SOVEREIGN WEALTH AND SOCIAL RESPONSIBILITY

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INTRODUCTION

In 2005, Andrew Rozanov decided to label certain entities, which he defined to be "typically . . . a by-product of national budget surpluses, accumulated over the years due to favorable macroeconomic, trade and fiscal positions, coupled with long-term budget planning and spending restraint," sovereign wealth funds ("SWFs").[1]

Since then, unfortunately, the SWF picture has not become much clearer. Still today, scholars and policy-makers struggle to even circumscribe the kinds of entities they denote when using the term, let alone agree upon one common concept.[2] Rather, one frequently encounters idiosyncratic definitions—i.e., authors simply stating their individual understanding of the term and developing their various arguments based upon such assumptions.[3] To be sure, there are paradigmatic examples, such as Norway's Government Pension Fund Global[4] or the Abu Dhabi Investment Authority,[5] upon which everybody agrees, but beyond that, little more than a changing set of family resemblances seems to be established, leaving rather blurred lines between SWFs and public pension funds or central reserve banks.[6] I submit that this apparent shortcoming lies in the very essence of SWFs: they are tailor-made vehicles designed to serve rather heterogeneous purposes, sharing no common legal morphology or regulatory framework of any sort. There are, as a matter of course, the Santiago Principles, drawn up by the

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1. Andrew Rozanov, *Who Holds the Wealth of Nations*, 15 CENT. BANKING J. 1, 4 (2005).

2. *See, e.g.*, TOMASZ KAMINSKI, POLITICAL PLAYERS? SOVEREIGN WEALTH FUNDS' INVESTMENTS IN CENTRAL AND EASTERN EUROPE 26 (2017).

3. *See id.*

4. *See* Larry Catá Backer, *Sovereign Wealth Funds as Regulatory Chameleons*, 41 GEO. J. INT'L L. 425, 452 (2010).

5. *See Abu Dhabi Investment Authority*, INT'L F. SOVEREIGN WEALTH FUNDS, http://www.ifswf.org/members/abu-dhabi-investment-authority (last visited Oct. 31, 2017).

6. *See* Backer, *supra* note 4, at 433.

International Working Group of Sovereign Wealth Funds.[7] However, according to their very self-understanding, they intend to restate and describe rather than regulate and command.[8] They are little more than a common denominator of preexisting practices, adopted voluntarily.[9] Holding SWFs, as a group, "accountable" to the Santiago Principles would be tantamount to saying that they *should* be doing what they *are* doing anyway. But there is more. A few years ago, the United Nations General Assembly adopted Guiding Principles on Business and Human Rights ("UN Guiding Principles") that explicitly extend to "all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."[10] Admittedly, as the UN Guiding Principles remark from the outset, "nothing in these Guiding Principles should be read as creating new international law obligations."[11] But this kind of lip service to regulatory abstention has been seen before: it will not, and indeed should not, preclude international lawyers from deriving at least some soft law normativity from the UN Guiding Principles.[12]

Assuming SWFs can be deemed obligated to a certain level of international human rights compliance, in limine they may be subject to exactly the same human rights obligations incumbent upon the state itself.[13] This sounds all good and well, but what does it mean in practice? Most human rights obligations, in effect, are simply not justiciable.[14] The predominant reasons for this deficiency are threefold. First, human rights obligations are largely ill-defined,[15] with their excessive indeterminacy leading to legal

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7. *See generally* INT'L WORKING GROUP OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO PRINCIPLES" (2008) [hereinafter SANTIAGO PRINCIPLES], http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf. Note the definition of SWFs provided in Appendix I, fitting neatly into the idiosyncratic pattern just described. *Id.* at 27.

8. *See id.* at 4.

9. *See id.*

10. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK 1 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

11. *Id.*

12. *Id.*

13. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 10, at 4; SANTIAGO PRINCIPLES, *supra* note 7, at 4.

14. Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 2–3 (2000).

15. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 676 n.220 (2004).

uncertainty[16] and, as a consequence, to a lack of enforcement.[17] Second, investing internationally, SWFs, like any multinational enterprise, can abuse the limits of extra-territorial jurisdiction.[18] Third, acting as investors, rather than operative entrepreneurs, SWFs are shielded by the separate entities they invest in and the limited liability these entities afford to them as their shareholders.[19] Consequently, compulsory social responsibility of SWFs does not exist in any meaningful way.[20] SWFs only assume social responsibility if they so choose.[21] They are not governed by the rule of law but rather by their rules of choice.[22]

In Europe, there have been two main attempts to balance some of the privileges listed above as far as they extend to multinational corporations. One instrument in play is reporting standards.[23] This rather soft mechanism tries to increase corporate group transparency in order to incentivize better human rights compliance.[24] Accompanying this are group liability statutes that posit a direct obligation of controlling corporate shareholders towards the creditors of their subsidiary.[25] The effectiveness and efficiency of these two measures with regard to multinational corporations ("MNCs") is certainly debatable. However, SWFs fall beyond their reach, for the idea of incentivizing corporate behavior through market transparency is parasitic on the assumption that these market forces will have a grip on corporate shareholders and management.[26] But SWFs and their management do not need capital markets in order to maintain themselves.[27] They do not

16. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000).

17. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002).

18. Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 266 (2012).

19. *Id.* at 265.

20. Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AM. U. INT'L L. REV. 1, 19 (2013).

21. *Id.* at 51 n.250.

22. *Id.* at 19 (using the words "guidelines" and "suggest" to indicate these ethical guidelines are frameworks of choice and not of law).

23. *The Impact of Multinational Corporations on the Development Process and on International Relations*, 13 I.L.M. 800, 867 (1974).

24. *Id.* at 867–68.

25. Brigette Haar, *Piercing the Corporate Veil and Shareholders' Product and Environmental Liability in American Law as Remedies for Capital Market Failures*, 2 EUR. BUS. ORG. L. REV. 317, 350 (2000).

26. Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 141–42 (2008).

27. Scott E. Kalb, *Sovereign Wealth Funds in the Global Capital Markets: Reintermediation and New Collaborative Models*, 32 CFA INST. CONF. PROCEEDINGS Q. 18, 21 (2015), http://www.cfapubs.org/doi/abs/10.2469/cp.v32.n4.2.

answer to markets and investors, but, depending on the choices the governments establishing them made, they will only have varying degrees of political responsibility.[28] The political principles of SWFs, however, do not need market transparency in order to know their agent: they have potentially unlimited access and power over investment policies anyway.[29] Likewise, group liability statutes do not apply to SWFs due to SWFs' typically diversified minority holdings.[30] Therefore, both key European regulatory initiatives on international business fail to effectively address SWFs.

SWFs, by virtue of having access to capital without immediate control by capital markets and through minority shareholding investment policies, are not subject to any effective compulsory legal regime governing their social responsibility.[31] This highlights the need for a paradigm change of business social responsibility and human rights compliance. As long as regulatory attempts focus on the investor directly, they are bound to fail as an entrepreneurial actor and market participant.[32] Animals such as SWFs show that the diversity of investment structures and policies, especially at an international level, is too high, flexible, and sophisticated to be truly domesticated by either indeterminate principles of international human rights or national measures such as reporting standards or group liability statutes.[33] Thus, the way ahead lies not with the investor, but with the investment. Investments need to be regulated by, for example, internalizing their externalities.[34] In other words, human rights infractions committed by corporate vehicles first need to sound in tort claims and damages and, second, need to reach economically beyond the vehicle's entity. Whether this is done most efficiently through minimum legal capital compulsory insurance or varying degrees of veil piercing or straight-out unlimited liability is a different issue. But it is incumbent upon the local regulator to design a healthy corporate system that, one way or another, bears its own costs. Once this is achieved, we will not have to worry about SWFs or any particular type of investor anymore. Conversely, even if we found other ways to regulate SWFs' behavior, the externalities caused by corporate systems would still remain a problem.[35] So, the

28. *See* Backer, *supra* note 20, at 3–4, 3 nn.2–3.

29. Rose, *supra* note 26, at 125, 133–34 (stating that investment policies set forth are nonbinding best practices).

30. *Id.* at 110.

31. *See* Kalb, *supra* note 27, at 26; Rose, *supra* note 26, at 99–100, 144.

32. Verna Krishnamurthy, *SEC Rules and Human Rights: Specialized Disclosure for Corporate Accountability*, 36 U. PA. J. INT'L L. 821, 845 n.102 (2015).

33. *See generally* Rose, *supra* note 26 (discussing the wide variety of SWFs and their regulations).

34. Backer, *supra* note 20, at 101–02, 107.

35. *See generally* Lok Tak Ming, Jafy, *Externalities and Social Responsibilities*, 3 INT'L J. ACAD. RES. MGMT. 193 (2014) (discussing positive and negative externalities and supporting companies with externalities).

real lesson from analyzing SWFs from a social responsibility and international human rights perspective is this: stop looking at SWFs in and of themselves, but instead start focusing on the kinds of investments available to them. In a remote way, the problem of regulating SWF social responsibility should be seen like gun control: if you cannot effectively regulate how actors will use objects that are potentially harmful to society, take away the objects.

I. SFWS AND THEIR HUMAN RIGHTS OBLIGATIONS

As already mentioned, the clearest indication of emerging international rules of business social responsibility are the UN Guiding Principles.[36] The key structural element of the UN Guiding Principles is the distinction between states and corporations.[37] While corporations only incur the "responsibility to respect" human rights, the UN Guiding Principles impose upon states a "duty to protect" human rights.[38] At first glance, this apparent binary logic seems to gloss over the myriad of possible state involvements within public enterprises. Just as the traditional public/private distinction is successively losing ground on theoretical accounts as well as in the face of public wealth being organized in partially state-owned or state-controlled enterprises,[39] it seems hard to tell when an entity falls into the category of "state" or "corporation" according to the UN Guiding Principles.[40]

Luckily enough, against the backdrop of this public/private, state/corporation uncertainty, the UN Guiding Principles are rather explicit when it comes to SWFs.[41] In this specific context, special attention should be given to Principle 4, entitled "The State-Business Nexus."[42] According to this Principle,

> States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[43]

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36. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 10.

37. *Id.* (using the term "corporation" in a nontechnical sense, comprising both corporations *sensu stricto* and other business enterprises).

38. *Id.* at 3, 13.

39. *See* ERIC ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 109–33 (2013) (analyzing a persisting distinction between what the author calls "state capitalism" and "market capitalism").

40. *See generally* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 10 (failing to define entities under "State" or "Corporation").

41. *See id.* at 6.

42. *Id.*

43. *Id.*

The commentary starts out by putting states into a franchise-like position as human rights agents of the international community: "States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime."[44] This principal-agent relationship is then extended towards the relationship of a state and linked business enterprises:

> Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.[45]

This resonates with the general theory of international human rights. It is still being debated if and to what extent "purely" private companies and corporations are subject to human rights obligations at a public international level.[46] SWFs, including their wealth and acts, are attributable to the state itself, based on its overwhelming control of a SWF's policies and decisions.[47] We can conclude, for the time being, that SWFs, generally speaking, incur the very same international human rights obligations as states do.[48]

II. WHY SWFS' HUMAN RIGHTS OBLIGATIONS ARE LARGELY INEFFECTIVE IN PRACTICE

Despite the paramount political importance of human rights as guiding principles of global civilization,[49] on the ground of legal

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44. *Id.* at 7.

45. *Id.*

46. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("[T]he General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."); Chris Thomale, *The Forgotten Discipline of Private International Law: Lessons From Kiobel v. Royal Dutch Petroleum*, 7 TRANSNAT'L LEGAL THEORY 155 (2016) (discussing the debate regarding private companies and corporations).

47. Salar Ghahramani, *Governments, Financial Markets, and International Human Rights: The State's Role as Shareholder*, 6 YALE J. INT'L AFF. 85, 89–90 (2011).

48. *Id.* at 89 (stating that SWFs are state-owned and would thus incur state obligations).

49. *See* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 10, at 1.

practice,[50] their justiciability and, hence, their effective influence, can be rather limited.[51] In the specific case of SWFs, I will advance this contention through highlighting three structural and, indeed, methodological deficiencies of human rights.

First, the guarantees commonly derived from human rights are subject to an excessive degree of indeterminacy.[52] This indeterminacy breaks down into three related but analytically distinct aspects of human rights at closer inspection. Human rights are general, vague, and contestable in nature.[53] Human rights are "general" in formulation because they are typically extremely broad, intending to cover many fact patterns at once.[54] Just consider terms like "speech," "due process," or even Art. 2(1) of German Basic Law (Grundgesetz), which provides the "right to free development of [anyone's] personality insofar as he [or she] does not violate the rights of others or offend against the constitutional order or the moral law."[55] These guarantees have thus rightly been labeled mere "platitudes"[56] of which little legal certainty can be derived. Add to this generality the typical vagueness of human rights—the difficulty that lies in defining the exact criteria—that constitutes speech, art, religion, etc.[57] Human rights, by virtue of their generality, do not only produce many potentially new cases, but also, being as vague as they are, many hard cases.[58] Finally, the generality and vagueness of human rights directly correlate with their high degree of contestability.[59] That means one can not only incidentally attempt to discover the monolithic "objective" meaning but also purposefully and justifiably disagree about the content of a human

50. Kathleen Renee Cronin-Furman, *60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect*, 25 AM. U. INT'L L. REV. 175, 196 (2010).

51. *Id.*

52. Gunnar Beck, *Reifying Law—Rule of Law, Government, the State, and Transnational Government*, 26 PENN ST. INT'L L. REV. 565, 582 (2008).

53. *See* Chris Thomale, *Cuius Regnum Eius Iudicium—Emancipating Private Legal Discourse from Human Rights* J. CONTEMP. CIV. L. (forthcoming 2017).

54. *See General*, OXFORD DICTIONARY, https://en.oxforddictionaries.com /definition/general (last visited Nov. 1, 2017).

55. GRUNDGESETZ [GG] [BASIC LAW], *translation at* https://www.gesetze-im -internet.de/englisch_gg/englisch_gg.html#p0025.

56. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1381 (2005).

57. *See* Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 645–47 (2003) (discussing the need for specification regarding freedom of religion, freedom of association, freedom of expression, etc. and noting that "the indeterminacy of an articulated human right is a matter of degree").

58. *Id.* at 648 n.41.

59. Beck, *supra* note 52, at 617–18.

right.[60] Human rights are about legalistic interpretation in a very superficial sense only.[61] They *invite* individual value judgments, sometimes even simply try to incite a discussion.[62]

On an international level at which we find SWFs, human rights compliance faces a second challenge. Politically speaking, while SWFs and MNCs operate globally, state courts, still being the prime institution to hold SWFs accountable for human rights violations, are confined by territorial bounds.[63] At the outset, the sovereign equality of states and the mutual respect that goes with it should hinder any state—using Justice Joseph Story's words—"to sit in judgment . . . as a . . . custos morum of the whole world."[64] This point of departure is echoed by Oliver Ellsworth, a primary drafter of the Alien Tort Statute, who opined that the United States lacked legislative jurisdiction over transactions in foreign countries.[65] It notably sits well with the nonintervention principle and the democratic paradigm of representation: why should courts be allowed to sit in judgment over defendants to whom they are not accountable in any democratic way?[66] One is immediately inclined

60. *Id.* (explaining that there is no single way to define "human rights;" therefore, individuals may attempt to discover the term's meaning while disagreeing as to its content); *see Contestable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/contestable (last visited Nov. 1, 2017).

61. Waldron, *supra* note 56, at 1367.

62. *Id.* at 1393; Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 527 (1994).

63. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (explaining that, even though the plaintiffs alleged human rights violations, the state of California did not have sufficient contacts to exercise general jurisdiction).

64. United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (Made in the context of adjudicating other states' actions, Justice Story's comment does not directly cut to modern Alien Tort Statute cases, where private actors' conduct is at issue. However, considering incidental findings on complicit state action like that of the Nigerian government in *Kiobel* and on the general failure of the state *delicti commissi* to comply with its own responsibility to protect, the political delicacy of adjudication might be deemed similar in the latter case).

65. William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 485–86 n.97 (1986).

66. Brief for the Governments of the Commonwealth of Australia et al. as Amici Curiae Supporting Petitioner at 23–24, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) [hereinafter Australia et al. Amicus Brief] (quoting the President of South Africa, Thabo Mbeki, in his address to Parliament on April 15, 2003: "We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitutions of the promotion of national reconciliation"); *see also* Brief for the Governments of the Kingdom of the Netherlands et al. as Amici Curiae Supporting Neither Party at 24, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2002) (No. 10-1491) (calling Alien

to object in the spirit of the eighteenth century's young United States republic: *No adjudication without representation*![67] This ties in with the leading public international authority on extra-territorial adjudicative jurisdiction: the *Lotus*[68] case. The *Lotus* case stated that every state enjoys "a wide measure of discretion which is only limited in certain cases by prohibitive rules . . . ."[69] This referred to the *kind* of principles of jurisdiction adopted domestically not to their boundaries in public international law.[70] While a state in its municipal law can avail itself of a "great variety of rules" not prescribed by international law, it may still not "overstep the limits which international law places upon its jurisdiction . . . ."[71] For a long time, the only reliable evidence of state practice of universal jurisdiction in civil matters was the Alien Tort Statute.[72] The Judiciary Act of 1789 humbly states it in a single sentence: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[73] On paper, this seems to counter the transnational edge SWFs and MNCs enjoy over territorially confined state jurisdiction.[74] However, this "unilateral exercise of the function of guardian of international values . . . has not attracted the approbation of States generally."[75] Plus, since the United States Supreme Court's decision in *Kiobel*,[76] the Alien Tort Statute has been effectively pacified so that even this last spark of state practice has been abandoned.[77] Therefore, territorial

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Tort Statute litigation an attempt to "bypass the legal systems of other sovereigns by deciding civil cases involving foreign parties").

67. JAN R. VAN METER, *No Taxation Without Representation*, *in* TIPPECANOE AND TYLER TOO 16–20 (2008) (elaborating on the provenience of the "basic American belief" in this phrase).

68. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

69. *Id.* ¶ 46.

70. *Id.*

71. *Id.*; F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 17 (1990).

72. *See* Alien Tort Statute, 28 U.S.C. § 1350 (2012).

73. *Id.*

74. *See* Daniel E. Etlinger, *Sovereign Wealth Fund Liability—Private Investors Left out in the Cold*, 18 U. MIAMI BUS. L. REV. 59, 82 (2010).

75. Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 48 (Feb. 14); Australia et al. Amicus Brief, *supra* note 66, at 6 (stating, "International law does not . . . recognize universal *civil* jurisdiction for any category of cases at all . . . ."); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 n.7, 788 (D.C. Cir. 1984) (recognizing public international law limits to the exercise of universal jurisdiction).

76. *See generally* Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013) (holding that violations occurring outside the United States are barred under the Alien Tort Statute because of the presumption against extraterritoriality).

77. *See id.* at 1664; *see also* Thomale, *supra* note 46.

restrictions incumbent upon the global state court system severely hinder the human rights accountability of SWFs.[78]

The third, and probably the biggest, obstacle to effective human rights compliance by SWFs is an institutional set-up deeply entrenched in virtually every corporate system: the idea of separate corporate entities endowed with limited liability.[79] This means that any enterprise can use a virtually unlimited number of corporate vehicles to structure and conduct its business.[80] As a consequence, what economically speaking has to be seen as a joint undertaking of all investors, represented by management as their agent at law, is translated into an enterprise of the corporation itself.[81] In general, only that separate corporate entity is liable for any debts arising out of the enterprise.[82] This includes liability for torts based on or concurrent with the violation of human rights.[83] Investors such as SWFs can thus cap the risks of their investments. While they remain fully entitled to all possible gains generated by the enterprise, they only risk their share in the corporate capital, which, depending on legal capital requirements, may just be worth close to nothing.[84] This mechanism of limited liability, economically speaking, works like an insurance policy that kicks in whenever corporate debts exceed corporate value. It is, however, an insurance policy with two quite remarkable characteristics. First, it is the creditors themselves acting as insurers.[85] This is especially noteworthy when dealing with involuntary creditors such as tort creditors and victims of human rights violations. For these creditors, as opposed to voluntary creditors such as banks, do not choose to become creditors of a limited liability corporate vehicle nor do they have efficient strategies available to them in order to compensate for the risk of corporate default.[86] Rather, separate corporate entities and limited liability allow investors to shift parts of their risks to this precarious group of corporate creditors.[87] In a

78. Etlinger, *supra* note 74 (discussing the parallel issue of sovereign immunity).

79. Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379, 392 (1999).

80. *Id.* at 382–83 (explaining that a company's use of franchises, licenses, contracts, and strategic alliances may allow it to avoid liability "simply by shifting a few papers at the appropriate time").

81. *Id.* at 381.

82. *Id.* at 380.

83. *Id.*

84. *Limited Liability*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/limited-liability.html (last visited Nov. 31, 2017).

85. *See Limited Liability*, INVESTOPEDIA, http://www.investopedia.com /terms/l/limitedliability.asp (last visited Nov. 31, 2017).

86. *See id.*

87. In Pigouvian terms, it would seem acceptable to call this an uninternalized externality. *See* ARTHUR PIGOU, THE ECONOMICS OF WELFARE

nonsubsidized world, at least, the insured investors would have to pay a premium on this policy.[88] But here comes the second peculiarity of limited liability insurance: the policy is free and accessible at the minimal transaction costs of incorporation.[89] To be sure, all equity investors profit from this peculiar kind of subsidy.[90] But the bigger the investor, the more he or she uses and profits from it.[91] Due to their sheer size, SWFs profit heavily from the separate corporate entity doctrine and limited liability, shielding them especially against tort claims, including those based on human rights violations.[92]

In sum, the indeterminacy of human rights, the limited ability of national courts to enforce them against international investors, and the ubiquitous availability to shield against tort claims based on the violation of human rights by making use of separate corporate entities endowed with limited liability allow for no effective human rights obligations of MNCs or SWFs. This is not to disqualify attempts made, for example, by Norway's Government Pension Fund Global to implement responsible investment policies.[93] But it seems worthwhile to point out the voluntary, and hence arbitrary, nature of such initiatives, which are nowhere near a binding legal framework of international human rights compliance.

III. RECENT EUROPEAN ATTEMPTS TO INCREASE HUMAN RIGHTS COMPLIANCE

Of late, Europe has tried to address some of the enforcement deficiencies just mentioned, employing, in essence, two strategies.

One is to use company reporting in order to increase transparency and accountability for human rights sensitive investments.[94] The applicable European Union Directive requires a

183 (4th ed. 1920) ("Here the essence of the matter is that one person A, in the course of rendering some service, for which payment is made to a second person B, incidentally also renders . . . disservices to other persons . . . of such a sort that . . . compensation [cannot be] enforced on behalf of the injured parties."); *see generally* ANDREAS PAPANDREOU, EXTERNALITY AND INSTITUTIONS (1994).

88. Brent Radcliffe, *Insurance Premium*, INVESTOPEDIA, http://www.investopedia.com/terms/i/insurance-premium.asp (last visited Nov. 1, 2017).

89. *See* William J. Rands, *Domination of a Subsidiary by a Parent*, 32 IND. L. REV. 421, 423 (1999).

90. *Id.* at 424.

91. *Id.* at 427.

92. *See infra* text accompanying notes 81–86.

93. *See generally* NORGES BANK INV. MGMT., RESPONSIBLE INVESTMENT: GOVERNMENT PENSION FUND GLOBAL (2016), https://www.nbim.no/contentassets /2c3377d07c5a4c4fbd442b345e7cfd67/government-pension-fund-global ---responsible-investment-2016.pdf (discussing risk monitoring and external mandates and the fund's awareness of responsible investment priorities).

94. NORGES BANK INV. MGMT., HUMAN RIGHTS: EXPECTATIONS TOWARDS COMPANIES 2 (undated), https://www.nbim.no/contentassets

non-financial statement "containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, *respect for human rights*, anti-corruption and bribery matters."[95] While obviously inspired by § 1502 of the U.S. Dodd-Frank Act, which imposes conflict mineral disclosure requirements,[96] the ambit *ratione materiae* reaches much farther, covering human rights in general and reaching not only specific regions such as the Congo but across the globe.[97] The apparent intention is as follows:

> [B]ring forward a legislative proposal on the disclosure of non-financial information by undertakings allowing for high flexibility of action, in order to take account of the multidimensional nature of corporate social responsibility (CSR) and the diversity of the CSR policies implemented by businesses matched by a sufficient level of comparability to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on the impact of businesses on society.[98]

On a national level, many member states adopted an additional measure in order to fill what is perceived as a regulatory vacuum, especially with regard to MNCs. Nowadays, many corporate law codes provide for corporate group liability statutes, declaring parent corporations liable for the debts incurred by their international subsidiaries.[99] The French legislature has taken the most recent and the most radical step forward. In February 2017, France passed a law holding parent companies liable for human rights violations committed by their foreign subsidiaries, granting victims a direct cause of action against the parent company.[100] Parent companies under this law incur a "duty of vigilance" with regard to their subsidiaries, the violation of which can sound in damage claims of

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/3258fe10181544cc8e02566c7237fa5f/human-rights-expectations-document2.pdf.

95. Directive 2014/95, art. 1, 2014 O.J. (L 330) 1, 4 (EU) (emphasis added).

96. 15 U.S.C. § 78m(p) (2012). *See* Krishnamurthy, *supra* note 32, at 821; *Conflict Mineral Regulation: The Regulation Explained*, EUR. COMMISSION, http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/ (last updated June 8, 2017).

97. Krishnamurthy, *supra* note 32, at 821–22.

98. Directive 2014/95, *supra* note 95, at 1.

99. *See, e.g.*, Código das Sociedades Comerciais [Commercial Companies Code], art. 501 (Port.); C.c., art. 2497 (It.); *see also* CHRISTOPH TEICHMANN, ZEITSCHRIFT FÜR DAS GESAMTE WIRTSCHAFTS- UND UNTERNEHMENSRECHT 45 (2014).

100. Ashley Hogan, *France Approves Law to Hold Parent Corporations Liable for Subsidiary Human Rights Violations*, JURIST (Feb. 23, 2017), http://www.jurist.org/paperchase/2017/02/france-approves-law-to-hold-parent-corporations-liable-for-subsidiary-human-rights-violations.php.

the victims against the parent company.[101] The law, according to its designers, is geared specifically to address the enforcement difficulties outlined above with regard to human rights accountability of international business. Rather than relying on ever-indeterminate human rights as allegedly self-executing norms, the law extends the French general rule on the law of torts[102] to cover torts committed by subsidiaries.[103] Through the rule of actor *sequitur forum rei*, French courts are also competent to hear cases against French parent companies as they enjoy general jurisdiction over the latter.[104] Finally, the law bypasses the separate entity of international subsidiaries and the limited liability that goes with them by providing a direct cause of action against the parent company.[105] France has thus made an attempt to take up the global lead and become a champion of social responsibility.[106]

Despite all the effort that has been put into increasing social responsibility, the status quo is still far from comprehensive. Nothing exemplifies this more than SWFs, for they escape both regulatory initiatives just outlined.[107] SWFs fall outside the immediate scope of reporting regulations in so many ways. First, they are not listed on stock exchanges, which is a typical requirement for modern reporting regulations to apply.[108] This leads to a second aspect of SWFs that puts them beyond conventional reporting. Having neither customers—at least not typically or predominantly—nor private investors or other identifiable beneficiaries,[109] the whole approach of nudging through transparency (i.e., the balancing of asymmetrical information) is bound to fail with SWFs.[110] Group liability suffers a similar defect. SWFs are non-entrepreneurial, institutional investors whose business case rests on composing a well-balanced portfolio of promising investments, not in controlling and running enterprises

101. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4 (Fr.).

102. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1382 (Fr.).

103. C. COM. art. L. 225-102-4 (Fr.).

104. C. COM. art. L. 225-102-5 (Fr.).

105. C. COM. art. L. 925-3 (Fr.).

106. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés méres et des enterprises donneuses d'odre [Law 2017-399 of March 27, 2017 relating to the Duty of Care of Parent and Ordering Companies] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Mar. 28, 2017, p. 7.

107. Alexandre H. Pauwels, *A Justified Defiance Towards Sovereign Wealth Funds?: A Tentative Defense Manual for the Wary Host State*, 16 U.C. DAVIS BUS. L.J. 103, 108–09 (2015).

108. Richard Wilson, *An Introduction to Sovereign Wealth Funds*, INVESTOPEDIA, http://www.investopedia.com/articles/economics/08/sovereign-wealth-fund.asp (last visited Nov. 1, 2017).

109. *See* Rose, *supra* note 26, at 145.

110. *Id.* at 144–45.

themselves.[111] SWFs will therefore acquire small minority shares in a given company, giving them comparatively little control over its management.[112] Group liability statutes, however, are based on the assumption that parent companies, be it through direct or indirect equity or otherwise, control their subsidiaries and can hence be held accountable for their wrongdoing.[113] As a consequence, neither reporting nor group liability regulation catch SWFs, leaving it an open question on how legally to ensure human rights compliance by this special kind of investor.

CONCLUSION: FROM INVESTOR TO INVESTMENT

The foregoing has shown that there lies a persistent regulatory challenge in trying to ensure social responsibility of SWFs. Against this backdrop, I suggest we start looking at the problem from a different angle. Until now, the main approach to SWFs and MNCs has been to regulate *them*, specifically aiming at *their* investment policies.[114] In the light of failing attempts to make this approach work, we should move away from these powerful and flexible global players that are so well-advised and sophisticated that it should be fair game for them to evade any regulation coming their way, be it on taxes or human rights. Rather, it falls upon national and local regulators to make sure not to offer investment opportunities that are potentially harmful to their societies. This will require a thorough reassessment of the legal framework in which local companies, receiving investments from SWFs or being embedded in the group of a MNC, operate.

In the light of the human rights enforcement deficiencies outlined above, I will only mention two main venues. First, local tort laws need to be up to the task of implementing human rights.[115] This goes to the specification of the concrete obligations emanating from human rights principles.[116] But it does not stop there. Many European laws of torts, for example, do not allow for punitive damages.[117] However, it may well be that in order to effectively incentivize human rights compliance, punitive damages or some equivalent sanction needs to be introduced despite the theoretical

111. *Id.* at 121–22.

112. *Id.* at 99.

113. C. COM. art. L. 225-102-4 (Fr.).

114. *See generally* SANTIAGO PRINCIPLES, *supra* note 7 (discussing the guidelines, principals, and practices for SWF investments).

115. *See* Kirshner, *supra* note 18, at 279 (discussing jurisdiction over human rights cases).

116. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 10, at 1.

117. THOMAS FAUSTEN & ROBERT HAMMESFAHR, PUNITIVE DAMAGES IN EUROPE: CONCERN, THREAT, OR NON-ISSUE 2 (Ingo Buse & Richard Heard eds., 2012).

problems that go with this adjustment.[118] Once an effective tort remedy against human rights violations is bestowed, the evasion strategy of using separate corporate entities endowed with limited liability needs to be addressed. The classical counterproposal, as was introduced into American legal discourse by Henry Hansmann and Reinier Kraakman in the early 1990s, that tort claims should be exempt from limited liability such as to allow pro rata liability instead[119] has to be revisited.

As I am demonstrating elsewhere,[120] it is possible to defend pro rata liability against all objections and attacks that have ever been wielded against it from an economic point of view, not to mention the ethical superiority of a solution that is able to mirror the right to profit from an enterprise and the responsibility to make whole the costs it causes to society.[121] It is conceivable that an intelligent reform of limited liability is not only advisable from a general economic and ethical point of view but that it is necessary specifically with regard to social responsibility of national and global business as a whole.

118. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 38 (2012).

119. Henry Hansmann and Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1880 (1991).

120. Chris Thomale, Kapital als Verantwortung (forthcoming).

121. *Id.*

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