory framework has, for good reasons and often to a good effect, severely restricted the capacity of State shareholders to use their

²⁵⁴ Naturally, the inclusion of broad human rights mandates into the Good State Shareholder model would likely raise a host of complexities. For a poignant critique of such 'Good Despots', see Doreen Lustig and Eyal Benvenisti, *The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings* 15 *Theoretical Inquiries in Law* 125 (2014).

²⁵⁵ Thynne, *supra* n 18, at 184-193.

financial power to pursue ends that escape the rationality of a private market participant.²⁵⁶

It is against this background that the significance of the SOE Guidelines' highly portable governance scheme, the Good State Shareholder, is illuminated. Belonging on the regulatory continuum developed since the dawn of privatizations, the SOE Guidelines, assume unique governance strategies. Most importantly, the SOE Guidelines, through the Good State Shareholder model, emerge as an instrument of shareholder governance. Laudable in its normative goals – efficiency, engagement, accountability –, the experience of the Good State Shareholder with contemporary human rights governance nevertheless exposes clear fault lines in the SOE Guidelines' conception of publicness. As such, the Good State Shareholder also exemplifies how an instrument governing the internal make-up, decision-making and objectives – the soul – of State shareholders becomes a site of ideological contestation and struggle, and how easily certain public interests, such as protection of human rights, are sidelined in expert-driven governance.²⁵⁷

6 Conclusion

As State owners continue to amass and command immense economic power tied to corporate equity, there is a natural inclination among governments, international organizations and even the human rights community to shape the parameters of State ownership for their own purposes. The broad appeal of the OECD's SOE Guidelines, a soft law instrument, becomes understandable against these changes.

Detailing how *States ought to act* when involved directly with the market through shareholder positions, the SOE Guidelines promise to channel State shareholder power towards principles of efficiency, transparency and accountability in the public interest. To this end, they sketch a powerful governance framework where State ownership can, allegedly, operate without waste, undue political interference and mixing of political and economic prerogatives. In the process, the SOE Guidelines construe an idealized State shareholder – the Good State Shareholder. Due to the SOE Guidelines' position as a key instrument linking corporate governance and global governance, the portable Good State Shareholder model is likely to export both best practices and more constitutive rationales behind State ownership policies well beyond the OECD area.

²⁵⁶ Compare with the development of the EU State aid law. According to De Cecco, *supra* n 7, at 81, for example, problems in the insistence of State aid law to separate State and market, and to impose 'the logic of economic efficiency on the commercial activities of Member States', leads to severe restriction of the 'the autonomy of Member States to pursue public interest goals through market participation'. Quite naturally, this autonomy is 'one of the most "emotionally charged" areas of internal market law', see Andrea Biondi, *When the State Is the Owner - Some Further Comments on the Court of Justice 'Golden Shares' Strategy* in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press 2010), at 95. For a more radical account, see Danny Nicol, *The Constitutional Protection of Capitalism* (Hart Publishing 2010), at 117-120.

²⁵⁷ For an illustrative examination, see David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

Forming *the* international standard for State ownership policy, the SOE Guidelines are set to govern how States behave as owners for years to come.

Considering the SOE Guidelines' propensity to introduce checks and balances on public policy objectives of SOEs, their attempted integration in international economic governance is understandable. On the contrary, the espousal of the SOE Guidelines by the UN business and human rights community warrants closer attention. Since the introduction of the GPs, State owners and State ownership policies have increasingly been targeted with human rights claims. Recently, the SOE Guidelines have been elevated as the primary framework through which human rights-sensitive State ownership should be operationalized. While more thorough in their treatment of CSR than their predecessor, close reading of the SOE Guidelines suggests that the instrument makes severe human rights omissions and contains conceptual formulations that, effectively, relegate human rights interests to a secondary role in economic policy-making. 'Good corporate citizenship' aside, the Good State Shareholder is not particularly good for human rights.

In general, governance of SOEs and State shareholder function appear to be divided into separate normative, substantive and discursive universes. While the UN efforts steer towards a rejuvenation of the idea of State ownership as a social policy with great human rights potential, the OECD, reflecting a distinctive privatization-era mindset, seeks to impose State shareholders with additional checks that effectively prohibit States' human rights obligations from influencing State ownership policies. Crucially, the utilization of the SOE Guidelines in both policy streams underscores a broader point and reveals the stakes and fault lines in construing and disseminating the Good State Shareholder model.

Even though normative differences between the two projects for governing State ownership are fully understandable, it is important to note how and where the attempts to govern State shareholder behaviour take place. In particular, the SOE Guidelines, a soft law instrument drafted by the OECD's policy experts, come out as a key node in the developing web of transnational shareholder governance. As the OECD instrument emerges as a key site for construing the identity – the soul – of a modern shareholder State, the political stakes in defining 'Good' in the Good State Shareholder become apparent. An instrument of shareholder governance, the Good State Shareholder implants ownership rationales that impinge efficiency, engagement and accountability in internal make-up, decision-making and objectives of State shareholders. These governance rationales penetrate State shareholder function and, as illustrated with the SOE Guidelines' treatment of human rights, crowd out some public interests while emphasizing others. Ultimately, then, the SOE Guidelines and the Good State Shareholder model exemplify both a new turn in economic governance and the ideological struggles that entail when the governance lens moves from transnational corporate governance to transnational shareholder governance. In this exercise, State shareholders stand at a critical, but not unique, juncture.

