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The Content and Scope of State Obligations in the Draft Treaty on Business and Human Rights: What Role for the State and What Place for State-Owned Enterprises?

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à l'occasion de la conférence

LES OPPORTUNITÉS ET LES DÉFIS POUR UNE CONVENTION INTERNATIONALE SUR LES ENTREPRISES ET LES DROITS DE L'HOMME

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The Content and Scope of State Obligations in the Draft Treaty on Business and Human Rights: What Role for the State and What Place for State-Owned Enterprises?

Introduction

The regulation of state-owned enterprises has recently raised complex questions in the context of the negotiations of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Initially confined to the scope of the treaty, the discussion on human rights and state-owned enterprises must focus on existing accountability gaps to ensure that the draft instrument will contribute to reduce impunity. To this end, it is necessary to understand to what extent the definitions, the scope, the conditions, and the consequences of the attribution of responsibility provided for in the said instrument will have an impact on the regulatory framework and international law of SOEs. This will allow to identify persistent gaps and necessary developments to ensure access to justice for individuals and groups affected by the activities, products, services and/or business relationships of state-owned enterprises.

Before addressing the questions raised by this issue and the possible answers that can be given to the legal loopholes that generate significant risks of impunity, it is necessary to understand the place of SOEs from an economic and political perspective. SOEs are located at a point of tension and play a dual role: on the one hand, they are economic actors and, on the other, they are an extension of the regulatory power of the state. It is thus necessary to understand how the treaty addresses the regulatory power of the state as a first step to deciphering the place of SOEs.

I. The Role of States as Regulators

The current version of the treaty adopts the traditional approach to international law where states have the primary obligation to respect, protect and fulfill human rights and fundamental freedoms. They are the primary duty bearers with respect to human rights. From this perspective, the role of companies is secondary. They are required to comply with all applicable laws and respect human rights. In line with the UN Guiding Principles on Business and Human Rights PP7 of the draft's

* *Les opinions exprimées ici n'engagent leur autrice qu'à titre personnel.*

preamble clearly recalls the primary obligations of states, including their obligation to protect against human rights abuses by third parties such as corporations. Despite the reference made to the obligations of companies to respect human rights in the preamble (PP11 and PP18) and in article 2 (1) (b). The central role given to the state is in accordance with the classical vision of international law in which the state is the subject of obligations and private persons are only derivative subjects whose obligations only arise, in a second stage, from the implementation of the international obligations of the state at the national level.

The content and the scope of state obligations, as a regulatory actor, is expressed by a requirement to adopt appropriate measures to prevent such violations and when they occur, to investigate, punish and provide redress. General Comment 24 of the Committee on Economic, Social and Cultural Rights details the implementation of this obligation to protect in three main types of actions.

First, states must prevent the commission of human rights violations by businesses. To this end, states must adopt a legal framework requiring businesses to exercise human rights and environmental due diligence to prevent abuses deriving form business operations and relationships. This duty is enshrined in Article 6 of the draft treaty. While the language of this article needs to be adjusted in line with comment number 24, it already sets out the framework for regulation at the national level. Article 6 details the basic conditions for the state to comply with its obligations filling thereby the gap that soft law instruments have failed to address in the last ten years.

Second, states have the duty to impose sanctions of criminal or administrative nature when business activities, relationships, products or services cause or contribute to a violation of rights or when their failure to exercise due diligence allow a human rights violation to occur. Article 8 of the draft treaty aims to address this issue. While it still requires an effort of clarification, it in essence seeks to clarify the elements of this duty.

Third, states must provide redress. As such, states shall enable victims of corporate abuse to pursue civil claims against perpetrators and provide access to other recourses through which they can obtain effective redress. The objective of articles 7 to 12 is precisely to clarify and promote the harmonization of useful remedies available to victims seeking redress for violations of their rights resulting from the activities of corporations, to give them legal certainty and the means to access these mechanisms, as well as to provide judges with tools to adequately deal with disputes that involve a transnational dimension.

From this perspective, the draft treaty does not innovate in this area as much as it clarifies and codifies existing obligations. In doing so, it contributes to establish a level playing field and harmonize the rules globally for companies and actual or potential victims of corporate abuses. In this sense, it brings legal certainty for

states, often confronted with litigations worth millions for having legislated for the protection of rights; for victims, who struggle to find a competent forum to hold companies accountable for violations of their rights ; but also for companies that strive to respect human rights in operations, but are often competing with less rights-conscious companies, and whose home country is not a preferred forum for their accountability. With the treaty, the latter will have stronger levers to demand that states provide them with the means to operate with respect for rights, and to demand their competitors do the same.

The fears expressed by states that the draft treaty is too prescriptive are unfounded insofar as the draft treaty sets out the lines along which states should exercise their duty to protect in sufficient detail to challenge the inaction in this area. However, it leaves a sufficient margin of appreciation for each state, in line with their internal legal system, to legislate. The interest of a treaty that will detail these obligations should be indisputable for countries such as France, which have for several years addressed the challenge through the duty of vigilance law. The current process at the European Union for the adoption of a regional legislation on due diligence demonstrates the importance of addressing this global issue from an international perspective, to avoid the fragmentation of the common market, and to support the transition towards more sustainable business models.

It is even possible to argue that while the treaty focuses on the regulatory power of the state, it remains too timid when it comes to the obligations of the state as an economic actor. This is a point on which the current draft treaty should be strengthened in order to promote rights-based globalization, where SOEs can also be effectively held accountable.

II. The Place of SOEs in the Draft Legally Binding Instrument

In countries whose economies depend to a large extent on the exploitation of natural resources, public companies are instruments of development. They control the extractive sector through joint concessions. However, in the current context, state-owned companies are also, and increasingly so, vehicles for foreign investments and in this framework may also be involved in human rights violations directly or through their business relationships. But they often enjoy impunity due to existing legal loopholes.

From a normative point of view, as recognized by the Working Group on Business and Human Rights, based on Guiding Principle 4, the regulation of these companies with respect to human rights requires an interaction between the duties of the state and the responsibilities of businesses.

SOEs exist at the legal intersection between the corporate responsibility to respect human rights and the state's duty to protect and guarantee them. As such, they bear greater duties and responsibilities. Paradoxically, victims of human rights violations linked to their operations face considerable obstacles in seeking justice and full reparation. The challenge of adjudicating the responsibility of state-owned enterprises stems from this duality, which imposes a distinction between the international obligations of state-owned enterprises as agents of the state and as non-state actors.

This debate was initially addressed in the framework of the United Nations Guiding Principles in 2016 and has resurfaced in discussions on the adoption of a binding instrument on human rights and business. Even if the topic of SOEs has so far been limited to the study of the scope of the treaty in order to ensure a formulation that encompasses SOEs regardless of their nature, governance structure or sector of activity, this is not the only dimension of the treaty relevant to the legal framework on human rights and SOEs. A comprehensive approach should consider the preventive and punitive dimensions of this instrument to ensure access to justice and reparation for victims of damages caused by SOEs.

From this perspective, multiple questions arise, namely, how does this blurred division between the state and public companies influence the legal framework that determines the content and scope of the due diligence obligation of such companies? How to attribute responsibility to the shareholder state for a conduct constituting a human rights violation? Also, how do these norms impact access to justice and reparation for victims of human rights abuses? How can due diligence obligations adapt to reflect the specificities of SOEs? And, more specifically, in the context of negotiating the draft binding instrument, how to overcome the obstacles of regulation and attribution of responsibility to public companies in order to achieve the objective of guaranteeing equal access to justice for all victims of human rights violations, including those related to the activities of public companies?

Despite the inclusion of SOEs and reference of business relations with state entities in Article 1 on definitions, the draft treaty does not translate it into operative clauses. No distinction is made between the obligations of private enterprises and SOEs in other relevant articles. It is important that the treaty addresses the particularity of public enterprises both in terms of the scope and content of their duties and of elements of liability.

A. The need for a differentiated approach to prevention

When speaking about SOEs, the state-Business proximity impacts the content and scope of SOEs due diligence obligation and the attribution of liability when an abuse occurs.

Principle 4 of the Guiding Principles, referring explicitly to state-owned enterprises, illustrates well their hybrid nature by providing that "[s]tates should take additional measures to protect against human rights abuses by enterprises owned or controlled by them, or receiving significant support and services from state agencies, such as official export credit agencies and official insurance or investment guarantee agencies, requiring, where appropriate, human rights due diligence". It therefore imposes a higher threshold of responsibility resulting from the proximity to the state that holds the obligation to protect, respect and ensure human rights even when acting as an economic actor. Similarly, the need for the state to "lead by example" was reaffirmed by the United Nations Working Group on Business and Human Rights in its report to the 32nd session of the United Nations Human Rights Council. Activities most closely linked to the state and its powers entail a reinforced duty of due diligence.

Thus, the due diligence obligation of SOEs is transformed or reinforced by the underlying duty to protect of the shareholder state. Depending on the analysis of the relationship of proximity between the state and the company, it may even tend to transform the obligation of means – due diligence – into an obligation of result – or of protection. In this sense, article 5 (4) of the revised instrument, by referring to the nature of the activities as one of the elements to be evaluated to determine and to guarantee the adequate implementation of the prevention obligations, opens a door to this consideration. In other words, it indicates the possibility of a variable assessment of the content of the due diligence obligation depending, among other things, on the public or non-public nature of the activity. This allows for a differentiated analysis that establishes variable levels and criteria for compliance with prevention obligations, which take into account the structural and functional links between the state's duty to protect and the public company's responsibility to respect, in order to demand a higher level of care. This analysis should lead to the reversal of the trend towards greater autonomy of SOEs, bringing their governance and operational structures closer to the reality of the link with the state, so that they exercise their due diligence as an obligation of result derived from the state's duty to protect.

However, these approaches should not entail the broadening of the impunity gap by an extensive interpretation of states immunities, covering the activities of SOEs which may result in human rights violations.

B. Challenging state immunities

In cases of human rights violations by state-owned enterprises abroad, a specific risk of impunity arises as a consequence of the legal framework of state immunities. The legal doctrine of sovereign immunity or state immunity derives from the notion of sovereign equality and non-intervention and establishes a

procedural bar to the jurisdiction of foreign courts (immunity from jurisdiction) and to the enforcement of foreign judgments against a state (immunity from execution). Over time and as a consequence of the development of the state's commercial activities, the doctrine has evolved from an initial interpretation of absolute immunity to a more "restrictive" or "qualified" regime. Despite codification and harmonization efforts in this area, the United Nations Convention on Jurisdictional Immunities of States and Their Property, which adopts the doctrine of qualified immunity and aims to establish a uniform regime, has not yet entered into force. However, national case law and legislation have largely adapted progressively to the idea of a restricted notion of immunity as an element of the OECD-led movement towards greater autonomy of state-owned enterprises to ensure fair competition.

Although the restrictive approach has now been widely recognized, the scope of state immunity remains an uncertain area of law. While in some cases the entities entitled to immunities may be restricted to state organs, other jurisdictions have agreed to include majority state-owned enterprises, considering them instruments of the state. In general, the inclusion of state-owned enterprises within the scope of immunities will depend not so much on their public character as on the commercial or sovereign nature of the acts in question and/or the public interest motivating them. Indeed, the commercial activity exception – the most commonly invoked immunity exception – may vary in scope and definition from jurisdiction to jurisdiction. In some jurisdictions, for example, the presence of a public interest motive or purpose may transform the qualification of an *acta jure gestionis* into an *acta jure imperii,* leading to the recognition of state immunity. In others, for example, the presence of a public interest motive or purpose may transform the qualification of an *acta jure gestionis* into an *acta jure imperii*, leading to the recognition of state immunity. In any event, "the liability of a state enterprise under the commercial activities exception to foreign sovereign immunity cannot extend to the state that owns or controls the state enterprise, even where agency or veil piercing would treat the state and its enterprise as a single entity."

Connecting the dots between this legal framework and the political and the structural context of the growing presence of state-owned enterprises operating abroad, it is clear that in the absence of a waiver of immunity, rights holders will not have access to an effective remedy. The strong strategic dimension of foreign investment by state-owned companies, as well as the framework agreements that accompany the arrival of some of these companies when investing abroad, raise questions about the commercial or sovereign nature of the acts of these companies and could lead to the conclusion that these activities are *acta jure imperii*, allowing immunities to obstruct access to justice and to redress even in cases of human rights violations.

This situation is aggravated in contexts where the country hosting the SOE investments has weak judicial systems, and for which the economic pressure

imposed by the growing weight of foreign investments in their national economies constitute additional obstacles to effective access to justice. Consequently, the risk of impunity in host countries is considerably high. From this point of view, the announced rapprochement between the state and its companies for the exercise of the enhanced duty of vigilance – which could lead to an extensive interpretation of the scope of the notion of governmental acts – could paradoxically lead to a broadening of the scope of state immunity.

The risk of impunity as a consequence of the combination of state immunities and weak judiciaries in host countries where SOEs have a growing investment, reveals yet another impunity gap in the current legal framework. A gap that has so far not been addressed in the spaces where future developments in international law on business and human rights may take place. Indeed, the current draft legally binding instrument does not address the issue of immunities, even though this constitutes an opportunity to harmonize the rules in particular on the scope of exceptions to such immunities.

The reinforcement of State obligations with respect to state enterprises under the notion of "additional measures" in Principle 4 of the Guiding Principles should not contribute to the impunity gap. In this regard, within the framework of the ongoing discussions on the treaty and on other similar instruments, a specific exception to immunity could be elaborated when human rights violations have occurred outside the forum of the state of origin of the enterprise. Alternatively, it has been suggested to require, without exception, the waiver of sovereign immunity for acts of states related to the operation of SOEs. This development, coupled with a clearer and broader understanding of the basis for jurisdiction over cases of human rights violations occurring abroad, by excluding *forum non conveniens* and allowing *forum necessitatis*, would help to overcome some procedural obstacles to access to justice for victims of human rights abuses.

Also, considering that in some cases the commercial exception to the immunity of a public enterprise operating abroad may not extend to the state behind it, it is essential to insist on the autonomy of state duty and of corporate liability, despite their close interrelationship. This distinction ensures that state-owned enterprises operating abroad respect the full scope of the human rights framework in the home- and in the host-state. This prevents state-owned companies from violating the most protective regulations when contradictions arise between the international obligations of the home-state. This indirectly ensures, through the corporate duty to respect, the highest level of human rights guarantees of both the home- and host-state, in accordance with the *pro persona* principle.

Beyond state immunities, the proximity of SOEs to the state impacts the criteria and grounds for the establishment and attribution of corporate and state shareholder liability. This liability must now be approached from a more dynamic

point of view: from the relations between the state shareholder and its company, and the latter's co-contractors or business partners.

C. From effective control to the nexus of influence in the attribution of responsibility

Despite the specificities of the legal framework for states and SOEs liability, the revised draft does not provide for specific rules determining the legal liability of the state for the actions of its enterprises.

Under international law, the responsibility of the state may be direct – on account of violations that are attributable to the state, its organs or agents – or indirect – for lack of diligence to reasonably prevent violations perpetrated by private parties. In the latter case, the duty to fulfill human rights results in liability when "the acts or omissions that violate a given right are committed by a private party, such as companies or economic actors, provided that the State has acted with a lack of diligence to reasonably prevent the violation or deal with it in accordance with international law". In this case, a level of knowledge of the risk is required and the adequacy of the State's behavior to prevent or remedy it is assessed. From this indirect responsibility, derives the responsibility of companies to respect human rights, which is nothing more than "the legal consequence of compliance with the obligations of States", and translates into a duty of due diligence.

The debate on the basis and conditions of attribution in the case of state-owned companies lies precisely between the two types of responsibility, direct and indirect, between due diligence and the state's duty to respect. The cursor between the two extremes will be closer to the duty to respect and protect the closer the relationship of the public company with the State gets, and will move away, in theory, to the extent that SOEs are assimilated to private companies. The links of proximity between the SOE and the state as a founder, a shareholder and a regulator have an impact on the content of the respective obligations of the state and the companies.

The clearest basis under which the conduct of a public enterprise can be attributed to the state is through the assimilation of such enterprise to a public organ or power. This is possible on the condition that a link of total dependence between the two exists. However, the trend towards increasing autonomy of public enterprises leads to the almost automatic exclusion of this legal basis and requires a more complex reasoning.

In this context, appears the key notion of "effective control". The notion of effective control presents varying levels of intensity according to the general international public law and the jurisprudence of the Inter-American Court of Human Rights (IACtHR). The International Court of Justice has held that the

notion of effective control requires the effective direction and participation of the state in the illegal conduct. Therefore, a generic control exercised by the state over the legal or natural person is not sufficient. From this perspective, it is not possible to accept an "automatic" attribution of the conduct of public enterprises to the State that has total or majority ownership of an enterprise. However, only where there is "evidence […] that the State directed or enforced the perpetration of acts contrary to human rights and humanitarian law", in other words, specific evidence that the State was using its participation or effective control, has the conduct in question been attributed to the State[1]. A high degree of intensity in the relationship between the State and the public enterprise is required. Such an invasive level of control potentially imposes a disproportionate evidentiary burden on the claimant, in a context where the evidentiary elements are generally in the hands of the state and the company. Thus revealing one more of the challenges of access to justice.

Contrary to this strict interpretation, the Inter-American Commission (IACHR) presents a broader approach to the notion of control and influence. The IACHR has considered that the existence of a state authorization and/or contract, nature of the activities and the violations in question, as well as the mechanisms of direction or supervision are indicators that determine the establishment of control and a derived responsibility of the state. This interpretation brings the notion of control closer to the economic and the operational reality of public companies, translating it into concrete indicators of more easily verifiable facts, thus lifting the disproportionate burden of proof of effective control understood in the strict sense. This explains why the jurisprudence of the Inter-American Court has, in general terms, focused its analysis on the presence and intensity of these indicators of proximity to the state when addressing the responsibility of states for the actions of state enterprises. The focus on the analysis of indicators, constitute an opportunity to close the impunity gap created by strict interpretations of the notions of "attribution of public powers" and "effective control" in the framework of state responsibility for the activities and commercial relations of SOEs.

In light of the normative framework, it clearly emerges that the reference to "control" and "supervision", if interpreted strictly, would be going backwards with respect to the advances that international law and in particular Inter-American law have achieved in terms of attributing unlawful conduct of public companies to the state. A differentiated approach for SOEs including specific criteria to determine the nexus of influence would prevent states from escaping their own responsibility through the excessively narrow notion of "effective control". On the contrary, the State's international obligations should, at a minimum, form the basis of an enhanced due diligence obligation when acting as a shareholder, regardless of its level of effective control. Further, in contexts where the state, even without being a majority shareholder of the company, authorizes its operations, contracts its

[1] ICJ, 27 June 1986, *Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports, 1986, § 115.

services, regulates or controls its activities, whether or not these are governmental in nature, it should incur direct responsibility for human rights violations perpetrated directly or linked to the activities and business relationships of state-owned enterprises. In the case of human rights violations, the state's international obligations to protect human rights and comply with international treaties should be sufficient to establish strict liability or at least a rebuttable presumption of attribution on the basis of control of capital.

D. Complicity and solidarity of SOEs

In practice, the role of SOEs and their participation in foreign investment projects is often materialized through joint venture contracts between the state-owned company and the concessionaire, generally a foreign company. The latter operates the project, while the state-owned company participates economically but is not directly involved in the day-to-day operational activities. In these contexts, the question arises not only as to the attribution of liability to the State, but also as to the liability of the state-owned company itself.

In the national jurisprudence of some countries, courts have distinguished between the liability of the foreign concessionaire company and the state-owned company, considering that the company that operates the project is exclusively responsible for the obligations inherent to this operation. In other words, the labor obligations towards employees, and potentially the responsibility derived from negative impacts on human rights, would fall solely on the foreign company. This reasoning contradicts the widely accepted principle of corporate responsibility to respect human rights, which requires companies to "prevent or mitigate adverse human rights impacts directly linked to their operations, products or services by their business relationships, even when they have not contributed to those impacts"[2]. Furthermore, this approach allows the use of contractual instruments as an escape hatch from the direct responsibility of the state.

In these cases, the duty to fulfill human rights justifies questioning the limits of contractual liability and even the lifting of the corporate veil. If international law permits the lifting of the corporate veil to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or misconduct, to protect third parties, there is no reason why the same logic should not be applied to hold a public company liable for violations arising from the operations of its associates or co-contractors. If the contractual instrument or the legal personality has been structured in such a way as to create loopholes of impunity, the state must be held directly liable.

It is even possible and necessary to go further in cases where concession contracts are approved directly by an agency or organ of the state. When the state controls

[2] *UN Guiding Principles on Business and Human Rights*, Principle 13b, p. 14.

the conclusion of an agreement, the Human Rights Committee has considered that the violations arising from the implementation of such agreement are directly attributable to the State. In such a case, it is not necessary to "consider for the purposes of direct State responsibility whether it was under the instructions or protection of the State"[3] since it follows from the Committee's reasoning that the approval of such an agreement reverses the burden of proof and imposes a presumption of responsibility on the state and therefore on the state enterprise. It is therefore correct to state that the liability of SOEs in this context is closer to the duty to protect than to the simple corporate responsibility to respect. Likewise, the strict test of effective control that would preclude automatic liability of the state as a shareholder should be excluded when the activities that have resulted in a violation of rights are carried out in coordination or in association with state enterprises and under the authorization or the contractual acquiescence of the state.

In fact, the doctrine of complicity has been significantly developed in the Inter-American system. According to the jurisprudence, a situation of acquiescence, tolerance or State collaboration in the facts constituting a violation[4] entails direct international responsibility either through action or omission. According to the IACtHR, acquiescence or collaboration involves the consent of the state through action or deliberate inaction and, as a consequence, generates a more direct level of responsibility than the one derived from the risk analysis of the obligation of due diligence. The "protection, coordination, permissiveness, tolerance, inaction or sponsorship that the transgressing companies have on the part of the government apparatus"[5] constitute a series of relevant indicators for the attribution of a given conduct to the state. Although the evidentiary burden is significant insofar as it requires specific circumstantial and non-contextual elements, this position strikes a balance that eases the evidentiary burden without automatically lifting the corporate veil.

The treaty's limited approach to the liability of corporations for the acts of third parties, if applied to the responsibility of the state for the actions of its enterprises, is less progressive than the caselaw described above. The revised draft treaty, by limiting liability for the acts of third parties with whom the company has a contractual relationship to the identification of a failure of prevention and the condition of the exercise of control or knowledge of the risks, imposes a higher burden of proof. The analysis of the Inter-American Court corresponds more closely to the reality of state enterprises.

Reference to the role of the State as a shareholder and as an economic beneficiary of an economic activity to the contractual structures and their approval process,

[3] IACHR, 1 November 2019, *Empresas y Derechos Humanos: Estándares Interamericanos*, doc. CIDH/REDESCA/INF.1/19, § 74.
[4] IACtHR, 4 July 2006, *Ximenes Lopes v. Bresil*, Serie C, n° 149, §§ 86, 87 et 100.
[5] IACHR, *Empresas y Derechos Humanos: Estándares Interamericanos*, *op. cit.*

may represent flexible but clear indicators of a strong link between the state and a business entity. Such criteria would add legal certainty in determining attribution, regardless of whether the violations were committed under the "effective control" of the state or are the result of the exercise of "elements of governmental authority", bearing in mind that in practice such powers are often framed within the purely commercial activities of state enterprises, but that this does not preclude a sufficient nexus to establish direct state liability.

The integration of the considerations set out here promote a reality-based approach that recognizes the particularities of SOEs, while striking a balance between the need to recognize the autonomy of enterprises, their nexus with the state and the duty to protect human rights. However, it should not lead to a confusion or diffusion of the state duty to protect and the corporate responsibility to respect. Their interdependence does not imply that they can constitute limits to each other: the stat"s non-adherence to an international instrument cannot not justify any abuse by a state-owned enterprise in a foreign country. On the contrary, it must be understood that in some cases, while the shareholder state may not be in breach of its international obligations, its state-owned enterprise operating abroad may be in breach of its obligation to respect international human rights standards and *vice versa*.

III. External coherence and interconnectedness: the need for a comprehensive reform of the regulation of state-owned enterprises with respect to human rights

The analysis of the legal framework reveals that while there cannot be a one-size-fits-all regulatory approach for all SOEs, there are common elements that point to the possibility of filling key regulatory and governance gaps at the international level. This objective can be achieved through the adoption and implementation of due diligence regulations that impact the governance structures of SOEs. The level of due diligence required of SOEs should be based on the State's underlying duty to protect human rights in international law and should, therefore, result in higher standards of human rights compliance. In addition, the obligation to take "due diligence measures" should be based on the state's duty to protect human rights in international law and should result in higher standards of human rights compliance. Additionally, the obligation to adopt "additional measures" should result in "substantial oversight of the activity of SOEs"[6]. Observance of these standards then requires sufficient state involvement and an alignment of the structure and regulations of these enterprises with the reality of their link to the

[6] L. Catá Backer, "Systemic Constraints on the Human Rights Obligations of States and State-Owned Enterprises (SOEs)", *Working Papers Coalition for Peace & Ethics*, 2019, n° 1/1, p. 6.

state, rather than the consolidation of the fiction of their separate legal personality. However, it should not be forgotten that the responsibility of public enterprises to respect human rights may, in some cases, go beyond the stat's international obligations, particularly when they operate abroad.

From this point of view, while recognition of the responsibilities of state-owned enterprises – like those of all business enterprises – to respect human rights is necessary, it is not sufficient. The content of Principle 4 of the Guiding Principles was a first step in identifying the specificities of state-owned enterprises. The next step will be to provide, within the framework of the negotiations of the binding instrument, greater clarity to the state's obligations to protect human rights when acting as a shareholder and given its structural links with state-owned enterprises. Such clarity should be accompanied by a relaxation of the standards of "effective control" and "exercise of governmental authority" to reflect the reality of the proximity between state-owned enterprises and the state. In this way, a higher level of accountability can be achieved to the extent that this prevents the state from hiding behind the corporate veil or contractual constructs when corporate activities threaten human rights.

However, this development must not allow the scope of immunities to be expanded. On the contrary, it must be accompanied by the inclusion of a specific exception relating to cases of violations of human rights and the environment. These measures would prevent the "broadening of the nexus between the State and SOEs" from impacting the ability of victims to access justice and to obtain an effective remedy. Beyond, more dynamic connections between different spheres of law are needed to incorporate human rights and environmental concerns into the operations of state-owned enterprises. For greater coherence and effectiveness of this legal framework, it needs to be more clearly articulated with public procurement regimes. The effort to fill existing gaps and prevent the state from escaping its own responsibility when acting through its state-owned enterprises requires better and more dynamic interconnections between different fields of law. Without such interconnections, efforts to incorporate human rights and environmental concerns into the operations of state-owned enterprises will remain limited. Therefore, the inclusion of specific obligations and mechanisms, such as joint and several liability of partners in the case of concession or public procurement contracts, would represent a first step to materialize the obligations of the state as regulators, shareholders, and co-contractors.