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Between Sovereignty and Commerce: Reflections on the Rise of State-Owned Entities

INTRODUCTION

In most industrialized economies, private enterprises are the predominant economic actors. However, in recent decades, the prevalence of enterprises associated with sovereign states — such as State-Owned Entities (SOEs) and related institutions like Sovereign Wealth Funds (SWFs) — has skyrocketed. This quiet revolution has shifted the balance between public interests and private initiative, blurring lines between market competition and statecraft. While the surge in commercial enterprises associated with the state is not without important historical precedent, much of the international legal architecture that was built over the twentieth century has not sufficiently engaged with these economic realities.

The rise of SOEs is not merely a matter of economics. It reflects deeper shifts in governance, law and diplomacy. In international law, these entities can present a puzzle: they behave like private corporations in commercial arenas, yet they may enjoy the privileges — and carry the burdens — of sovereign authority. Their growing prominence in sectors from energy to infrastructure raises fundamental questions: How should international law recognize and adapt to their dual nature? Moreover, what lessons can history offer us in understanding this evolving phenomenon?

In reflecting on this, I am reminded of the recent fate of the Hudson's Bay Company in Canada. Founded in 1670 under a royal charter from the English crown, it functioned for centuries as both a commercial trading house and a quasi-sovereign administrator of vast territories. Its powers — to govern, to tax, to negotiate with Indigenous nations — blurred the line between public interest and private enterprise. Yet by the late twentieth century, it had shed its political functions, becoming simply another retail brand. In 2025, the Hudson Bay Company shut its doors forever: it filed for bankruptcy and subsequently liquidated its assets, including its physical stores and intellectual property. This transformation offers a striking counterpoint to today's SOEs,

which are moving in the opposite direction: expanding their reach not only in commerce, but in shaping state policy and international law. *Come cambiano i tempi.*

1. HISTORICAL AND CONCEPTUAL BACKGROUND

State entities are not unique to the modern state. History offers a long lineage of enterprises that fused public authority with commercial ambition — from chartered companies to nineteenth-century state railways. While today's SOEs are common in emerging economies, their presence is by no means confined to them. What they hold in common is their *publicness* — a defining characteristic rooted in their connection, whether by ownership, control, or policy, to broader social outcomes, or the provision of public service.

This *publicness* is not simply a matter of formal ownership structures; it is embedded in the purposes these entities serve. Whether financing infrastructure, managing natural resources, or delivering essential goods, they operate at the junction of market and state, where market efficiency and social policy intersect. This dual mandate can be both a source of strength and a site of tension, especially in the realm of international economic law.

The rise of what has been called *state capitalism* — countries in which governments hold an ownership stake or exert significant influence over more than one-third of the 500 largest companies — is particularly significant. The causes of this phenomenon are varied. They include: increasing privatization in liberal democracies, where governments retain a "golden share" or strategic control; the delegation of state functions in formerly socialist states; the ascendance of China, with its distinctive combination of a state-driven economy; and competitiveness in global markets; and a reversion to authoritarianism in some states with prior histories of centralized control.

Moreover, *entità statali economiche* (SAEs) now fulfill remarkable roles in diverse and dynamic ways — from being champions of national industrial policy, to serving as diplomatic tools in soft power strategies, to acting as global investors through sovereign wealth funds. Their reach is no longer restricted by geography, nor is their influence confined to [traditional sectors]?. They are as likely to own a critical port in the Mediterranean as to be majority shareholders in a South American mining conglomerate.

2. RATIONALES AND CONTRASTS

The rationale for SOEs is mixed, reflecting a blend of social, economic, and strategic interests that vary from state to state. Their purposes range from advancing industrial policy and fostering regional development, to ensuring the supply of public goods, and managing so-called natural monopolies where competition is deemed politicaly infeasible. These justifications are often framed in the language of national interest, appealing to the legitimacy of state intervention in strategic sectors.

SAEs can be contrasted with what Jacob Levy has described as "intermediate groups" — associations, clubs, churches, and other organizations that exist midway between the individual and the state, and provide social and institutional resistance to state dominance. The difference lies partly in their origin: while intermediate groups arise from the ground up, SAEs are created from the top down as instruments of state policy.

Moreover, while both intermediate groups and the state itself can act as agents for individuals, states have a historical tendency to overreach, seeking to control, co-opt, or regulate these intermediary bodies. This overreach, Levy notes, often forces associations into a defensive posture: raising barriers to entry, becoming more opaque to external scrutiny, and demanding greater loyalty and ideological conformity from their members.

SAEs are also to be contrasted with political parties, which Samuel Issacharoff has argued require a thick right of autonomy to protect them from adverse state regulation. He situates this as part of the broader problem of intermediary institutions within civil society: "These institutions fall between the realms where rights of autonomy truly take hold and those where the claim to fidelity to the full range of social mores may be imposed." He further warns that political parties cannot retain their organizational identity if they devolve into mere instruments of the median voter.

Despite these distinctions, there remains one notable similarity between intermediate groups and SAEs: both are often prone to secrecy and criticized for their lack of transparency. As Levy observes, states are, by their nature, information-gathering and surveilling entities, and the relative opaqueness of intermediate groups can provoke state antagonism. For grassroots associations, opacity may be a survival strategy; for SAEs, it may be a function of national security, commercial confidentiality, or political sensitivity. In both cases, the result is a shield against scrutiny — and a lightning rod for criticism.

3. LEGAL AND GOVERNANCE CHALLENGES IN INTERNATIONAL LAW

The dual nature of SAEs— simultaneously market participants and instruments of sovereign policy — generates complex legal and governance challenges. Chief among these is the question of sovereign immunity. In many jurisdictions, the doctrine of *immunità sovrana* protects states from being sued without their consent. Yet, when SAEs engage in *atti commerciali*, they may fall within exceptions to immunity, especially under restrictive immunity regimes. Determining whether an SAE's conduct is "sovereign" or "commercial" is often contentious, particularly when the same act may have both policy and profit motives.

In the realm of international investment law, SAEs present further difficulties. Under many bilateral investment treaties (BITs) and free trade agreements, they can appear on either side of the dispute: as "private" investors themselves or as respondents accused of breaching investment protections. The ICSID Convention and UNCITRAL rules have grappled with questions of attribution: when does an SAE's conduct engage the responsibility of the state under *diritto internazionale pubblico*? Cases such as *BUCG v. Yemen and CSOB v. Slovakia* illustrate the tensions in defining the threshold for state control and governmental function.

SAEs also pose challenges in the field of competition law and trade regulation. In the European Union, for example, state aid rules under Articles 107–109 TFEU constrain the ability of Member States to grant preferential treatment to their own enterprises. The WTO's Agreement on Subsidies and Countervailing Measures similarly seeks to discipline distortive state support, yet its application to SAEs remains politically sensitive, particularly when such entities operate as *campioni nazionali* in strategic industries.

Transparency norms present another point of contention. Multilateral frameworks, such as the OECD Guidelines on Corporate Governance of State-Owned Enterprises, promote disclosure, accountability, and competitive neutrality. However, compliance varies widely, and many SAEs resist full transparency on grounds of national security or commercial sensitivity. This resistance mirrors the dynamics described by Levy with respect to intermediate groups — opacity as a strategic choice — but in the case of SAEs, the stakes are amplified by their potential to influence global markets, shape industrial policy, and act as vectors of diplomatic leverage.

CONCLUSION - SOVEREIGNTY AND COMMERCE IN DIALOGUE

In tracing the rise of state affiliated or owned enterprises in the modern global economy, it becomes clear that these hybrid actors are neither an aberration nor a novelty. They are part of a longer story — one that runs from the chartered companies of early modern Europe to today. Today's SOEs, by contrast, are moving in the opposite direction — expanding their reach from commerce into realms once reserved for the sovereign itself.

This evolution reflects recurring tensions in the relationship between *Stato*and *mercato*: the desire to harness market mechanisms for public ends, the temptation to conflate strategic policy with competitive advantage, and the challenge of governing actors that answer to both boardrooms and ministries. The legal complexities — from sovereign immunity to competition law — are symptoms of a deeper truth: that the boundary between public and private is never fixed, but continually negotiated.

In Bologna, under the arches of the*portici*, one walks through a city that has witnessed centuries of such negotiation. Here, jurists of the *studium* once wrestled with the reception of Roman law, adapting it to the realities of medieval commerce and governance. That same spirit of comparative law is needed today to navigate the legal space occupied by SAEs — a space that demands both respect for sovereignty and insistence on transparency, accountability, and the rule of law.

Ultimately, *il diritto è un dialogo senza fine* — the law is an endless dialogue. The challenge for our time is to ensure that, in this dialogue, the voices of both state and market are heard, balanced, and held to account, so that the hybridity of SAEs serves not merely the interests of power, but the broader public interest.

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