

STATE OWNED OIL COMPANIES, NORTH-SOUTH AND SOUTH-SOUTH (PERSPECTIVES ON) INVESTMENT

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1 Introduction

The involvement with and interest of multinational corporations on natural resource trade and investment is often traced back to the 16th Century¹ when colonial outposts such as the British East India Company (EIC)² and the Dutch Vereenigde Oost-Indische Compagnie, (VOC)³ traded with distant lands and overseas territories. Both companies started out as speculative vehicles to import precious spices and exotic materials but as their activities expanded from the spice trade to other resources and commodities so did their powers and reach. Their powers included quasi-governmental prerogatives such as the ability to wage war, imprison and execute convicts, negotiate treaties, strike their own coins, and establish colonies.⁴ While the VOC is widely considered to be the first multinational company (MNC) the EIC, in turn, ruled over one-fifth of the world's population at the time and its revenues were greater than

¹ Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013) 18-19

² Anthony Wild, *The East India Company: Trade and Conquest from 1600* (Harper Collins 1999); 'The East India Company: The Company That Ruled the Waves' *The Economist* (17 December 2011) <www.economist.com/node/21541753>

³ That literally means the United East Indian Company and is referred to by the British commonly as the Dutch East India Company. See <<http://entoen.nu/voc/en>> for a brief introduction to the origins and early expansion of the VOC

⁴ Wild (n 2) with reference to the EIC

those of many European countries.⁵ Both companies were central actors in forging the structural history of foreign investment (FDI) through what has been described as ‘coerced imperialism and monopolistic mercantilism’.⁶ The territorial control enjoyed by the EIC enabled the manipulation of terms of trade, the extraction of taxes and, in general the financing of Britain’s own industrial revolution through the plunder and de-industrialisation of the colonies.⁷

The early companies engaged in commercial transactions under the so called ‘colonial encounter’⁸ that was to lay the foundations of future interactions between the ‘Old World’ and the ‘New’. Between what became known as ‘the West’ and, later, ‘the North’ (the capital exporting, developed countries) and the resource rich, raw material exporting (ex) colonies, the developing South. For many, this ‘encounter’ is to account for today’s uneven and much criticised system of international law in general and FDI in particular.⁹ Watched through this prism current British affluence is not just a consequence of the nation’s superior ingenuity and industrial past, it has on the contrary, much to do with a planned, ruthless drive to

⁵ Nick Robins, ‘Loot: In Search of the East India Company, The World's First Transnational Corporation’ (2002) 14 *Environment & Urbanization* 79

⁶ Glenn J Ames, *The Globe Encompassed: The Age of European Discovery, 1500–1700* (Pearson, 2007) 102-03

⁷ Robbins (n 5) 80

⁸ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 6-7; Nico Schrijver *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 2008) 173

⁹ The literature in this area draws mostly from two historical secondary sources, Anghie (n 8) and Charles Lipson, *Standing Guard: Protecting Capital in the Nineteen and Twentieth Centuries* (University of California Press, 1985); Miles (n 1) expands upon this idea and so did, previously, Elena Blanco and Jona Razzaque in *Globalisation and Natural Resources Law* (Edward Elgar, 2011) advancing the theory that the quest for resources was the driving engine of the globalisation process

conquer and plunder through a ‘remorseless logic of its eternal search for profit, whether through trade, through taxation or through war’.¹⁰

This chapter examines multinational corporations’ relationship with home and host states in the course of resource extraction. It begins by looking at the early extractive imperial companies from a North-South perspective and tries to contextualise the lasting legacy of colonial plunder as resource extraction politics evolved through the decolonisation period first and the advent of globalisation later, until the emergence and growth of South-South investment in the postcolonial world. The chapter focuses on a particular type of resource – oil, and on a particular type of company –state owned. Oil is the world’s wealthiest industry¹¹ and the companies involved in its extraction and commercialisation have particular ties with their home and host states.¹² Oil companies, whether state owned or privately owned, have a substantial impact on a country’s economy that often translates itself into political influence and economies of corruption and clientism.¹³ The importance of state owned oil companies

¹⁰ Robbins (n 5) 80-81

¹¹ Approximately two billion dollars a day of petroleum are traded worldwide, which makes petroleum the largest single item in the balance of payments and exchanges between nations. Silvana Tordo, Brandon S Tracy and Noora Arfaa, ‘National Oil Companies and Value Creation’ (2011) World Bank Working Paper No 218 at xi. For the most up-to-date and comprehensive ‘guide’ to the politics, trends and issues surrounding oil and its governance see Gavin Bridge and Philippe Le Billon, *Oil* (Polity, 2013)

¹² Michael Watts, *Empire of Oil: Capitalist Dispossession and the Scramble for Africa*, (2006) Monthly Review <<http://monthlyreview.org/2006/09/01/empire-of-oil-capitalist-dispossession-and-the-scramble-for-africa/>> accessed 10 July 2016 for a critical account of the relationship between the US and the governments of Saudi Arabia, The Gulf Oil States, Venezuela and Nigeria and the absurdly high profits of ‘Big Oil’. Visit also the think tank ‘Price of Oil Campaign’<<http://priceofoil.org/campaigns/separate-oil-and-state/>> accessed 10 July 2016

¹³ Daniel Yergin, *The Prize: The Epic Quest for Oil, Money and Power* (Free Press, 1999) 3

cannot be overstated. The IEA expects over 80% of growth in oil production between 2010 and 2035 to come from just six OPEC countries, Saudi Arabia, Iraq, Kuwait, Iran, Qatar and Abu Dhabi, in all of them state oil companies play the leading role.¹⁴

The second part of the chapter traces the growth and expansion of national or state owned natural resource extraction companies alongside the emergence of the Global South as an economic force, and the subsequent growth of South-South investment. The focus in this part remains on national oil companies (NOCs), and the historical and political factors that determined their development, highlighting the tenuous yet dynamic divide between the ‘public’ and the ‘private’ in the global economy.

The third section considers the goals and aims of SOEs in the Global South and links these to the international investment strategy of many national oil companies. Advancement of the public interest and economic expansion are considered against the backdrop of existing investment rules. The fourth part examines both the external and internal corporate governance structures of NOCs and considers the special risks associated with the close relationship between State and enterprise activity in the context of resource extraction and management. Two related aspects are highlighted: the first one is the danger of and opportunities for corruption and clientism and how these are addressed and managed within the increased demands for transparency and good governance. The second relates to the drive to ensure a so called ‘level playing field’ and the proper separation between the state and the enterprise in the context of a variety of corporate governance codes including the OECD

¹⁴ Bernice Lee and others ‘Resources Futures’ (Chatham House Report, 2012)

<www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/1212r_resourcesfutures.pdf> 40

Guidelines on Corporate Governance of State Owned Enterprises (OECD SOEs Guidelines).¹⁵ The role played by the state as a public power in the control and management of the enterprise and the definition of SOEs are considered in the context of investment dispute resolution with emphasis on the standing of SOEs as both claimants and respondents in investment arbitration disputes. The interpretation given to the doctrine of attribution and the applicability of the structural and functional tests developed by investment arbitration tribunals is examined in turn to establish the potential liability of the state alongside that of state owned companies.

Some of the points raised in the third and fourth sections are developed in the fifth section which considers state liability within the context of the International Law Commission's (ILC) Draft Articles on State Responsibility (ILC Articles)¹⁶ and the United Nations Guiding Principles on Business and Human Rights (UNGPs).¹⁷ The potential shortcomings in using the ILC Articles and on the UNGPs are considered in the conclusion within the context of the work and findings of the UN Intergovernmental Working Group on Business and Human

¹⁵ OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition* (OECD, 2015) <<http://dx.doi.org/10.1787/9789264244160-en>> accessed 10 July 2016. Please note that throughout the chapter national or state owned oil companies will be referred to as NOCs while the term SOE will be reserved to identify state owned companies in general to follow the OECD Guidelines terminology and the nomenclature chosen by most of the literature. NOCs are, of course, SOEs

¹⁶ *Report of the International Law Commission*, UN GAOR 56th sess, Supp No 10, UN Doc A/56/10 (2001) (ILC Articles)

¹⁷ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex

Rights for drafting of an ‘international legally binding instrument’ on Business and Human Rights.¹⁸ Human rights claims against SOEs face potential obstacles of immunity from jurisdiction and lack of neutrality of state based courts leading to suggestions for independent, transnational tribunals that may provide a more impartial forum.¹⁹ Investment arbitration was indeed developed to address problems of state immunity and local court bias in favour of states however, and despite some arguments in favour of extending investment arbitration tribunals’ scope to cover human rights claims against corporations the lack of expertise in human rights issues of the tribunal and the need to include public interest considerations in the evaluation of state policy may pose an unsurmountable obstacle to siting human rights related claims in those tribunals.²⁰

The chapter concludes by highlighting that state ownership of national oil companies is not a monolithic concept; on the contrary it takes multiple shapes and contours to serve varied, combined political, social and economic goals. In the context of South-South expanding trade and investment and, more specifically, in the context of increased natural resource demands and consumption by emerging economies, state ownership enables a policy informed economic option that can greatly facilitate positive social and economic outcomes. For this, a

¹⁸ *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, HRC Res 26/9, 26th sess, Agenda Item 3, U.N. Doc A/HRC/RES/26/9 (July 14, 2014) <http://ap.ohchr.org/documents/alldocs.aspx?doc_id> accessed 10 October 2015

¹⁹ Claes Cronstedt and Robert C Thompson, Working Group on International Arbitration Tribunal on Business and Human Rights, (24 July 2015) <www.ihrb.org/other/remedy/a-proposal-for-an-international-arbitration-tribunal-on-business-and-human/> accessed 10 November 2016

²⁰ Ionnis Glinavos, ‘Public Interests, Private Disputes: Investment Arbitration and the Public Good (2016) 13 Manchester Journal of International Economic Law 50

system that implements, transparency, accountability and sustainability in respect of both states and business actors is crucial.

2 The Rise of State Owned Companies and the Global South

In colonial times, land use regulations were often deployed as a control mechanism against the indigenous and local communities.²¹ Access to natural resources was a priority for the *metropolis* and regulation facilitating resource extraction often laid down the foundations of ecological degradation.²² At the same time international investment law, an offshoot of public international law, developed within European nations and under the auspices of liberal capitalism, exercised a legal quasi-colonialism that ensured, alongside the supply of raw materials, the subjection to European rule.²³ The cycle of resource extraction that followed resulted in the commodification of nature²⁴ while the displacement of local resource management practice²⁵ created poverty, environmental damage and fractured economies. In

²¹Susan Marks, 'Empire's Law' (2003) 10 *Indiana Journal of Legal Studies* 449; Joseph Murphy, 'Environment and Imperialism: Why Colonialism Still Matters' (SRI Papers No 20, 2009) at 6 SRI available at <www.sse.leeds.ac.uk/sri> accessed 10 July 2016

²² Patricia Kameri-Mbote and Philippe Cullet, 'Law, Colonialism and Environmental Management in Africa' (1997) 6 *Review of European Community and International Environmental Law* 23

²³ Schrivjer (n 8) 173; Miles (n 1); Anghie (n 8) 224, 238-9

²⁴ Ellen Meiksins Woods, *Empire of Capital* (Verso, 2005) 139; Anthony Allot, 'Modern Changes in African Land Tenure' in Neville Rubin and Eugene Cotran (eds), *Readings in African Law* (vol 1, Franck Cass 1970), 236

²⁵ Shalini Randeira, 'Global Designs and Local Lifeworlds: Colonial Legacies of Conservation, Disenfranchisement and Environmental Governance in Postcolonial India' (2007) 9 *Interventions* 12

this fertile ground the early incarnation of the multinational company²⁶ thrived with closely aligned interests to those of the ‘home’ state.²⁷

The well-known English East India Company or the Dutch East (and West, another company) India Company (the VOC) were private companies pursuing private gain but, at the same time, acted as instruments of the home state establishing a system of diplomacy and trade that was to shape and poison international markets and the global economy for centuries.²⁸ The common interests of early companies and states explain partly the high degree of ‘home’ state involvement in their expansion and activities, and the vesting of powers and prerogatives in the companies that would be considered ‘public’ today.²⁹ In respect of the host state, these early overseas companies had an ‘extractive’ and colonial relationship not dissimilar to that of contemporary multinationals investing in developing countries.³⁰

Notwithstanding their activities and public involvement these companies remained private enterprises. It was necessary to wait until the early XXth Century for the creation of the first national oil company. It was the government of Austria-Hungary, the first to build and operate a plant to supply oil products in 1908, in the years of instability preceding World War

²⁶ Janet McLean, ‘The Transnational Corporation in History: Lessons for Today?’ (2004) 79 *Indiana Law Journal* 363

²⁷ Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press, 2009) 8-10

²⁸ *ibid* 9

²⁹ Miles (n 1) 30; Ann Carlos and Stephen Nicholas, ‘Giants of an Earlier Capitalism: The Chartered Trading Companies as Modern Multinationals’ (1988) 62 *Business History Review* 398

³⁰ Carmen Gonzalez, ‘China’s Engagement with Latin America, Partnership or Plunder?’ in Elena Blanco and Jona Razzaque (eds) *Natural Resources and the Green Economy* (Brill, 2012) 37

I.³¹ As war loomed in the horizon and oil entered the war machinery it did not take long for other European powers to follow suit either creating companies to supply the domestic market or in upstream operations from their colonial territories. Security of supply was a key motivation at the eve of World War I and alongside the creation of national oil companies European private oil companies (POCs) took advantage of the protection and diplomatic weight of their home countries to prospect and extract oil in the colonies.³² Strategic control battles of the new oil fields³³ in the Middle East in territories which had been for centuries under either Ottoman or European control saw the UK investing in the Anglo-Persian Oil Company (later to become British Petroleum—BP)³⁴ while new private oil giants rapidly expanded into oil rich countries such as Venezuela (1910), Egypt (1911), Trinidad and Mexico (1913).³⁵

In Latin America, where oil was found at the beginning of the XXth Century, national companies (NOCs) didn't take long to emerge. The first of them was Argentina's Yacimientos Petrolíferos Fiscales (YPF) in 1922 followed by Bolivia's Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) in 1936, and Chile's Empresa Nacional del Petroleo (ENAP) in 1950.³⁶ However it was Mexico's Petróleos Mexicanos (Pemex) that in 1938

³¹ Tordo (n 11) 15

³² *ibid*

³³ Wilfred Nunn, *Tigris Gunboats, The Forgotten War in Iraq 1914-1917* (Chatham, 2007) 21

³⁴ Yergin, *The Prize* (n 13) 142

³⁵ Tordo (n 11) 16-17

³⁶ Osmel Manzano and Francisco Monaldi, 'The Political Economy of Oil Production in Latin America' (2008) *Economía*, 59

rocked the industry by taking over the operations of foreign private firms in the first large-scale expropriation/nationalization within the oil sector.³⁷

Following the instability of the interwar period at the wake of the postcolonial era, a very different type of foreign domination emerged, that of international oil companies (IOCs) or private oil companies (POCs). These private companies had been expanding silently while cashing in on the profits of war.³⁸ In the Middle East, for example, petroleum production remained controlled by a variety of private oil companies until the wave of nationalizations in the 1950s, 60s and 70s which eventually led to the declaration on permanent sovereignty over natural resources,³⁹ the New International Economic Order (NIEO),⁴⁰ and the establishment of national oil companies for the first time in the region.⁴¹

From the postcolonial NOCs' creation to today's post-global order, national oil companies have increased both their power and their market share.⁴² It is estimated that 75% global oil

³⁷Noel Maurer, 'The Empire Struck Back: Sanctions and Compensation in the Mexican Oil Expropriation of 1938' (2011) 71 *Journal of Economic History* 590

³⁸ Yergin, *The Prize* (n 13) 150

³⁹ *Permanent Sovereignty over Natural Resources*, GA Res 1803, UN GAOR, 17th sess, 1194th plen mtg, Supp No 17, UN Doc A/RES/1803 (14 December 1962)

⁴⁰ *Establishment of a New International Economic Order*, GA Res 3201 (S-VI), 6th special sess, 2229th plen mtg Agenda Item 7 UN Doc A/RES/S-6/3201 (1 May 1974)

⁴¹ In Saudi Arabia, five U.S. companies set up the Aramco Oil Company, today nationalised and under control of the Saudi Royal family. Schrijver (n 8) 167

⁴² Christopher Helman, 'The World's Biggest Oil and Gas Companies – 2015' *Forbes* (19 March 2015) <www.forbes.com/sites/christopherhelman/2015/03/19/the-worlds-biggest-oil-and-gas-companies/>

production and 90% of proven oil reserves today are controlled by state owned companies.⁴³ Saudi Arabia's Aramco, for example, is the world largest oil company⁴⁴ while Petrobras, Petrochina, Sinopec or Snoc have eclipsed traditional oil giants like Exxon Mobil, BP or Royal Dutch Shell.⁴⁵ The weight of the public sector in oil extraction and distribution in emerging economies can partly be explained by their recent political history.⁴⁶ Countries like Saudi Arabia, Iraq or Libya were subject to colonial rule and one of the first post-independence priorities consisted in the nationalization of the oil industry.⁴⁷ Private oil companies were perceived to be backed up by foreign, imperialistic governments and therefore opposed to national interests.⁴⁸ Government control of the oil industry became the logical corollary of the much fought for principle of sovereignty over natural resources⁴⁹ while ideological and practical reasons contributed to the growth of the state sector in oil

⁴³ Tordo (n 11) xi

⁴⁴ Which is currently considering to float some shares, see: 'Saudi Aramco Sale of the Century?' *The Economist* (9 January 2016)

⁴⁵ 'Really Big Oil' *The Economist* (10 August 2006)

⁴⁶ An analysis of ownership of oil companies shows that with the exception of Norway, most NOCs are in emerging economies. Przemyslaw Kowalski, and others, 'State-Owned Enterprises: Trade Effects and Policy Implications' (Trade Policy Papers No 147, OECD, 2013) 5

<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2012\)10/ANN/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2012)10/ANN/FINAL&docLanguage=En)> accessed 12 June 2016

⁴⁷ Schrijver (n 8) 82-100

⁴⁸ Daniel Yergin, *The Quest: Energy, Security, and the Remaking of the Modern World* (Penguin 2011) 285.

Political and economic interest lurked heavily in the Middle East where governments were topped or financed depending on their friendliness or openness to the big oil companies. Dictators were kept in place as far as they allowed a steady supply of the drug to which the economy had become addicted See Tordo (n 11) for the fall and rise of the Shah in Iran's post-independence

⁴⁹ Schrijver (n 8) 41-100

extraction. The combination of a weak domestic private sector and the practical benefits of natural monopolies' management for interlocking sectors made public ownership of oil companies a clear favourite. State ownership of oil production was used as a policy tool that enabled the collection of revenue and the re-distribution of wealth and privileges.⁵⁰

National Oil Companies (NOCs) are an example of strategic state owned companies whereby the state pursues socioeconomic goals alongside economic priorities. They provide cheap oil to the local population, local jobs and serve as the motor for other industries.⁵¹ These national oil companies can be structured in different ways. In some case the state has full ownership like in Aramco in Saudi Arabia⁵² or Pemex in Mexico. The state may also operate through a majority share that enables control of their operations. This is the case with ENI in Italy, Statoil in Norway; Sinopec in China, Petrobras in Brazil, or Gazprom in Russia. This second type of NOC is generally publicly traded.⁵³ The choice depends on the type of objectives that policy makers wish to achieve by the NOC and the country specific context including exogenous factors such as oil and gas prices, economic cycles or even the existence of international sanctions.⁵⁴

The above discussion should not encourage the assumption that the close link between oil companies and states is limited to those oil companies that are state owned fully or in part.

⁵⁰ Robert Pirog, 'The Role of National Oil Companies in the International Oil Market' (CRS Report for Congress, 21 August 2007) 4 <<http://fas.org/sgp/crs/misc/RL34137.pdf>>

⁵¹ *ibid* 4

⁵² Tordo (n 11) 67 provides examples of the various ownership models of NOCs.

⁵³ *ibid*. This will be of particular relevance to qualify as claimant and defendant in investment arbitration and it is discussed in section 4 of this chapter

⁵⁴ Tordo (n 11) xii

Private oil companies also have close ties with their ‘home governments’ either because they were initially under public ownership -like British Petroleum (BP), or due to their strategic role in securing access to one of the world’s most precious natural resources. The history of BP illustrates this special relationship well. British Petroleum origins date back to 1908 when the Anglo-Persian Oil Company was originally established as a subsidiary of the Burma Oil Company to exploit oil discoveries in what was then Persia (today, Iran).⁵⁵ Following World War II, and the subsequent process of decolonisation the new government of Iran nationalised the oil industry in 1951 creating the Iranian National Oil Company. The British Government, that failed to retain control by legal means,⁵⁶ with the help of the CIA staged a *coup d’état* in 1953.⁵⁷ A new pro-Western government allowed the Anglo-Iranian Oil Company to return to Iran and operate there until the triumph of theocratic Islamic Revolution of 1978-79.⁵⁸ The Anglo-Iranian Company changed its name to British Petroleum (BP) and expanded its operations beyond the Middle East as far as Alaska and, in 1965; it became the first company to strike oil in the North Sea.⁵⁹ BP became a public limited company and one of the world’s ‘supermajors’ oil and gas companies.⁶⁰ Registered in England and with headquarters in London, BP is a vertically integrated company operating in all areas of the oil and gas industry.⁶¹ Of the various environmental disasters it has been involved with⁶² the recent

⁵⁵ Yergin, *The Quest* (n 48) 285

⁵⁶ *Anglo-Iranian Oil Co (United Kingdom v Iran) (Preliminary Objection)* [1952] ICJ 2. The case can be found at <www.icj-cij.org/docket/index.php?p1=3&p2=3&k=1ba&case=16&code=uki&p3=4>

⁵⁷ Yergin, *The Quest* (n 48) 300

⁵⁸ Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror* (Wiley, 2003) 272

⁵⁹ ‘Our History’ (BP) <www.bp.com/en/global/corporate/about-bp/our-history.html>

⁶⁰ It was privatised by the British Government in stages between 1979 and 1987

⁶¹ Bridge and Le Billon (n 11) at 35-40

Deepwater Horizon oil spill off the coast of the US illustrates especially well the very close relationship between oil companies (private as well as publically owned) and their ‘home’ governments. Indeed the British government involvement at the diplomatic level in the resolution of the case didn’t escape the scrutiny of those who have long denounced the indifference with which the suffering by victims of multinational corporations abroad have been met in similar scenarios.⁶³

3 Strategies, Goals and Investment by State Owned Companies in the Global South

Servicing of national markets, operations of natural monopolies and the pursuit of public interest may have all been behind the creation of state or national companies in the oil sector in what is known as the Global South but there is, today, a discernible trend towards expansion into international markets by state owned oil companies. This is particularly the case in respect of large national oil companies from emerging Asian economies, and, in particular, China. China was one of the first emerging economies that encouraged its state owned companies to invest and acquire a market share abroad pursuing a ‘Going Out’

⁶² For an overview of these see Corporate Watch <<https://corporatwatch.org/company-profiles/bp-plc>> accessed 12 July 2016 and Ishaan Tharoor, ‘A Brief History of BP.’ Time Magazine, 2 June 2010.

⁶³ The Deepwater Horizon oil spill is considered the largest accidental oil spill in the history of the oil industry. It has cost the group around \$54bn in penalties, damages and clean-up costs.

<<http://www.theguardian.com/environment/bp-oil-spill>> accessed 12 July 2016. In contrasts one can cite the outcome of the tragedy in Bhopal<www.bhopal.com/> accessed 12 July 2016. For an overview of the current state of corporate accountability see Anna Grear and Burns H Weston ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on the Post-Kiobel Lawscape’ (2015) Human Rights Law Review, 21-44.

strategy and progressing from market seeking to resource seeking.⁶⁴ Natural resources were always at the heart of this ‘Going Out’ policy⁶⁵ with oil, of which China had become increasingly dependent, occupying a prominent role.⁶⁶ This has become a type of South-South investment that many praise while others loathe.⁶⁷

Chinese investments in the oil industry in two countries –Angola and Ecuador- exemplify the advantages and perils of this type of South-South resource seeking relationship. Chinese presence in Angola⁶⁸ began during the cold war with China supporting the three major liberation movements in the country: the Movimento Popular de Libertação de Angola (MPLA), União Nacional para a Indêpendencia Total de Angola UNITA), and the Frente Nacional para Libertação de Angola (FNLA).⁶⁹ This relationship got caught up with China’s

⁶⁴ In this period Chinese investment rose from US \$ 3 billion to US\$ 60 billion in the 5 years from 2005 to 2010. Susan Harris *China’s Foreign Policy* (Polity, 2014)

⁶⁵ Bo Kong (ABC, Clio 2010) *China’s International Petroleum Policy* at 46 and ‘China’s Quest for Oil in Africa Revisited’ SAIS Working Papers in African Studies 01-2011

⁶⁶ Jeremy Glenn and Hinrich Voss (2012) ‘Chinese Overseas Investment in the European Union’, Europe China Exchange and Research Network (ECRAN) p. 15-16
<http://eeas.europa.eu/china/docs/division_ecran/ecran_chinese_investment_in_the_european_union_jeremy_cl_egg_and_hinrich_voss_en.pdf> (accessed 3 October 2015)

⁶⁷ Andrew Bracken, Christina Hajj, Kristy Hartman & Shivan Sivalingam. ‘China’s Quest for Energy Security: Redefining and Driving Foreign Aid. An Analysis of China’s Involvement in Central Asia and Africa’ (2013) 10The Michigan Journal of Public Affairs. 4

⁶⁸ See, Indira Campos and Alex Vines ‘Angola and China a Pragmatic Partnership’ Center for Strategic and International Studies, (Chatam House, 2008)) available at <<http://www.china-briefing.com/news/2011/05/25/the-china-angola-partnership-a-case-study-of-chinas-oil-relationships-with-african-nations.html>>

⁶⁹ Iain Taylor, *China and Africa: Engagement and Compromise* (London: Routledge, 2006). Campos and Vines at 2.

own struggles against Soviet dominance during the cold war. After almost 30 years of civil war following independence from Portuguese rule, Angola, with large oil, minerals and diamonds reserves exemplifies the so-called resource curse or paradox of plenty⁷⁰ as it scores in the lowest ranks of the human development index and suffers from endemic poverty, malnutrition and under-development.⁷¹ It is with this already challenging governance climate that Chinese involvement began. Spurred by Mao Zedong's ideology, the initial involvement of China in Africa was driven by what China claimed as a 'shared history of grievances as victims of Western imperialism and colonization and a strong will to cultivate and protect national sovereignty'.⁷² Initial relations, thus, were driven by political as well as economic interests.

After joining the OPEC in 2007, Angola became the biggest oil exporter in Africa with China as its main client.⁷³ China, as it is common in its international resource seeking relations, provided Angola with loans for infrastructure, without imposing any stipulations to improve transparency, corruption, human rights, or democratization in exchange.⁷⁴ Instead a 'no-

⁷⁰ Jeffrey D. Sachs and Andrew M. Warner 'Natural Resources and Economic Development The curse of natural resources' (2001) 45 European Economic Review 827-38.

⁷¹ The 2015 Human Development report for Angola can be found at http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/AGO.pdf

⁷² Bracken et al (n 68) 12.

⁷³ China imports 41 % of Angola's oil, followed by the US which imports 23 %. The Economist Intelligence Unit (EIU). <http://www.eiu.com/industry/energy/sub-saharan-africa/angola>

⁷⁴ Ethan Cramer-Flood. 'Chinese Oil Investment in Angola and The Quest to Evade the Resource Curse.' Perspectives on Global Issues. 2007. <http://www.perspectivesonglobalissues.com/archives/fall-2009-energy/chinaangola/>

strings attached' policy based on China's 'Eight Principles'⁷⁵ respected the sovereignty and political choices of the aid recipient. This respect offered a stark contrast with the conditions often attached to IMF loans.⁷⁶ It also took place when no other concessionary loans were available to Angola due to the different priorities of Western powers at the time⁷⁷ Chinese national oil companies invested \$7.989 billion in Africa between 1995 and 2006 including crude and refined oil ventures.⁷⁸ However and for the much trumpeted Sino influence in Africa in general and in Angola in particular, a detailed look at the figures shows that international oil companies like Texaco, Exxon Mobil or Total still dominate the oil market in the country⁷⁹ and that trading relations with the US and Europe are still important.⁸⁰ The Angolans have also expressed their dissatisfaction at the exaggerated emphasis on their ties with China and the implications commonly drawn from these ties. Although China moved by economic considerations such as resource access and the opening of new markets for Chinese products would not insist on the staff monitoring programmes that were initially suggested by the IMF in respect of transparency and anti-corruption initiatives these are important for both

⁷⁵ Premier Zhou Enlai proposed what is called the 'Eight Principles Governing China's Aid to other countries'.

In Bracken et al (n 69) at 5.

⁷⁶ Dambisa Moyo, *Dead Aid* 'The Chinese are our friends' (Penguin 2009) at pp 98-114.

⁷⁷ Tony Hodges, *Angola: from Afro-Stalinism to Petro-diamond Capitalism* (Oxford: James Currey, 2001).

⁷⁸ Indira Campos and Alex Vines at 16. Campos, Indira, and Alex Vines. 'Angola and China: A Pragmatic Partnership.' Center for Strategic and International Studies. Mar. 2008. Web. 21 Apr. 2012.

http://csis.org/files/media/csis/pubs/080306_angolachina.pdf

⁷⁹ According to data from the EIU among the largest players are ChevronTexaco (U.S.), ExxonMobil (U.S.), TotalFinaElf (France), BP (UK), and Agip/Eni (Italy). Hodel, Mike. 'The Scramble for Energy: China's Oil Investment in Africa.' *The Journal on International Policy Solutions*. University of California, San Diego. Page 51. <http://irps.ucsd.edu/assets/017/7168.pdf> 3

⁸⁰ Vinas and Comas (n 69) 24. Alec Russel, 'The New Colonialists,' *Financial Times Magazine*, November 17, 2007

Angola and China.⁸¹ Angola is currently working with the IMF to improve transparency standards in the country and has recently published reports on payments to and from its extractive sector that surpass the information supplied by many members of the EITI.⁸² China, on the other hand, is keen on reducing corruption in its national owned companies and has developed a variety of initiatives to this end; including ratifying the United Nations Convention against Corruption (UNAC)⁸³ and agreeing to accept that other State Parties to the Convention assess its compliance with the treaty during the 2010-2015 review cycle.⁸⁴ China, the biggest economy of the Global South, shows in its aid and investment policy shows very similar motives to those of traditional OECD donors in economic terms⁸⁵ but a radically different political positioning. What emerges from these recent investment encounters is that whether South-South investment replicates conventional Western prescriptions for good governance or chooses to develop its own rules within a different paradigm should only be decided by those participating in the process.

⁸¹ Sara Lengauer 'China's Foreign Aid Policy: Motive and Method' 9(2011)2 Culture Mandala: Bulletin of the Centre for East-West Cultural & Economic Studies. 35 < www.internationalrelations.com/CM2011/PRC-Foreign-Aid-2011.pdf> Accessed 30 April 2016.

⁸² Vinas and Comar (n 69) at 27.

⁸³ New York 31 October 2003, United Nations, Treaty Series, vol. 2349, p. 41; Doc. A/58/422. '

⁸⁴ Pursuant to article 63 of UNCAC by a body created by and dependent on the conference of the parties.

Giovanni Nicotera 'China's commitment to the United Nations Convention against Corruption' (2013)

<http://f3magazine.unicri.it/?p=617>>accessed 16 November 2016.

⁸⁵ 'White Paper on China's Foreign Aid' State Council Information Office of the PRC (2011) in Sara Lengauer 'China's Foreign Aid Policy: Motive and Method' 9(2011)2 Culture Mandala: Bulletin of the Centre for East-West Cultural & Economic Studies. 41 < www.internationalrelations.com/CM2011/PRC-Foreign-Aid-2011.pdf> Accessed 30 April 2016.

In the case of Ecuador a crippling foreign debt and several decades of legal battle with American private owned oil companies for damages related to environmental destruction in the Amazon⁸⁶ pushed the populist government of Eduardo Correa towards China's offer of loans for oil.⁸⁷ China approached the transaction within the same parameters that it used for its investments in Angola and other Global South countries: it prioritised its own economic needs and strictly pursued a policy of non-intervention in the political affairs of the recipient country.⁸⁸ China's oil interests in Ecuador, however, have been blamed for the failure to maintain the oil drilling moratorium in the Yasuni National Park,⁸⁹ an exciting and novel payment for ecosystem services⁹⁰ global scheme devised by Correa's government with the help of civil society and international donors.⁹¹ Failure to raise enough contributions from the international community together with Chinese pressure to extract oil in payment for the loans advanced meant that the scheme was suspended in August of 2013.⁹² This suspension

⁸⁶ For an overview of the ongoing legal battle visit <<http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>> accessed 12 July 2016

⁸⁷ Joshua Cheynder & Nicolas Medina Mora 'Special Report: How China took control of an OPEC country's oil, At <www.reuters.com/article/2013/11/26/us-china-ecuador-oil-special-report-idUSBRE9AP0HX20131126> accessed 12 July 2016

⁸⁸ Bracken et al (n 68) 4

⁸⁹ www.sosyasuni.org/en/index.php?option=com_content&view=article&id=99:oil-extraction-moratorium-in-the-yasuni-national-park-&catid=1:news&Itemid=34 accessed 12 July 2016.

⁹⁰ For a discussion on payments for ecosystem services see Elena Blanco and Jona Razzaque 'Ecosystem Services and Human Well-Being in a Globalized World' 31 (2009) HRQ 692-720.

⁹¹ Gonzalo Escribano 'Ecuador's energy policy mix: Development versus conservation and nationalism with Chinese loans' (2013) 57 Energy Policy 152–159

⁹² Jeremy Watts, 'Ecuador Approves Oil Drilling in the Yasuni National part' (The Guardian 16 August 2016) <https://www.theguardian.com/world/2013/aug/16/ecuador-approves-yasuni-amazon-oil-drilling> accessed 10 July 2016

reinforced the perhaps partisan but extended view that China's appetite for resources is so insatiable that it will contribute to the ecological destruction of the planet, conveniently forgetting the decades of Western led resource depletion and its environmental cost.⁹³

In other emerging economies, it is difficult to discern a single trend.. While some countries concentrate on the promotion of the national oil sector others have clearly moved towards foreign expansion and are engaging in what is has been described as 'South-South Neo-extractivism'.⁹⁴ In India, for example, special schemes have been developed in the last few years with a clear emphasis on natural resource acquisition, particularly oil.⁹⁵ In Brazil, the 1988 Constitution made private participation in protected sectors, of which oil is one, more difficult, therefore restricting private sector investment.⁹⁶ In Russia, an oil exporting country, the Strategic Investment Law of 2008 specified strict rules of engagement for foreign investors interested in the sector.⁹⁷

93 U. Thara Srinivasan, et al. 'The debt of nations and the distribution of ecological impacts from human activities' 105(2008) PNSA 1768–1773. Dries Lesage, Thijs van de Graaf, Kirsten Westphal, 'Prospects for Energy Cooperation in a Multipolar World' in Lesange et al. (ed) *Global Energy Governance in a Multipolar World* (Ashgate 2010) 177-195

⁹⁴ Tordo (n 11) 67-72

1.1.1 ⁹⁵ The biggest expenditures abroad in 2010-11 the foreign exchange expenditure of five of the largest Indian SOCs Indian Oil Corp. Ltd., MMTC Ltd.; Bharat Petroleum Corp Ltd.; Mangalore Refinery, and Petrochemicals; Hindustan Petroleum Corp. Ltd.) exceeded foreign exchange earnings by almost USD 60 billion.' Fernanda Ribeiro Cahen, 'Internationalization of State-Owned Enterprises through Foreign Direct Investment' 55 (2015) Rev. Adm. Empresa. '

⁹⁶ Tordo (n 11) 67-72

⁹⁷ William Pomeranz 'Russian Protectionism and the Strategic Sectors Law' 25(2010) 2 American University International Law Review , 213-24

While these transactions could be and are, in some cases, an excellent example of South-South cooperation, they often simply reproduce neo-colonial and imperialist extractive systems.⁹⁸

4 Corporate Governance of State Owned Enterprises And Investment Law

One of the worries surrounding the expansion of SOEs abroad is the potential anti-competitive effects and distortions in respect of local or foreign competitors for the host's state resources.⁹⁹ In today's global markets and despite the growing participation of SOEs there is still very little reliable information on their scope and the type of benefits these companies may be enjoying vis-à-vis their private counterparts.¹⁰⁰

Concerns about both the internal and external corporate governance of SOEs are warranted when the state sector comprises of a large number of national oil companies. The strategic importance of the oil industry in many countries' economies has already been discussed. Income from oil exploitation directly contributes to the national budget and pays for various policy tools and interventions.¹⁰¹ The OECD has addressed some of these concerns in a variety of working documents and guidelines: Accountability and Transparency: A Guide for

⁹⁸ Gonzalez (n 30) 39

⁹⁹ Pradaig Carmody, 'The New Plunder of Africa' (Polity, 2013) 95-112.

¹⁰⁰ See Annex to OECD Trade Policy Paper No. 147 By Przemyslaw Kowalski, Max Büge, Monika

Sztajerowska and Matias Egeland TAD/TC/WP(2012)10/ANN/FINAL at 5

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2012\)10/ANN/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2012)10/ANN/FINAL&docLanguage=En) (accessed 1 October 2015)

¹⁰¹ cf discussion in previous section

State Ownership (2011);¹⁰² Competitive Neutrality: Maintaining a Level Playing Field Between Public and Private Business (2012);¹⁰³ Boards of Directors of State-Owned Enterprises (2013);¹⁰⁴ Financing State-Owned Enterprises: An Overview of National Practices (2014);¹⁰⁵ and State-Owned Enterprise Governance: A Stocktaking of Rationales for State Ownership (2015).¹⁰⁶ Of this list, the OECD Guidelines on Corporate Governance of SOEs (‘OECD SOE Guidelines’)¹⁰⁷ are the first international benchmark on good practice for governments on corporate governance of SOEs. Other relevant OECD instruments include the OECD Guidelines for Multinational Enterprises,¹⁰⁸ Auxiliary guidance in the articulation on the so called ‘level playing field’ and corporate governance of state owned companies may also be sought from other sources, such as the OECD Policy Framework for Investment¹⁰⁹ and the OECD Competition Assessment Toolkit.¹¹⁰

¹⁰² <http://www.oecd-ilibrary.org/governance/accountability-and-transparency-a-guide-for-state-ownership_9789264056640-en> accessed October 2015.

¹⁰³ <<http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/50302961.pdf>> accessed October 2015.

¹⁰⁴ <<http://www.oecd-ilibrary.org/docserver/download/5kg9xf6n4wj.pdf?expires=1444598012&id=id&accname=guest&checksum=46AB83F44003209BEA56AFAFE2E738E3>>

¹⁰⁵ http://www.oecd-ilibrary.org/finance-and-investment/financing-state-owned-enterprises_9789264209091-en

¹⁰⁶ <http://www.oecd.org/publications/state-owned-enterprise-governance-9789264239944-en.htm>

¹⁰⁷ The Guidelines were first published in 2005 and updated in 2015. The updated version can be found at <<http://www.oecd.org/daf/ca/guidelines-corporate-governance-soes.htm>>

¹⁰⁸ 2011 Update of the OECD Guidelines for Multinational Enterprises, available at <http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html> [hereinafter OECD Guidelines]. A much criticised instrument, see Blanco and Razzaque (n 9) 226-7.

¹⁰⁹ Updated in 2015, available at : <http://www.oecd.org/investment/investment-policy/pfi-update.htm>

¹¹⁰ First published in 20017 and updated in 2010, <http://www.oecd.org/daf/competition/assessment-toolkit.htm>

The Guidelines are intended as a complement to the OECD Principles of Corporate Governance,¹¹¹ with which they are fully compatible. The Guidelines state that ‘the ultimate purpose of state ownership of enterprises should be to maximise value for society, through an efficient allocation of resources’¹¹² while recommending the maintenance of a level playing field between state-owned and privately owned companies through the implementation of a number of guiding principles. Concerns and priorities reflected in the principles revolve around three areas: ‘transparency and accountability’, ‘the State acting as an owner’ and ‘the functioning of SOE Boards’. We will consider these concerns in turn in the following subsections.

The majority of SOEs in OECD countries are incorporated according to ordinary company law and need to comply with regular corporate governance requirements. In addition, SOEs are often subject to more stringent financial disclosure and transparency standards than their private counterparts due to the danger posed by their proximity to policy makers and regulators.¹¹³ For example Statoil (Norway) publishes financial statements and annual reports with disaggregated data on both their payments and the cost of their operations.¹¹⁴

Political interference in the affairs of the company and the complexity of the accountability chain often are manifested in oil based economies as a version of the ‘resource curse’ in the

¹¹¹ OECD Principles of Corporate Governance 2015. Originally developed in 2004, modified in 2009 and 2015

<http://www.oecd.org/corporate/principles-corporate-governance.htm>

¹¹² Id.

¹¹³ Sofia Wickberg, Transparency International,(2013) ‘Transparency of State-Owned Enterprises’

http://www.transparency.org/files/content/corruptionqas/Transparency_of_state_owned_enterprises.pdf

¹¹⁴ Id at 2

form of the so called ‘rentier state theory’.¹¹⁵ The ‘rentier state’, typically incurs into governance failures that range from cronyism and clientism the picking up of certain firms that receive privileges in exchange for funds and political backing¹¹⁶ to poor economic diversification and lack of an independent press or opposition.¹¹⁷

Countries with large NOCs are at a greater risk of cronyism or clientism than other economies. In many of the oil rich Middle Eastern states like Saudi Arabia, Bahrain, Kuwait, Qatar, Oman, and the United Arab Emirates (UAE) politics are heavily conditioned by oil. Redistribution of wealth takes precedence and forsakes democratic bargaining¹¹⁸ Populations are bought off by oil wealth and those who dissent are repressed.¹¹⁹ A very small but important group within society is involved in the generation of the rents and in sustaining the ruling elite.¹²⁰ In fact, many oil producing states and their national oil companies fall in a

¹¹⁵ The term was crafted by Hussein Mahdavy, ‘Patterns and Problems of Economic Development in Rentier States: The Case of Iran,’ in *Studies in Economic History of the Middle East*, ed. M. A. Cook (Oxford: Oxford University Press, 1970), 428-467; and developed by Hazem Beblawi, ‘The Rentier State in the Arab World,’ in Hazem Beblawi and Giacomo Luciani (eds) *The Rentier State* (Routledge 1987) 49-62

¹¹⁶ Oliver Falck, Christian Gollier, & Ludger Woessmann (2011). ‘Arguments for and Against Policies to Promote National Champions’ in Falck, Gollier and Woessmann (eds) *Industrial Policy for National Champions*. (MIT Press, 2011) 3

¹¹⁷ See Matthew Gray ‘A Theory of ‘Late Rentierism’ in the Arab States of the Gulf’ (2011) Center for International and Regional Studies, Georgetown University School of Foreign Service in Qatar, for an up to date account of rentier state theory.

<<https://repository.library.georgetown.edu/bitstream/handle/10822/558291/CIRSOccasionalPaper7MatthewGray2011.pdf?sequence=5>> accessed 10 November 2016

¹¹⁸ Falck et al (n 118) at 58.

¹¹⁹ Gray (n 117) 4

¹²⁰ Belawi (n 115) at 78

slightly more sophisticated version of the rentier state theory called neopatrimonialism whereby rulers develop new economic opportunities for themselves and their clients.¹²¹ The Guidelines address these perils by stating that a clear rationale for state ownership needs to be published and always guided by the ultimate purpose of providing a the highest service to society considering whether an alternative ownership structure or taxation could achieve the same or better results.¹²² This approach enshrines societal service into the government's policy choice and ensures that the debate about ownership policy is subject to appropriate procedures of political accountability and disclosed to the general public.¹²³ However private oil companies also influence policy and politics in countries without a large SOE sector.¹²⁴

Chapters III,¹²⁵ IV,¹²⁶ V,¹²⁷ VI,¹²⁸ and VII¹²⁹ of the OECD SOE Guidelines further expand upon the idea of a 'level playing field' that will allow free competition without unjustified privileges be granted to SOEs.

¹²¹ Gray (n 117) 7 discussing Gero Erdmann and Ulf Engel, 'Neopatrimonialism Revisited – Beyond a Catch-All Concept,' GIGA Working Paper 16-2006 (Hamburg, GIGA German Institute of Global and Area Studies, 2006): 17-20, <http://repec.giga-hamburg.de/pdf/giga_06_wp16_erdmann-engel.pdf.> accessed 10 July 2016

¹²² <http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf> at 30.

¹²³ Id at 31-32.

¹²⁴ Indeed the financing of political parties in the United States by, among others, oil companies was recently exposed in respect of 2016 presidential election by Nicholas Confessore, Sarah Cohen and Karen Yourish, (10 October 2015) http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?_r=0

¹²⁵ Chapter III: '[t]he legal and regulatory framework for SOEs should ensure a level playing field and fair competition in the marketplace...?'

¹²⁶ Chapter IV: Equitable treatment of shareholders and other investors.

¹²⁷ Chapter V: Stakeholders relations and responsible businesses.

¹²⁸ Chapter VI: Disclosure and transparency.

4.1 *Transparency, accountability and the 'level playing field'*

National oil companies account for over two thirds of the total revenue in countries such as Azerbaijan, Congo-Brazzaville, Iraq and Yemen.¹³⁰ They not only sell and distribute the country's oil but often collect payments and revenue from private oil companies¹³¹ yet, despite the volume and value of the transactions involved, their accounts are often opaque and the transfer of funds between the government and the state-owned national oil company is not transparent.

Lack of transparency on resource revenue reporting is linked to poor development outputs. Revenue Watch estimated that, in Angola, poor reporting from the national oil company produced at \$32 billion gap in public funds sorely needed for public support projects.¹³² In other African countries the figures are not dissimilar.¹³³ The EITI has published some

¹²⁹ Chapter VII: The responsibilities of the boards of state owned enterprises.

¹³⁰ Revenue Watch (2012) 'Advancing State-Owned Transparency through the EITI'

<https://eiti.org/files/SWG/RWI_SWG_Paper_State_owned_enterprises_April_2012.pdf> accessed 30 April 2016

¹³¹ Id.

¹³² J. R. Mailey, 'The Anatomy of the Resource Curse: Predatory Investment in Africa's Extractive Industries' 24.<<http://africacenter.org/wp-content/uploads/2015/12/Africa-Center-Special-Report-No.-3-EN.pdf>> accessed 10 July 2016.

¹³³ OECD (2011), Corporate Governance of State-Owned Enterprises: Change and Reform in OECD Countries since 2005, OECD Publishing. <<https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/48455108.pdf>> Accessed 30 April 2016 Nigeria had a gap of several billions in its GDP. id.

guidelines on the type of information it suggests NOCs provide.¹³⁴ Membership and implementation of EITI is however no guarantee of compliance. For example Azerbaijan and Kazakhstan, both EITI members, publish barely any information about their national oil companies.¹³⁵ Cameroon, on the other hand, reports on royalties, bonuses bonds, payments and transfers to the treasury from national oil companies and so do national oil companies like Statoil (Norway), Pemex (Mexico), Petrobras (Brazil) and Petroecuador (Ecuador) who without EITI membership publish audited financial statements and annual reports with disaggregated data on both their payments and the cost of their operations.¹³⁶

A different attempt to address lack of transparency is that of introducing ‘Integrity Pacts’. India, with a large SOE sector began to implement in 2005 the so called ‘Integrity Pacts’ with the aim of reducing the endemic culture of bribery around state owned enterprises providing public services and exploiting natural resources.¹³⁷ The pacts consist of an undertaking by the government office –or the SOE- that public officials will not demand or accept any bribes or gifts and that disciplinary or criminal sanctions will be imposed in case of violation of this rule while the private sector, in turn undertakes to disclose of all payments made and makes a ‘non-bribery’ commitment. Many state owned companies have

¹³⁴ EITI as a Tool for Improving the Trading Climate with National Oil companies (NOCs) (2015)

<https://eiti.org/sites/default/files/documents/EITI_Brief_NOC_FirstTrade_March2015.pdf> at 5. Accessed 9

October 2016.

¹³⁵ Ibid at 5.

¹³⁶ OECD (n 134) 2

¹³⁷ Integrity Pact in the Public Sector Undertaking (PSU) in India

<<http://www.integritypact.in/page.php?pid=136>> accessed 30 April 2016

signed to the pacts¹³⁸ and despite criticism indicating that more stringent measures are needed to address the endemic bribery that also plagues the private sector,¹³⁹ the Central Vigilance Commission, an autonomous governmental body that addresses public sector corruption, published a report stating that 95% of the participating state-owned companies believed that integrity pacts have ‘helped making procurement processes transparent’.¹⁴⁰

4.2 *The State as Owner*

Definition of what constitutes a SOE and what type of criteria - control, management, majority share, or subordination to state activity or goals are to be used for defining SOEs is of paramount importance as it will have a direct impact on the type of transparency requirements, access to foreign markets and dispute resolution procedures.

It is not always easy to establish, a priori, what constitutes a SOE due to the different ways in which these can be structured. For national oil companies the state may have full ownership of the company like in the case of Aramco, the national oil company in Saudi Arabia or Pemex, the national oil company in Mexico.¹⁴¹ The state may also operate through a majority share that enables control of their operations as it happens with ENI in Italy, Statoil in Norway; Sinopec in China, Petrobras in Brazil, or Gazprom in Russia. This second type of

¹³⁸ Among them the Oil and Natural Gas Corporation, Hindustan Petroleum Corporation and Gas Authority of India. Id

¹³⁹ Integrity Pact in the Indian Private Sector, Id. [ACSS Special Report No. 3 May 2015. Africa Center for Strategic Studies <http://africacenter.org/wp-content/uploads/2015/12/Africa-Center-Special-Report-No.-3-EN.pdf](#) accessed 30 April 2016.

¹⁴⁰ <http://www.transparencyindia.org/page.php?pid=23> > accessed 30 April 2016

¹⁴¹ Tordo (n 11) 67 provides examples of the various ownership models of NOCs.

NOC is generally publicly traded.¹⁴² These variations in structure make necessary to define SOEs in investment treaties in order to avoid situations of preferential treatment by the state. For example the US model BIT, defines SOEs in its article 1 as ‘an enterprise owned, or controlled through ownership interests, by a state [Party].... Excluding governmental, administrative or regulatory acts and public functions.’¹⁴³

The Transpacific Partnership Agreement (TPPA)¹⁴⁴ reflects the preoccupation of those countries with a market economy and a privately owned oil sector with the presence of state owned companies on the natural resource extraction sector in particular.¹⁴⁵ The TPPA negotiations were seen as an opportunity to improve treatment of (mostly American) private investors vis-à-vis SOEs.¹⁴⁶ The US tried to eliminate any potential or actual unfair competition effects of state subsidies to foreign state enterprises that could potentially make American products uncompetitive. It did so by establishing a clear definition of what constituted a SOE and then creating some specific transparency requirements. Article 17.1 of

¹⁴² Id.

¹⁴³ The text of the BIT can be found at <http://www.state.gov/documents/organization/188371.pdf>

¹⁴⁴ The Trans-Pacific Partnership Agreement (‘TPP’) is a free trade agreement currently being negotiated by nine countries: The United States, Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. The US text can be found at <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>> Accessed 12 October 2016. Note that following the US presidential election of November 2016 it is doubtful that US will ratify the TPP.

¹⁴⁵ In this context some countries like Vietnam, Malaysia, Peru and Chile have a larger presence of SOEs in natural resource exploitation.

¹⁴⁶ According the Office of the United States Trade Representative the TPP is offering a much better protection in terms of levelling the playing field in respect of regulatory preferential treatment and competition law. See, <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-7>> accessed 1 October 2015

the TPPA defined state-owned enterprise/s as ‘an enterprise that is principally engaged in commercial activities in which a Party:(a) directly owns more than 50 per cent of the share capital; (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.’¹⁴⁷ These requirements should, in principle, be considered disjunctive and the presence of any one of them would suffice to consider an enterprise as state owned.¹⁴⁸

The Agreement states that it will seek to enhance transparency in respect of SOEs (Article 17.10), eliminate unrecorded subsidies that may harm other countries’ (to the TPPA) businesses and workers and seek to ensure that there is no discrimination against goods of services of other treaty parties while enabling them to provide public goods and domestic public services. There are, however special provisions for those countries with a large SOE sector like Vietnam, Malaysia¹⁴⁹ and Brunei Darussalam.¹⁵⁰ The negotiations of these

¹⁴⁷ <<https://ustr.gov/sites/default/files/TPP-Final-Text-State-Owned-Enterprises-and-Designated-Monopolies.pdf>> Accessed 10 October 2016

¹⁴⁸ It would be necessary to await the interpretation of a tribunal in this point. See discussion below in fnt 163 and accompanying text in respect of Broches test for SOEs in the context of investment arbitration.

¹⁴⁹ Article 17.10.1 provides that Viet Nam and Malaysia, respectively, separately, within six months after the date of entry into force of this Agreement for Viet Nam and Malaysia, respectively, each Party shall provide to the other Parties or otherwise make publicly available on an official website a list of its state owned enterprises that have an annual revenue derived from their commercial activities of more than SDR 500 million in one of the three preceding years, and shall thereafter update the list annually, until the obligation in this paragraph applies and replaces this obligation.

¹⁵⁰ For Brunei Darussalam, Article 17.10.1 requiring of each party publication of the full list of SOEs shall not apply until five years from the date of entry into force of this Agreement for Brunei Darussalam. Separately, within three years after the date of entry into force of this Agreement, Brunei Darussalam shall provide to the

exceptions take into account the role played by the state in the economy and especially in the oil sector, often through national oil companies.¹⁵¹

The OECD Guidelines, similarly to bilateral and multilateral investment treaties, aim at standardising corporate governance duties and erasing the differences between private and state owned companies.¹⁵² The Guidelines are generally not intended to apply to entities or activities whose primary purpose is to carry out a public policy function, even if the entities concerned have the legal form of an enterprise.¹⁵³ In practice this distinction is not always straight forward.¹⁵⁴ They establish that for the purpose of the Guidelines ‘any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership,

other Parties or otherwise make publicly available on an official website a list of its state-owned enterprises that have an annual revenue derived from their commercial activities of more than SDR 500 million in one of the three preceding years, and shall thereafter update the list annually, until the obligation in this paragraph applies and replaces this obligation.

¹⁵¹ Annex IV lists excluded sectors and enterprises for each country party to the agreement. Exception for national oil companies are provided for Vietnam, Brunei, Chile and Peru.< <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> > Accessed 10 October 2016

¹⁵² Chapter II (OECD SOE’s Guidelines) ‘State’s role as an owner’. See, Hans Christensen ‘*Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises* (OECD Corporate Governance Working Papers No. 6 2013) 6–8, explains that the Swedish ‘Guidelines for External Reporting by State-owned Companies’

¹⁵³ Chapter I (OECD SOEs Guidelines 2015) ‘Applicability: ‘The Guidelines are applicable to all SOEs pursuing economic activities, either exclusively or together with the pursuit of public policy objectives or the exercise of governmental authority or a governmental function’’

¹⁵⁴ Investment tribunals have clarified this point famously in *Maffezini v Kingdom of Spain*, Award on Jurisdiction ICSID Case ARB/97/7 (Jan, 25, 2000) discussed later in this section. It is also one of the contentious points in the negotiation of the TPPA and other investment agreements.

should be considered as an SOE'.¹⁵⁵ This includes joint stock companies, limited liability companies and partnerships limited by shares. Statutory corporations, are also considered SOEs if their purpose is mostly economic.¹⁵⁶ In parallel with the investment treaty provisions discussed above, once an enterprise is considered a SOE requirements such as the reporting of objectives, composition, activities carried out in the public interest, remuneration of state members, governance ownership and voting structure, financial assistance by the state and transactions with state agencies or state related entities as specified in chapter VI (Disclosure and Transparency).¹⁵⁷

4.2.1 SOEs as claimants in Investment arbitration

Investment arbitration co-exists with both state-state arbitration¹⁵⁸ and commercial arbitration for private international commercial disputes. It was developed to bridge the gap between those two forms of arbitration (inter-state and private) and sought to address the problem posed by sovereign immunity to jurisdiction and enforcement therefore encouraging foreign ventures by private commercial actors.¹⁵⁹

¹⁵⁵ Definitions (OECD SOEs Guidelines) <http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf> at 17.

¹⁵⁶ Id.

¹⁵⁷ Id at 26

¹⁵⁸ Which can be submitted to the International Court of Justice (ICJ). See Nathalie Bernasconi-Osterwalder 'The State-State Dispute Settlement Clause in Investment Treaties' (2014) IIED.

<https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> Accessed 28 October 2016.

¹⁵⁹ Christoph H Schreuer, *The ICSID Convention: A Commentary* (CUP 2009) 2. Due, mostly, to the privileged enforcement mechanisms facilitated by article 53 (1) and 54(1) of the ICSID Convention. See Michael Feit,

Investment arbitration has developed, mostly, around the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) Washington Convention (ICSID Convention),¹⁶⁰ the ICSID Additional Facility¹⁶¹ and the UNCITRAL Arbitration Rules.¹⁶² In order to fall within the remit of the ICSID the dispute must be one between an 'investor' of a state party to the convention and another state party (Article 25 (1) ICSID Convention).¹⁶³ In respect of SOEs, in principle, and unless the BIT indicates otherwise, those that fall within the definition of 'investor' can trigger the process¹⁶⁴ but potentially SOEs may be precluded from acting as claimants in investment arbitration if applying the doctrine of attribution they

'Responsibility of the State under International Law for the Breach of Contract Committed by a State Owned Entity' 28 Berkeley Journal of Int'l Law 142 (2010) 1-36

¹⁶⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force on October 14, 1966). Available at

<<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx>>

¹⁶¹ The ICSID Additional Facility was created on September 27, 1978. It offers arbitration, conciliation, and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention.

[https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Overview-ICSID-Additional-Facility-](https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Overview-ICSID-Additional-Facility-Arbitration.aspx)

[Arbitration.aspx](https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Overview-ICSID-Additional-Facility-Arbitration.aspx) accessed 10 July 2016. Aurélia Antonietti, *'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules'* ICSID Review—Foreign Investment Law Journal, 21(2006)2 pp. 427-448

¹⁶² http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html accessed 10 July 2016

¹⁶³ Article 25 (1) ICSID Convention. Aron Broches, *Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers 1995) 202.

¹⁶⁴ Jo En Low, 'State-Controlled Entities as "Investors" under International Investment Agreements', Columbia FDI Perspectives No 80 (8 October 2012).

are considered to be a state or state organ which would render the dispute state-to-state and this excluded from investment arbitration.¹⁶⁵

The duality of SOEs as commercial and public interest enterprises poses other important challenges on a system that already has difficulties accommodating the equitable treatments of foreign investors and the public interests of host states.¹⁶⁶ The attitudes of states and investors in respect of public interest protection are unsurprisingly radically different. Investors will not hesitate to initiate investment arbitration claims to protect their investment and profit in cases where another state would perhaps appreciate the legitimate policy reasons behind certain measures.¹⁶⁷ States should be aware when negotiating trade and investment deals, especially multilateral ones that agreeing to investor/state arbitration will certainly reduce the regulatory autonomy of a host country. In some cases, the investment treaty will expressly provide that ‘government-owned’ or ‘State’ enterprises can bring claims by including them within the definition of ‘investor’.¹⁶⁸ In fact, only two BITs were found to

¹⁶⁵ Mark Feldman, ‘The Standing of State-Owned Entities under Investment Treaties’ in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2010–2011* (OUP 2012) 615.

¹⁶⁶ Jan Paulsson, ‘The Public Interest in International Arbitration’ *Proceedings of the Annual Meeting (American Society of International Law)* 106, *Confronting Complexity* 106 (2012), pp. 300-303

¹⁶⁷ Bernasconi-Osterwalder (n 158) at 20

¹⁶⁸ Mark Feldman ‘State Owned Enterprises as Claimants in Investment Arbitration’ (2016) 31 *ICSID Review* 26, fn 7: ‘USA–Korea Free Trade Agreement (signed 30 June 2007, entered into force March 15, 2012) art 11.28 (KORUS) (including ‘state enterprise’ within the definition of ‘investor of a Party’); Agreement between the Government of the United Mexican States and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection of Investments (signed 11 July 2008, entered into force 6 June 2009) art 1 (China–Mexico BIT) (including within the definition of ‘investor of a Contracting Party’ an ‘enterprise,’ which is defined to include ‘governmentally owned’ entities.’

expressly exclude state owned entities from access as claimants in investment arbitration.¹⁶⁹ While BITs and investment chapters of FTAs adopt a range of approaches to potential claims against States by States or State enterprises, the ICSID Convention simply excludes State-to-State disputes from its coverage: a State cannot qualify as a ‘national’ of a Contracting Party under ICSID Convention Article 25, even in a subrogation context.¹⁷⁰ ‘The broad purpose of the Convention is the promotion of private foreign investment and the balancing of the investors and host state interest.’¹⁷¹ Based on Broches’ analysis, SOEs ‘acting as an agent for the government’ or ‘discharging an essentially governmental function’ should be precluded from accessing ICSID (and other forms of) investment arbitration.¹⁷² The test put forward by Broches was originally formulated as a disjunctive. However the only case to date where an ICSID tribunal has examined whether a SOE can be considered an ‘investor’ and qualify as a claimant in ICSID investment arbitration proceedings applied the two propositions cumulatively,¹⁷³ arguably extending the scope for SOE to bring cases as claimants. To ascertain whether an SOE is acting as an agent of the State Articles 5 and 8 of the International Law Commission’s (ILC) Draft Articles on State Responsibility¹⁷⁴ provide guidance to the factors considered by the customary international law attribution rules: The ‘conduct of a person’ is attributable to a State if the person: (i) ‘is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’ (ILC Article 8), or (ii) ‘is empowered by the law of that State to exercise elements of the

¹⁶⁹ Jo En Low, ‘State-Controlled Entities as “Investors” under International Investment Agreements’, Columbia FDI Perspectives No 80 (8 October 2012) (citing Panama BITs with Switzerland and Germany).

¹⁷⁰ Broches (n 163) at 202.

¹⁷¹ *Id.*

¹⁷² *ibid.*

¹⁷³ Feldman (n 168) 27

¹⁷⁴ Cf (n 16); Feldman (n 168) 27. We discuss attribution in the next sections.

governmental authority ... provided the person ... is acting in that capacity in the particular instance' (ILC Article 5).¹⁷⁵ Applying this criteria in *Československa Obchodní Banka, as v Slovak Republic* (COB v Slovak Republic),¹⁷⁶ and *Hrvatska Elektroprivreda DD v Republic of Slovenia* (HEP),¹⁷⁷ the tribunal found that CBO and HEP (the SOEs claimants in each case respectively) were acting under State control and/or exercising delegated State authority. However as the activities of a State-owned entity were commercial in nature, a claim submitted by such an entity to ICSID arbitration could be brought as an investor-State, rather than a State-to-State, dispute.¹⁷⁸ This was so even if the entity is engaged in activities that are 'driven by' State governmental policies and is controlled by the State such that it is 'required' to do the State's 'bidding'.¹⁷⁹ The test under international law is set extremely high 'would not extend to cases where a State does not actively exercise its right to control'.¹⁸⁰ Annacker, however, disagrees with this analysis and opines that '[t]he attribution criteria of the rules of State responsibility ... have no general applicability, and should not be used to override definitions and standards laid down in specific investment treaty provisions or the ICSID'.¹⁸¹

¹⁷⁵ Id.

¹⁷⁶ ICSID Case No ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) (CSOB)

¹⁷⁷ Case No ARB/05/ 24, Decision on the Treaty Interpretation Issue (12 June 2009) (HEP)

¹⁷⁸ Ji Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration' in Shaheez Lalani and Rodrigo Polanco (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014) 404 (asserting that 'all multitasking SOEs except those discharging clear and narrowly-defined governmental functions' should be able to bring claims against States under the ICSID Convention)

¹⁷⁹ Discussed by Feldman (n 168) 29.

¹⁸⁰ Feldman id, discussing *White Industries Australia Limited v Republic of India*, UNCITRAL, Award (30 November 2011) para 5.1.25

¹⁸¹ Claudia Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10 *Chinese J Intl L* 531, 564

The growth of overseas investment activities of SOEs will, no doubt, provide an opportunity for the re-examination of the applicable criteria in the determination of what constitutes state activity and what doesn't and on the availability or not of investment arbitration for the settlement of disputes involving SOEs.

4.2.2 SOEs as defendants in investment arbitration

In order to sue a SOE as a defendant in investment arbitration proceedings the conduct of the SOE must be attributable to the state. Investment disputes susceptible of resolution by an ICSID tribunal need to be disputes between an investor, national of a state party, and a state party. If in the previous section we discussed in which cases the SOE activities are non-governmental and enable the SOE to qualify as an 'investor' to trigger the investment arbitration mechanism, in this section we turn our attention to the opposite scenario, that of SOEs displaying or performing governmental activities or functions, acting under the direction or control of the State and therefore treated as 'the State' for the purposes of being defendants to investment arbitration cases.

Investment tribunals have applied several tests to establish a connection (–attribution) between the acts of the SOE and the state.¹⁸² In *Maffezini vs. Spain*¹⁸³ the arbitral tribunal found that the defendant, SODIGA, was not only a *state-owned* company (the so called 'structural test') but that it was also *state-controlled* ('control test') and operated within government objectives ('functional test'). The tribunal in *Maffezini* went further, by

¹⁸² See Michael Feit, 'Responsibility of the State under International Law for the Breach of Contract Committed by a State Owned Entity' 28 Berkeley Journal of Int'l Law 142 (2010) 1-36, at 6.

¹⁸³ *Maffezini* (n 154) para 77

establishing that a ‘finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity’ even though ‘company ownership or control alone is, however, not sufficient to define a company as a state entity’.¹⁸⁴ A further, ‘functional test’ was necessary to determine whether the company’s operations were commercial or governmental in nature.¹⁸⁵ The tribunal concluded that SODIGA represented an entity of the Spanish State because the latter owned more than 88% of the company’s capital (—control and structural test) and because it carried out governmental functions of regional development (—functional test).¹⁸⁶

These tests of attribution of conduct to the state has been suggested, can be used in another context to attribute responsibility for violation of human rights under international law to states.¹⁸⁷ This idea is developed in the next section.

5 State Owned Companies and Human Rights

While there is a consensus today that MNCs have a duty to respect human rights¹⁸⁸ there is still a vigorous debate about the exact nature of that obligation and about the way it can and

¹⁸⁴ Id.

¹⁸⁵ Feldman (n 168) 27

¹⁸⁶ Maffezini (n 154) para 75. The case is amply discussed in the investment law literature, See Feldman (n 169), Feit (n 159) or ‘Investor-State Dispute Settlement and Impact on Investment Rulemaking (UNCTAD 2007) <http://unctad.org/en/Docs/iteiia20073_en.pdf>

¹⁸⁷ Camilla Wee, ‘Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility’ (2008) <<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf>> accessed 12 July 2016

should be enforced.¹⁸⁹ SOEs not only share the duty to respect human rights with their private counterparts but their public nature could potentially generate a) a higher expectation on standards of conduct and b) facilitate accountability for violations of human rights through the use of the doctrine of attribution either under the principles of state responsibility in international law (ILC Articles)¹⁹⁰ or the first pillar of the State duty to protect under the UN Guiding Principles on Business and Human Rights.¹⁹¹

Under customary international law on state responsibility conduct by any organ of the state can trigger state responsibility for an internationally wrongful act (Article 2 ILC Articles).¹⁹² SOEs, however, have distinct legal personality from the state -even if the state is the majority

¹⁸⁸ John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. 7 April 2008. A/HRC/8/5, p. 3

¹⁸⁹ Olivier De Schutter, Gwynne Skinner and Robert McCorquodale 'The Third Pillar: access to judicial remedies for human rights violations by transnational business' (British Institute of International and Comparative Law, London, 2013)

¹⁹⁰ Cf n 146. James Crawford, *International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (CUP, 2002) 249.

¹⁹¹ *Business and Human Rights: The Evolving International Agenda* John Ruggie John F. Kennedy School of Government - Harvard University June 2007 RWP07-02. Olivier De Schutter, et al., *Human Rights Due Diligence: the role of states* (ICAR, 2012). Michael Hakimi, M., 'State Bystander Responsibility', (2010) 21(2) *European Journal of International Law* 341.

¹⁹² For a comprehensive study on attribution see Kaj Hober, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christopher Scheuer, *Oxford Handbook of International Investment Law* (OUP, 2008) pp 549-583.

(or even the only) shareholder.¹⁹³ Indeed in respect of the legal effects of conduct of SOEs, the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004¹⁹⁴ article 10(3) provides that the immunity of a State is not affected by acts of SOEs if the enterprise has separate legal personality.¹⁹⁵ It will become necessary thus to establish the actual relationship between the State and the SOE in each case arguably according to the same criteria discussed in the previous section.¹⁹⁶

In principle, conduct of SOEs is not, *per se*, attributed to a state, for this to happen the SOE will need to exercise governmental authority or elements of it.¹⁹⁷ Indeed the combined reading of ILC Articles 4, 5 and 8 sets out a ‘functional’ test of attribution by stating that persons or entities that are not in principle state organs (as defined in Article 4) but which are *de facto* empowered to exercise state authority can be considered organs of the state for the purposes of attribution. Article 5 read in conjunction with Article 8

¹⁹³ Commentary to International Law Commission Articles on State Responsibility. ILC Annual Report 2001, Ch. IV, pp 107-108. Available at: <http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>

¹⁹⁴ Adopted by the General Assembly of the United Nations on 2 December 2004. Not yet in force. See General Assembly resolution 59/38, annex, Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49

(A/59/49).

¹⁹⁵ Wee (n 187) 18

¹⁹⁶ The SOE is ‘acting as an agent for the government’ or ‘discharging an essentially governmental function’ cf ft 177 to 181 and accompanying text.

¹⁹⁷ Attribution was discussed by the ICSID tribunal in *Maffezini*, discussed above. ICSID case n arb/97/7. It has also been discussed in *Salini v Jordan* ICSID case No Arb/02/13 Decision on Jurisdiction, 29 November 2004, 44 ILM 573 (2005) and *Trendex v Albania* ICSID case No Arb/94/2 Decision on Jurisdiction 24 December 1996,

which deals with actions which do not necessarily involve state activity¹⁹⁸ but which nevertheless can be attributed to the state because they have been authorised by the state. These provisions create an array of problems in respect of SOEs as we shall discuss.

These provisions bear some commonalities with the doctrine of ‘lifting the corporate veil’ in cases of litigation involving private companies.¹⁹⁹ In the case of private companies in some instances it is necessary to pierce the so called corporate veil in order to avert the use of the doctrine of separate personality to commit fraudulent acts or human rights violations by the company.²⁰⁰ If the corporate veil is lifted, or pierced, then the parent company, and not only subsidiary can be found to be liable on the basis that the subsidiary’s conduct is its own conduct.²⁰¹ This device is used for several reasons, one of them is that of securing jurisdiction in a more favourable forum (that of the parent company). The other, is to access greater resources to satisfy any potential liability. In the case of SOEs, if the state is found to be liable for the SOE’s conduct as a principal for the acts of its agent, a new array of rules and resources become available to the victim to satisfy potential liability for human rights violations. This was done, as discussed in the previous section in the case of *Maffezini* where the tribunal consider the relationship between SODIGA and the Spanish state in order to establish the jurisdiction of the tribunal.²⁰² A note of caution must be made, however, the conduct attributable to the State under Article 5, will be limited to those acts and omissions

¹⁹⁸ Hober, (n 192) 557

¹⁹⁹ Robert B. Thompson, ‘Piercing the corporate Veil: An Empirical Study’ (1990) 76 Cornell L. Rev. 1036

²⁰⁰ According to the *Barcelona Traction Case* ICJ Reports (1970), 3. In Hober (n 192) 557

²⁰¹ The principle set by *Salomon v Salomon & Co Ltd* (1897) AC 22 (HL) is not set in stone. A court in certain circumstances has justifiably lifted the corporate veil and disregarded the separate existence of a corporation and held shareholders liable for corporation’s actions as if they were their own.

²⁰² Cf ().

which are deemed to be particularly governmental or public in their nature, therefore, if the violation of human rights by a SOE took place in ‘commercial’ acts or omissions these may not be attributable to the state.²⁰³ Although in principle the three terms ‘instructions’, ‘direction’ and ‘control’ of Article 8 of the ILC Draft Articles ‘are disjunctive and it should be sufficient to establish any one of them’²⁰⁴ to establish state responsibility, in practice claimants face an extremely difficult to discharge test, particularly when valuable resources are involved in areas with poor governance.²⁰⁵

The issue of state responsibility for the acts of a state owned national oil company was brought to the African Commission of Peoples and Human Rights in respect of the destruction of Ogoni’s lands and resources.²⁰⁶ The Commission, unfortunately, didn’t make a clear statement as to whether acts of the state-owned oil company, the Nigerian National Petroleum Company (NNPC), were directly attributable to State. Only in respect of the destruction of food sources by NNPC, Shell Petroleum Development Corporation (SPDC), and security forces did the Commission establish a link between the acts of the NNPC to the

²⁰³ Hober (n 192) 557-8.

²⁰⁴ Crawford (n 159) and ‘Commentary to International Law Commission Articles on State Responsibility’(ILC Annual Report 2001) Ch. IV, 107-108, <<http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>>
Accessed 12 June 2016

²⁰⁵ ‘The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights’. Summary Report 2 < <http://www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf> > accessed 12 June 2016. For an overview of the duty to protect and due diligence see Dangood Mzikenge Chirwa ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights’ 5 Melbourne Journal of International Law, (2004) p. 11-18

²⁰⁶ African Commission on Human and Peoples’ Rights, Case No. ACHPR/COMM/A044.1, 27 May 2002

state in connection with the violation of the right to food.²⁰⁷ In this case the African Commission on Human and People's Rights found that Nigeria had failed in its 'duty to protect' on several counts, including 'failure to investigate human rights violations, to conduct environmental and social impact assessments, and to provide information to the affected people' for human rights violations caused by a consortium consisting of a Nigerian SOC and Shell.²⁰⁸

In many cases it is arguable that the state duty to protect, which constitutes one of the three pillars of the Ruggie Framework on Business and Human Rights²⁰⁹ may be more easily enforceable in respect of acts of state owned companies than of privately owned companies since the level of information, relative control and influence are all relevant factors to the duty of the State²¹⁰ and it is likely that these will be more easily established in the case of state owned companies. As one commentator has noted 'because ownership places the State in a better position to protect against violations of human rights by SOEs, the corresponding duty will be equally higher.'²¹¹

²⁰⁷ Decision Regarding Communication 155/96 (Social and Economic Rights Action . Centre for Economic and Social Rights v. Nigeria), African Commission on Human and Peoples' Rights, Case No. ACHPR/COMM/A044.1, 27 May 2002

²⁰⁸ Discussed in Shelton, D. 'International Decisions: Decision regarding Communication 155/96' (2002) 96 American Journal of International Law 937-942. Wee (n 187) at 33.

²⁰⁹ Wee (n 188) at 33.

²¹⁰ Id.

²¹¹ Ibid at 36.

The European community case of *Foster v British Gas*²¹² interestingly took a different angle in the relationship between the state and a state owned company when it held that obligations of the state could be claimed directly against privatised entities²¹³ under the so called ‘horizontal’ application of fundamental rights. Whereas under article 5 ILC Draft Articles attribution is directed against the State, in *Foster* it was held that the claimants could rely on an equal treatment directive directly against the privatised entity rather than the State, when the State had failed to implement the directive within the prescribed period.²¹⁴ The European Court of Justice held that when the transition of the entity from the public to the private sphere adversely affected individual rights, the privatised entity ‘inherited’ some of the State’s obligations.²¹⁵ It is doubtful that such an extension of state obligations could be expected of SOEs (or even POCs) deploying state activities in countries with weak governance. While states indisputably have a duty to protect those within their jurisdiction against rights abuses by third parties, including business actors, they are not required, at the moment, to exercise extraterritorial jurisdiction over human rights violations by business.²¹⁶ To summarise, state ownership has, at least three immediate effects on the likelihood of victims of human rights violations by SOEs obtaining protection. The first one is the

²¹² *Foster v. British Gas Plc.* [1991] ICR 84, ECJ Case C 188/89, see especially § 16-20

²¹³ In this case an equal treatment directive was brought against British Gas, recently privatised by the British government. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. This is the so called ‘horizontal’ effect of constitutional and fundamental rights.

²¹⁴

²¹⁵ See discussion in Wee (n 188) 26

²¹⁶ Stephanie Lagoutte, The State Duty to Protect Against Business-Related Human Rights Abuses. Unpacking Pillar 1 and 3 of the UN Guiding Principles on Human Rights and Business (September 15, 2014). Matters of concern Human rights’ research papers Series No. 2014/1. Available at <http://ssrn.com/abstract=2496355>

strengthening of the standard of human rights observance expected and demanded of SOEs; the second is the possibility of engaging the direct responsibility of States when a SOE acts in violation of international law and the conduct can be attributed to such States; and, the third, is an increased likelihood of State responsibility for the failure to protect against human rights violations.²¹⁷

6 CONCLUSION

While sustainable use of resources is vital for both economic growth and human development, the experience of decades of market liberalisation suggests that certain public goods and human values may be better served by public bodies. Yet, the policy space of countries in their developmental path is increasingly constrained by the neoliberal agenda, the proliferation of free trade and investment agreements and multinational company friendly laws and policies. Investment arbitration is a timely and highly contested exponent of the subrogation of public interests to commercial pursuits, but it is not the only one. In the case of state owned companies the overview of existing regulation shows that SOEs face, perhaps, more stringent conditions than private companies and that aside from the ideological misconceptions and certain economic bias against state commercial activity, real danger exists within the potentially incestuous role of the state's as both regulator and owner. Corruption, renterism, clientism are some of the ills surrounding this, at times, dysfunctional

²¹⁷ Joylon Ford (2015) 'Business and Human Rights. Bridging the Governance Gap' (Chatham House, September 2015)

www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150226BusinessHumanRightsFord.pdf for an excellent up-to-date overview of the agreed parameters and future challenges of the business and human rights debate, including accepted standards of duties for companies and states.

relationship. A survey of the historical context of national oil companies however illustrates that state ownership is not a monolithic concept; on the contrary it takes a variety of shapes and forms and can serve multiple political and social goals. In the context of South-South expanding trade and investment and, more specifically, in the context of increased natural resource consumption by emerging economies, state ownership enables the development of a policy informed economic option that can facilitate growth and provide a variety of public services. What is crucial, thus, is not the fact that state ownership is used as policy tool in the context of resource extraction and of meeting natural resource consumption needs, but that transparency requirements and clear boundaries between the fundamentally different roles the state as regulator and the state as owner are established.²¹⁸

Companies involved in resource extraction often impose a high toll in the form of environmental damage and human rights abuses in the countries where they operate. A commitment to responsible growth from state and private companies can only crystallize with clearer, faster and more effective mechanisms of accountability, irrespective of whether the companies are private or state owned. Those mechanisms, arguably, are not value neutral and require a wider understanding of the political and historical responsibilities acquired by the Global North, and facilitated by international law, in resource extraction from the Global South.²¹⁹ The legacy that the ruthless and destructive machinery of capital accumulation introduced in colonial times, is still, sadly, stealing the future of millions of innocent people in resource rich but governance poor countries.

²¹⁸ Mushtaq H. Khan ‘ Governance and Anticorruption Reforms in Developing Countries: Policies, Evidence and Ways Forward,(UNCTAD G-24 Discussion Paper 2006)

http://unctad.org/en/Docs/gdsmdpbg2420064_en.pdf accessed 10 November 2016

²¹⁹ Akinpelu O. Olutayo & Ayokunle O. Omobowale, ‘Capitalism, Globalisation and the Underdevelopment Process in Africa: History in Perpetuity’ (2007) XXXII, Africa Development 97.

Accountability of companies (state or private owned) appears to depend largely on political factors that invariably reproduce colonial patterns.²²⁰ Victims in developed countries are more likely to receive compensation from violations by corporate actors.²²¹ Victims of human rights violations by private or state owned companies in host countries in the Global South are mostly not so lucky. A combination of poor governance in host countries, insufficient funding to enable access to justice and reduced political leverage by the host state make both private litigation²²² and interstate actions²²³ difficult and unpredictable.

Despite the many criticisms against the proposal put forward by Ecuador and South Africa for a binding regime regulating business and human rights²²⁴ it is indeed imperative that a global binding system that partially levels the extraterritorial reach of transnational corporations with extraterritorial liability. How this should be achieved is however the

²²⁰ Sabelo J. Ndlovu-Gatsheni 'Genealogies of Coloniality and Implications for Africa's Development' (2016) *Africa Development*, 16

²²¹ As was the case on the Deep Water Horizon Oil Spill discussed above (n 63) and accompanying text.

²²² Claims are highly dependable on civil society organisations willingness to take the case. For example claims pursued under the US ACTA, much more restricted arguably since the Supreme Court decision in *Kiobel v Shell*, See Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' 1 (2014) 1 <http://www.utrechtlawreview.org> | accessed 12 July 2016

²²³ Penelope Simons and Audrey Macklin, *The Governance Gap. Extractive industries, human rights and the host country advantage* (Routledge 2014) p 9-13

²²⁴ Human Rights Council Res. 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014) <<http://ap.ohchr.org/documents/al>>accessed 10 July 2016. Norway proposed a parallel resolution A/HRC/26/20 adopted by UN Human Rights Council on 27 June 2014 and Signed by twenty one countries.

subject of debate. Those against adopting a binding instrument argue that the UNGP's approved not long ago and widely adopted provide enough of an accountability framework.²²⁵ Proponents of the binding instrument argue that despite its success the UNGP's as a voluntary instrument of accountability presents serious deficits, especially in respect of the third pillar –provision of a remedy. The new instrument will focus of this deficit either through the inclusion of suitable procedural rules in existing instruments like BITs or multiparty international investment agreements.²²⁶ Technical issues of jurisdiction are often the main impediment in the exercise of the victims' right of access to justice.²²⁷ Clear and non-discretionary jurisdictional grounds whereby the victims can rely on a choice between the host and the home country of MNCs or SOEs to hear and determine disputes involving violations of human rights or environmental damages could both advance the right to a suitable remedy²²⁸ and reduce expenses, delay and uncertainties in litigation involving MNCs.²²⁹

²²⁵ See on the debate surrounding the proposed treaty commentary by John Ruggie,

<https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision> accessed 10 November 2016

²²⁶ Nadia Bernaz, 'Multilateral Agreement on Investment: Time to Awaken the Beast? – A contribution to the 'Business and Human Rights Treaty' Debate' (2014) <<http://rightsasusual.com/2014/02/mai-beast-treaty/>> accessed 10 November 2016

²²⁷ <https://www.ihrb.org/other/treaty-on-business-human-rights/beyond-the-guiding-principles-examining-new-calls-for-a-legally-binding-ins>

²²⁸ Richard Meeran, 'Tort Litigation against Multinational Companies for Violations of Human Rights: A Position outside the United States' (2011) 3 City University of Hong Kong Law Review 1–41.

²²⁹ The regime could be imaged from that of the Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Regulation (recast)). In the case of torts the case can be brought under the general rule of domicile in the place where the defendant is domiciled or according to art 7(3) in the place where

Another option could consist on allowing victims of human rights abuses to bring cases in a re-defined ICSID or in other investment tribunal where arbitrators with human rights background would have the power to grant damages in cases of violation of human rights.

The landscape of transnational companies operating in the natural resource sector shouldn't be reduced to simplistic 'North-South' narratives. The debate on the binding treaty suggests that much. China, for example, voted in favour of such treaty²³⁰ despite being a global economic player with a large state sector. Brazil, on the other hand, abstained perhaps reflecting the increased global exposure of its state-owned and private mining, energy,

the tort has occurred or may occur at the plaintiff's discretion and without power of the courts to decline jurisdiction.

²³⁰UN Human Rights Council Resolution 26/9 was adopted by a recorded vote of 20 to 14, with 13 abstentions.

In favour: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam.

Against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America.

Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.

Joe Zhang, Negotiations Kick Off on a Binding Treaty on Business and Human Righ (November 26, 2015) <https://www.iisd.org/itn/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights/#_edn1>

For the latest news and developments in respect of the calls for a Binding Treaty on Business and Human Rights see <<https://business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>> accessed 12 June 2016.

²³⁰ Glinavos, (n 20) 60

agribusiness companies.²³¹ The dominance of SOEs in energy and natural resources exploitation in emerging economies is an opportunity to re-consider the objectives of BITs and to move on from what could be described as the dogmatic fixation with the narrow protection of investors' interests²³² onto a new stage in investment law that addresses and includes the public interest issues²³³ that often arise in the context of investment claims. A shift in focus -from investor protection to sustainable investment that is inclusive of social and environmental criteria-²³⁴ would facilitate to combine efforts to address two of the most controversial and current issues in the field of business and human rights: the correct regulation of state owned companies and the accountability of multinational corporations for human rights violations through the fast evolving matrix of international investment law.

²³¹ Ford (n 217) at 9 and J. Ruggie, 'Closing Remarks' 3rd UN Forum on Human Rights and Businesses, Geneva, 3 December 2014, 2.

²³² Glinavos (n 20) 50

²³³ Bernasconi- Osterwalder (n 158) 24

²³⁴ A term that encompasses the respect of human rights alongside environmental sustainability concerns.

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