Examining Privatisation as a Solution to Rescue South African State-Owned Entities

Mini-thesis submitted to the Faculty of Law of the University of the Western Cape, in partial fulfilment of the requirements for Magister Legum (LLM) in Mercantile Law

Student Name and Surname: Sibulelo Ganda

Student Number: 3366503

Supervisor: Professor Riekie Wandrag

Proposed Degree: LLM in Mercantile Law

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Declaration

I, Sibulelo Ganda, declare that *Examining Privatisation as a Solution to Rescue Struggling South African State-Owned Entities* is my own work and has never been submitted for any degree or examination at any university. All the sources I have used have been indicated and acknowledged by complete reference.

Student Name and Surname: Sibulelo Ganda

Signature

Supervisor: Professor Riekie Wandrag

Signature

Dedication

This work is dedicated to my grandmother, Nobantu Debora Mgatyelwa.

Although she has no formal education, she has never ceased imparting her intellect, tutelage, and encouragement to study.

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'I lift up my eyes to the mountains; where does my help come from? My help comes from the Lord, the Maker of heaven and earth.' Psalm 121: 1-2.

The process of writing this dissertation was never one that was easy for me, physically or emotionally, but because of the Lord's constant presence in my life, He provided me with the confidence and power to see the task through to the end. I thank you, Lord, for meeting my needs.

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Abbreviations

AGM	Annual General Meeting
ANC	African National Congress
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CIPC	Companies’ Intellectual Property Commission
COO	Chief Operating Officer
CPC	Communist Party of China
CRS	Contract Responsibility System
CSRC	China Securities Regulatory Commission
DC	Developed Countries
DEC	Developing Countries
ESKOM	Electricity Supply Commission
FG500	Fortune Global 500
IPO	Initial Public Offering
JSE	Johannesburg Stock Exchanges
MOI	Memorandum of Incorporation
NA	National Assembly
NDP	National Development Plan 2030 vision
OECD	Organization for Economic Cooperation and Development
PCB	People’s Bank of China
PFMA	Public Finance Management Act 1 of 1999
PIC	Public Investment Corporation
PIPOs	Privatisation Initial Public Offers
PPP	Public-Private Partnerships
PRC	Presidential Review Committee
SAA	South African Airways
SABC	South African Broadcasting Corporation
SASAC	State-owned Assets Supervision and Administration Commission

SEP	Strategic Equity Partnerships
SIP	Share Issue Privatisation
SMP	Strategic Management Partnerships
SOC	State-owned Companies
SOE	State-owned Entity
SSA	Sub-Saharan Africa
UK	United Kingdom
US	United States

Keywords

- state-owned entities
- state-owned companies
- corporate governance
- privatisation
- centralisation of state ownership
- decentralisation
- mixed ownership
- South Africa
- appointment and removal of board of directors
- executive managers
- share issue privatisation
- legal framework

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Chapter 1: Introduction

1.1 Background of the study

The term 'state-owned entity' (SOE) has no universal definition. 'SOE' refers to businesses founded by central and local governments and managed by government officials.[1] An SOE can also be understood as a legal entity established by government to conduct commercial operations on behalf of the government. It is often entirely or partially owned by the government and is intended for a certain commercial activity.[2] Globally, countries utilise SOEs to supply public goods, limit private sector and foreign control of the local economy, produce revenue for the fiscus, improve service delivery, and promote economic development and industrialisation.[3] Thus, it is accurate to define SOEs as businesses that are *sui generis* in origin and are utilised by governments to either engage in the economy commercially, or to enable the government to offer services to its inhabitants.

Globally, SOEs commonly have both commercial and non-commercial goals. Governments have founded and maintained parastatals for a variety of socioeconomic, political, and historical reasons.[4] Following displeasure with the results of privatisations and structural reform programmes in the 1990s, many Southern African economies have prioritised SOEs in their national development strategies.[5] For this reason, government policies in South Africa also rely on SOEs to foster economic development.[6] According to Kikeri, SOEs are critical to the South African economy because they are drivers of economic growth and significant vehicles for providing critical infrastructure services such as transportation, energy, and water, thereby enabling the economy to grow while ensuring equal access to quality services.[7] It is clear that governments globally and domestically view parastatals as key instruments in advancing both commercial and non-commercial activities.

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[1] OECD Working Group on Privatisation and Corporate Governance of State-Owned Assets – State Owned Enterprises in China: Reviewing The Evidence (2009) 5.

[2] Keton W 'State – Owned Enterprise (SOE) and how Does it Work?' Available at https://www.investopedia.com/terms/s/soe.asp (accessed 5 February 2022).

[3] Thabane T & Snyman-Van Deventer E 'Pathological Corporate Governance Deficiencies in South Africa's State Owed Companies: A Critical Reflection' (2018) PER/PELJ (21) Available at DOI http://dx.doi.org/10.17159/1727- 3781/2018/v21i0a2345.

[4] European Commission State-Owned Enterprises in the EU: Lessons Learnt and ways forward in post-crisis context (2016) Available at https://ec.europa.eu/info/sites/default/files/file_import/ip031_en_2.pdf (accessed 5 February 2022).

[5] OECD Governance of SOEs in South Africa (2014) Available at https://www.oecd.org/daf/ca/SOE%20Network%20info%20sheet.pdf. (accessed 5 February 2022).

[6] OECD (2015) corporate governance: State-Owned Enterprise Reforms Available at https://www.oecd.org/corporate/south-africa-state-owned-enterprise-reform.pdf.(accessed 5 March 2022).

[7] Kikeri, S 'Corporate Governance in South Africa State-Owned Enterprise' (2018) Available at https://openknowledge.worldbank.org/handle/10986/30029. (accessed 6 February 2022).

South Africa has SOEs such as Transnet, Eskom, South African Airways (SAA), and Denel.[8] The South African government saw a need to centralise these the public entities under its ownership as key entities for driving the developmental state of the country.

The South African government established the National Development Plan 2030 vision (NDP) in 2010, with the stated goal of eradicating poverty and inequality in the country.[9] The NDP 2030 vision envisages that South African SOEs will have a critical role to play in the realisation of a developmental state.[10] Additionally, the national planning commission's study argues that these parastatals should serve a clear public interest and are critical to achieving national objectives through economic and social justice.[11] As a result, it is apparent that the African National Congress (ANC) administration's mandate is to proclaim that, in order for this country to achieve economic emancipation, SOEs should be used as a vehicle to address socio-economic concerns.

These national key entities are funded by government, and fall under the control of the Minister of Public Enterprise, although some fall under line ministers as majority shareholders. Additionally, SOEs are intriguing in nature because they face a dual obligation to ensure profitability as commercial entities, while also being expected to fulfil social mandates.

SOEs that are well governed and managed contribute significantly to economic growth and development, particularly in emerging nations.[12] For instance, in 2017, Fortune Global 500 (FG500) SOEs generated a total of $6.1 trillion in sales, accounting for 22% of overall FG500 revenue ($27.7 trillion). Chinese SOEs account for a sizable percentage of the FG500 SOEs.[13] The contribution of Chinese SOEs to FG500 is a clear indication of well-governed SOEs.

One might infer that South Africa's approach of centralising SOEs for commercial and non-commercial purposes, which is comparable to China's model, would similarly provide favourable returns for the state. However, in their current configuration, SOEs are not only dysfunctional, but also fall short of their developmental mandate.[14] For instance, South Africa's

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[8] Research and Markets ('South African State-Owned Enterprise Report 2021') Available at 'https://www.prnewswire.com/news-releases/south-africa-state-owned-enterprises-report- 2021-total-soe-debt-stands-at-a-staggering-r692-9bn-301442984.html. (accessed 06 February 2022).

[9] NDP The role of State-Owned enterprises in achieving economic and inclusive growth (2020). Available at https://www.nationalplanningcommission.org.za/assets/Documents/NPC%20Position%20Paper%20on%20The%20Contribution%20of%20SOEs%20to%20Vision_2030.pdf (accessed O6 February 2022).

[10] NDP The role of State-Owned enterprises in achieving economic and inclusive growth (2020) Available at https://www.nationalplanningcommission.org.za/assets/Documents/NPC%20Position%20Paper%20on%20The%20Contribution%20of%20SOEs%20to%20Vision_2030.pdf (accessed O6 February 2022).

[11] NDP The role of State-Owned enterprises in achieving economic and inclusive growth (2020) Available at https://www.nationalplanningcommission.org.za/assets/Documents/NPC%20Position%20Paper%20on%20The%20Contribution%20of%20SOEs%20to%20Vision_2030.pdf (accessed O6 February 2022).

[12] Wandrag R, 'Legal Framework of SOE Boards' (2018) Available at wandrag_legal_framework_v4-1-3-for-electronic-use-1 Part 1.pdf (accessed 06 March 2022).

[13] Lin K, Lu X, Zhang J & Zheng Y 'State-owned enterprises in China: A Review of 40 years of research and practice' (2020) China Journal of Accounting Research 13(1) 1-2.

[14] G: enesis 'Charting a new course for failing state-owned enterprises' Available at https://www.genesis-analytics.com/who-we-are (accessed 7 April 2022).

governance has deteriorated alarmingly in recent years, particularly that of parastatals.[15] It is also suggested that a large number of SOEs have suffered substantial governance failures as a result of inadequate regulatory oversight, excessive centralisation, and ambiguous aims.[16] The financial and governance shortcomings of South African SOEs have been traced directly to the establishment of a fragmented legal framework comprising overlapping and sometimes contradictory regulations.[17] It is also important to note that another major contributing factor to the failure of South African SOEs is political interference and having SOEs that have a dual mandate in nature.[18] As a result, these parastatals have been utilised as vehicles for looting by ANC political officials and their inner circle of business allies.[19] For instance In his State Capture report, Chief Justice Zondo details how public officials, board members, and chief executive officers (CEOs) used parastatals to perpetrate fraud and corruption, bringing these businesses to their knees.[20] Thus, the crucial question is whether the ANC administration is sincere in centralising these public entities for the purpose of achieving the national developmental programme, or whether they are preserved merely to provide a stage for politicians to embezzle state resources? These are the questions that this study seeks to examine.

The study's aim is to give a rational and evidence-based contribution that will guide South African policy-makers in their discussions about the future of SOEs. This will also add significantly to the study of the privatisation of parastatals. The thesis will argue that South Africa's public entities require a complete rebuilding. To begin, the study advocates the complete decentralisation of SOEs. The study will first examine the global trends on good corporate guidelines, and then benchmark such findings using South Africa's legal framework. The intention is that this study will fully examine some of the failures that have negatively contributed to the distress of parastatals. This analysis will contribute to the development and advancement of the study's central argument, as it will provide the study with a complete picture of the difficulties facing South African SOEs.

The study will also examine two methods of privatisation of SOEs that have been implemented globally, providing insight into which form would be most beneficial to South Africa's SOE privatisation agenda. The study will also reflect on some of the attempts that have been made

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[15] Mail & Guardian (2018) 'SA counts costs of poor governance' Available at https://mg.co.za/article/2018-03-02-00-sa-counts-cost-of-poor-governance/ (accessed 07 February 2022).
[16] OECD South Africa Policy Brief: Corporate governance (2015) Available at https://www.oecd.org/corporate/south-africa-state-owned-enterprise-reform.pdf. (accessed 7 February 2022).
[17] Wandrag R, 'Legal Framework of SOE Boards' (2018) Available at wandrag_legal_framework_v4-1-3-for-electronic-use-1 Part 1.pdf (accessed 06 February 2022).
[18] Skiti S 'No more space for political interference in state-owned enterprise' (2020) available at https://mg.co.za/business/2020-07-30-no-more-space-for-political-interference-in-state-owned-enterprises/ (accessed 7 April 2022).
[19] Hanspa J 'South Africa: Zondo 'State Capture' report exposes fraud and corruption' available at https://www.theafricareport.com/163918/south-africa-zondo-state-capture-report-exposes-fraud-and- corruption/ (accessed 7 April 2022).
[20] Zondo R.M.M 'State Capture, and Fraud in the Public Sector including Organs of the State: chapter 1- South African Airways and its Associated Companies' available at https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf (accessed 9 April 2022).

to privatise South African SOEs. Through this exercise, the thesis will give a clear indication as to whether such privatisation reforms have improved the corporate governance of SOEs and, if not, what form of privatisation could potentially be adopted by South Africa. This thesis will then analyse all the of the above-mentioned challenges, and make recommendations aimed at bringing SOEs under the decentralised ownership of government with private investors as shareholders.

1.2 Significance of the study

South Africa's economy is reliant on SOEs.[21] SOEs, on the other hand, continue to seek and get government assistance, diverting revenues intended for basic service delivery.[22] In his 2022 budget statement, Finance Minister Enoch Godongwana decried the fact that over R380 billion has been spent since 2013 in bailing out SOEs.[23]23 What the Minister has emphasised is a clear indicator that there are structural failures with SOEs that must be addressed, and that, as long as the state retains complete ownership of these public institutions, they will continue to cost the state.

The South African government has also received a warning from the rating agency that continuing to bail out larger public entities that are unable to balance their assets and liabilities will have a detrimental effect on the country's improved fiscal performance.[24] Immediately following the budget address, the Fitch rating agency warned the state that if the government continues to financially bail out these parastatals, the present credit rating will deteriorate from stable to negative.[25]25 It is critical for this study to advocate for decentralisation of public entities, so that the government is not compelled to financially bail out these parastatals, as such an intervention would have a negative impact on the country's economy and credit rating score.

Due to the inherent inefficiency of SOEs, privatisation has become a critical component of many economies' structural reform processes.[26] Thus the significance of this study is to also advocate for the privatisation of SOEs, based on empirical evidence showing that South

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[21] Simone, A. & Wang, Z., South Africa: Selected issues, The Role of SOEs in South Africa: Issues and Policy Options. (2021), International Monetary Fund Washington, D.C. Available at https://doi.org/10.5089/9798400201318.002 (accessed 18 November 2022) Page 19.
[22] Business Tech (2021) 'South Africa's list of failures – the state-owned companies that are in a financial crisis' Available at https://businesstech.co.za/news/government/545244/south-africas-list-of-failure-the-state- owned-companies-that-are-in-a-financial-crisis/ (accessed 7 February 2022).
[23] Ferreira E (2022) 'Budget 2022: Godongwana sticks to tough love talk on SOEs, but dishes out funding to Denel' Available at https://mg.co.za/business/2022-02-23-budget-2022-godongwana-sticks-to-tough-love- talk-on-soes-but-dishes-out-funding-to-denel/ (accessed 23 February 2022).
[24] BusinessTech (2022) 'Rating agency sends warning to South Africa after budget speech' Available at https://businesstech.co.za/news/government/562102/rating-agency-sends-warning-to-south-africa-after- budget/ (accessed 10 April 2022)
[25] BusinessTech (2022) 'Rating agency sends warning to South Africa after budget speech' Available at https://businesstech.co.za/news/government/562102/rating-agency-sends-warning-to-south-africa-after- budget/ (accessed 10 April 2022)
[26] Awuah G B, 'The case for privatization of South Africa state-owned companies: A critical assessment' (2019) Available at https://www.researchgate.net/publication/343181951_The_case_for_privatisation_of_South_African_state-owned_companies_A_critical_assessment (accessed 24 February 2022).

Africa's SOEs have been plagued by numerous challenges since 2002, including political interference, governance instability, and incapacity to carry out their objectives.[27]

This dissertation argues that, despite the numerous initiatives and recommendations made by the 2010 Presidential Review Committee (PRC) to address the shortcomings of SOEs, and because less than half of those recommendations have been followed, privatisation of SOEs could potentially be a viable option. Privatisation is widely regarded as a means of reducing the public sector's borrowing requirements to pay for subsidies, subventions, and the corruption associated with inefficient and unprofitable SOEs.[28] The billions of rands of taxpayers' money that the government continues to waste in an effort to save SOEs that barely generate a profit should be decentralised as a means of promoting good corporate governance. In addition, these SOEs should be partially privatised to attract investors with the capital to save these SOEs and, more importantly, investors with the skills to instil good corporate governance practices.

The purpose of this study is to examine options for South African SOEs and the best model for the government to adopt in decentralising the SOEs through privatisation. The research strongly suggests that the government should consider the share issue privatisation (SIP) model when selling some portion of SOEs to the private sector. This is based on the current debate that government assistance for financially unviable SOEs is unsustainable.[29] It is further suggested that privatisation can encourage a more dynamic industrial infrastructure, subject SOEs to market discipline, and bring in critical capital infusions, skills, systems, and knowledge.[30]

The study acknowledges the government's previous efforts to privatise SOEs. Despite the substantial benefits of privatisation, a few governments, including South Africa, have taken a cautious approach to gradually divesting their interests in SOEs.[31] In 1994, the Deputy President Thabo Mbeki announced that the government would consider fully or partially privatising state assets and enterprises, as appropriate, to raise funds for debt reduction.[32] The rationale for this approach was that the government hoped that reforming SOEs would make them more competitive and, more importantly, would promote fair competition in the country's economy.

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[27] Bauer N (2013) 'Experts: State-owned enterprises doomed to fail' https://mg.co.za/article/2013-04-03-00-state-owned-enterprises-doomed-to-fail/ (accessed 9 April 2022).
[28] OECD Privatisation and the Broadening of Ownership of State-Owned Enterprise (2018) https://www.oecd.org/daf/ca/Privatisation-and-the-Broadening-of-Ownership-of-SOEs-Stocktaking-of-National-Practices.pdf (accessed 24 February 2022).
[29] Democratic Alliance (2018) Revitalising our State-Owned Enterprises – The DA's 6-point plan Available at https://www.da.org.za/2018/05/revitalising-our-state-owned-entities-the-das-6-point-plan/ (accessed 9 April 2022).
[30] Democratic Alliance (2018) Revitalising our State-Owned Enterprises – The DA's 6-point plan Available at https://www.da.org.za/2018/05/revitalising-our-state-owned-entities-the-das-6-point-plan/ (accessed 9 April 2022).
[31] Gumede N & Andoh K 'Prescriptions of the National Development Plan For Stat-Owned Enterprises In South Africa: Is Privatisation An Option?' (2016) Journal of Public Administration, 269.
[32] Gumede W, The Political Economy of State-Owned Enterprise (SOE) Restructuring in South Africa' (2016). Journal of Governance and Public Policy, Vol6(2) (July December) Page 75.

The government then pursued several different strategies for restructuring SOEs: strategic equity partnerships (SEP); strategic management partnerships (SMP); public private partnerships (PPP); privatisation (complete or partial); and SOE floatation (initial and secondary).[33] However, for the purposes of this study, the research will only examine the efforts taken by the government to sell public entities through the SEP model. The importance of this approach is to positively criticise the SEP model that was adopted by the South African government in responding to SOE privatisation, as this model has produced limited tangible results and ineffective good corporate governance. The study will then argue that share issue privatisation (SIP) could potentially be considered as the best model that government could adopt. Therefore, the study will highlight successes in China, which has adopted this form of privatisation. It will examine challenges so that South Africa can draw some lessons from China's experience.

1.3 Research question(s)

The main question is whether the decentralisation of ownership of SOEs would be better served under the auspices of privatisation, or through mixed ownership, taking into consideration the previous failed initiatives and the reactions that the South African government has received in the past.

To discuss this question, these further sub-questions must be discussed:

- What is the current legal framework that governs South African SOEs, and how well does it function?
- What is privatisation, and what models are available for a country to embark on privatisation?
- What are the successes and disadvantages faced by privatised SOEs?

1.4 Objectives of the study

- To explore internationally accepted guidelines on corporate governance of SOEs.
- To explore and examine the current legal framework that governs South African SOEs.
- To explore and describe the different types of privatisation.
- To determine the successes and disadvantages caused by the privatisation of SOEs.
- To provide evidence for or against privatisation as a solution for SOEs.

[33] Gantsho, J. Restructuring Status Report: Department of Public Enterprise. Presentation to portfolio committee on Public enterprises. (1996) https://slideplayer.com/slide/6953528/. (accessed 25 February 2022).

1.5 Limitation of the study

As was alluded to previously, the creation of SOEs by countries is intended, among other things, to promote economic growth and to secure the delivery of essential services to citizens. In the context of South Africa, SOEs have also been used to create employment possibilities, particularly for individuals deemed to have been disadvantaged by the pre-democratic regime. Consequently, privatisation of SOEs in South Africa remains a contentious issue for many individuals for numerous reasons. For example, the Minister of Employment and Labour, Thulas Nxesi, recently stated that he opposes the direction that is being taken by the Minister of Public Enterprise to privatise major parastatals.[34] The minister contends that the privatisation of SOEs like ESKOM would perpetuate poverty and result in the loss of ESKOM jobs.[35] This study is exclusively limited to two aspects: the legislative framework that governs South Africa SOEs; and the prospect of adopting privatisation as a means of rescuing struggling SOEs. The thesis is also strictly limited to examining the privatisation of South Africa's SOEs; and, most importantly, to ask how privatisation can enhance the good corporate governance of SOEs when it comes to the appointment and removal of boards of directors and COEs.

1.6 Research methodology

A desktop study will be used for the purposes of this thesis's research. An examination of pertinent primary sources, such as South African legislation and regulations, government documents, position papers, reports such as the guidelines on SOEs and the King IV reports, and any relevant primary sources. The study will also consult secondary sources such as journals, academic articles, conference papers, textbooks, newspapers, and internet websites.

The study will also conduct a comparative analysis of South Africa and China's privatisation efforts. It must be emphasised, however, that the study is not comparative in character. The comparative analysis that will be conducted in this thesis is simply to strengthen the case for the gains and challenges China has experienced since the country committed to some privatisation of its parastatals. China has been chosen for the study because it has recorded the fastest economic growth globally. Most importantly, China's SOEs, as was previously mentioned, have contributed, and continue to contribute, greatly to the Chinese economy.

1.7 Chapter outline

The structure of this dissertation is as follows:

Chapter 1: Overview of the Study

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[34] News 24 (2022), Forget about electricity for all if ESKOM is privatised- Nxesi, Available at https://www.news24.com/fin24/economy/forget-about-electricity-for-all-if-eskom-is-privatised-nxesi- 20220711 (accessed 18 November 2022).

[35] Times Live (2022), Labour minister Thulas Nxesi opposes any plan to privatise Eskom, Available at https://www.timeslive.co.za/politics/2022-07-11-labour-minister-thulas-nxesi-opposes-any-plan-to-privatise-eskom/ (accessed 18 November 20220).

Chapter 1 of this dissertation introduces the topic, provides the significance of the study, the central research question, sub-questions, research objectives of the study, and limitations of the study. This chapter also provides a roadmap so that the reader can understand how this dissertation seeks to achieve the examination of the topic.

Chapter 2: Overview of State-Owned Entities and their Legal Framework

Chapter 2 examines the effectiveness of the legal framework that governs South African SOEs, and attempts to understand the shortcomings that have contributed to the failures of SOEs. The examination will be comprehensive, but will emphasise the centralisation of ownership that government enjoys due to the legal framework. The South African legislation will also be benchmarked using OECD Guidelines on SOEs, which are internationally accepted standards, in order to further determine the effectiveness and shortcomings of the South African legal framework that regulates SOEs. The overall objective of this chapter is to determine whether South African legislation is solid enough to rescue SOEs, or whether privatisation could enhance the corporate governance of SOEs.

Chapter 3: Privatisation and Privatisation Methods

Chapter 3 seeks to provide a conceptual framework for the privatisation of SOEs. The chapter will commence by defining the term privatisation. This will be followed by an examination of the historical development of SOEs, and methods of privatisation limited to SEP and SIP. The chapter will also assess South Africa's past privatisation of SOEs, attempting to assess the challenges and successes encountered by SOEs. This will determine which forms of privatisation could best be adopted when decentralising ownership.

Chapter 4: Lessons from China: Successes and Challenges Faced by Privatised SOEs

Chapter 4 is a case study that seeks to examine the success and challenges encountered by China post privatisation through SIP. The chapter seeks to discover how the corporate governance legal framework in China has been enhanced by the privatisation of parastatals through SIP. This chapter seeks to draw some lessons from the Chinese experience in order to make an informed conclusion as to whether the privatisation of SOEs through SIP can have the potential to decentralise the ownership of SOEs, and whether this improves the performance of parastatals.

Chapter 5: Recommendations and Conclusion

In this brief chapter, based on the previous chapters, certain recommendations will be presented, followed by the conclusion.

Chapter 2: Overview of State-Owned Entities and their Legal Framework

2.1 Introduction

This chapter will pursue five essential goals. The first objective is to investigate the international patterns or, more precisely, the motivations underlying the creation of SOEs by countries. The second objective is to explore the international standards for good corporate governance that are recommended as the best practices for running effective SOEs. Thirdly, the chapter aims to critically analyse the reasoning supporting the concept of centralisation and state ownership. The fourth objective is to review the current legal framework that governs South Africa SOEs. Lastly, the chapter will also investigate some of the reforms that South African policy-makers have conducted in addressing certain of the issues affecting SOEs' governance. Through an evaluation of the legislative framework, the thesis will argue that centralisation of ownership has contributed significantly to the current unattractive status quo of SOEs in South Africa.

2.2 The rationale and the importance of SOEs

The evaluation of the legislative framework that governs SOEs cannot be completed without first evaluating the motivations that led to the formation of these public entities. This will allow the chapter to analyse what policy-makers' expectations were and whether they have remained the same or have shifted in response to the current demands of individual nations. The study contends that a variety of factors have influenced the choice to nationalise formerly private enterprises or to establish state-owned and managed businesses.[36]

Global consensus exists regarding the significance of SOEs in all nations. A study undertaken by the World Bank in 2020 demonstrates that SOEs are the largest corporations in the world, having the potential to positively contribute to the economic and developmental growth of their respective nations.[37] According to the World Bank's research, SOEs are positioned as significant economic and development boosters.[38] Governments have traditionally constructed SOEs with a range of public policy aims in mind, including: establishing fundamental physical infrastructure; providing necessary services such as finance, water and electricity; generating money for the treasury; achieving self-sufficiency in the production of basic commodities and services; regulating natural resources; correcting market failures; limiting oligopolistic behaviour; and advancing social objectives such as employment, and social welfare.[39] Given

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[36] Kouser.R & Ali. K, 'Reasons for Privatization and Consequent Role of Government: Comprehensive Study Based on Early Evidence' (2011) International Journal of Contemporary Business Studies Vol:2. 35

[37] World Bank, State-Owned Enterprises: Understanding their market effects and the need for competitive neutrality 2022 Available at https://thedocs.worldbank.org/en/doc/739371594131714315-0130022020/original/15444WBSOEWEB.pdf (accessed 20 November 2022).

[38] World Bank, Corporate governance of State-owned Enterprises: A Toolkit (2014) available at https://openknowledge.worldbank.org/handle/10986/20390 (accessed 03 June 202) 1-2.

[39] World Bank, Corporate governance of State-owned Enterprises: A Toolkit (2014) available at https://openknowledge.worldbank.org/handle/10986/20390 (accessed 03 June 202) 1-2.

the growing global competition for capital, talent, and resources, SOEs have become tools used by some nations to better position themselves in the global economy of the future.[40] The 2014 research done by the World Bank acknowledges the rise of SOEs in strategic economic sectors in high-income countries, in emerging market economies and the majority of low- and middle-income nations.[41]

Despite the global clamour for the privatisation of SOEs and the outsourcing of their commercial activities to the private sector,[42] Mwaura argues that many nations have emphasised the necessity of state ownership of SOEs for directing their economic development. In the African context, state ownership of SOEs is hegemonic, as African nations assert that they are required to provide fundamental services in crucial sectors like energy, infrastructure, agriculture, and oil.[43]

In the South African context, the establishment of SOEs has mixed policy objectives. South Africa was declared a developmental state in 2005, by the country's current ruling party during their national policy conference.[44] Later, when former President Jacob Zuma was elected as the ANC's presidential candidate for the 2009 national election, the term developmental state acquired prominence. The former president announced: 'The developmental state should maintain its strategic role in shaping the key sector of the economy. This means that we need to … strengthen the role of SOEs … in advancing our overarching industrial policy and economic transformation objectives.'[45] Indeed, as was pointed out in chapter 1, in 2009 the country enacted the NDP policy. It is stated in this developmental policy document: 'Public Enterprises are key institutions entrusted with a developmental mandate. They are expected to possess some productive capabilities requisite for the contemporary global economy.'[46]

The broad opinion is that SOEs are the optimal mechanism for providing essential services. Moreover, the thesis submits that SOEs are established by governments, with the intention to use them to deliver those services to citizens that cannot be provided by the private sector. It could also be argued that SOEs are established by nations to provide service delivery as part of their legal obligations to citizens. However, parastatals go beyond the state's provision of

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[40] PWC. State-Owned Enterprises: Catalysts for Public Value Creation. Available at https://www.pwc.com/gr/en/publications/assets/state-owned-enterprises-catalysts-for-public-value- creation.pdf (accessed 21 November 2022).
[41] World Bank Group, Corporate Governance of State-Owned Enterprises: A Toolkit (2014) Available at https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf (accessed 21 November 2022).
[42] World Bank Group, Corporate Governance of State-Owned Enterprises: A Toolkit (2014) Available at https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf (accessed 21 November 2022).
[43] Mwaura, K 'The failure of Corporate Governance in State-Owned Enterprises and the need for a restructured governance in fully and privatised enterprises: The case study of Kenya' (2007). Fordham International Law Journal 1 Vol 31. Page 43.
[44] Omano, E. Constructing a democratic developmental state in South Africa: Potential and Challenges (2010), 1.
[45] Zuma, J.G. Statement of the National Executive Committee on the occasion of the 96th Anniversary of the ANC. 2008 Available at https://www.anc1912.org.za/anc-january-8th-statements-2008/ (accessed 21 November 2022).
[46] Mokwena T. Restructuring of State-Owned Enterprise in South Africa (2012) Available at https://dpe.gov.za/ (accessed 21 November 2022).

essential services to citizens, as they have been recorded as being key players in boosting countries' economies on a global scale. What is also important to note is that, in the South African context, SOEs have dual activities, to meet the developmental agenda of the country while also actively engaging in commercial activities.

2.3 Corporate governance as a concept

The preceding portion of this chapter covered two matters: first, the logic behind the establishment of parastatals, and secondly, the significance and function that these parastatals play in a country's economy, both globally and particularly in the South African setting. This section now turns to the exploration of corporate governance. The essential task here is to critically understand the meaning of corporate governance, and how the concept fits in the management of parastatals.

In the corporate world, it is commonly believed that adopting excellent corporate governance policies improves a company's performance.[47] In a 2012 study conducted for the Latin American Development Bank, it was observed that in general, SOEs should establish best corporate governance principles and practices.[48]

However, numerous academic experts and observers of corporate governance have written extensively about the incapacity of SOEs to meet their economic growth mandate and their poor performance. As opposed to being economic stimulants, SOEs in Sub-Saharan Africa have been a financial burden on their own countries.[49] According to Chang and Lin, SOEs are likely to face corporate governance challenges because of various factors such as political interference and lack of a clear ownership policies.[50] Moreover, studies demonstrate that state interference in corporate decision-making can have a substantial impact on corporate governance.[51] According to Mangena and Tau, South Africa was the first developing nation to adopt corporate governance guidelines.[52] However, Muzata points out that South African companies are afflicted by corporate governance problems as a result of failure to comply with

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[47] The Economist 'The rewards of virtue: Does good corporate governance pay? Studies give contradictory answers' Available at https://www.economist.com/business/2010/04/26/the-rewards-of-virtue (accessed 22 November 2022).
[48] Wilcox, J., Schneider, L.,& Bernal, A., 'White Paper The Importance Of Corporate Governance In State-Owned Enterprises – SOEs' (2012) Available at https://www.oecd.org/daf/ca/SecondMeetingLatinAmericaSOECAFWhitePaper.pdf (accessed 22November 2022).
[49] Harris, J., Imbert, B., Medas, P. Ralyea, J. & Singh, A. 'Government Support to State-Owned Enterprises: Options for Sub-Saharan Africa' IMF Affairs (2020) Available at file:///C:/Users/Admin/Downloads/enspecial-series-on-covid19government-support-to-stateowned-enterprises-options-for-subsaharan-afric%20(1).pdf (accessed 21 November 2022).
[50] Chang, Y-C., & Lin, Yu-H., 'Do State-Owned Enterprises Have Worse Corporate Governance? An Empirical Study of Corporate Practices in China' (2021) European Business Organization Law Review (23) https://link.springer.com/content/pdf/10.1007/s40804-021-00223-1.pdf 712.
[51] Andrei, S. & Vishny, R., 'Politicians and Firms' (1994) The Quarterly Journal of Economics Vol 109(4), 995.
[52] Mangena, M. & Chamisa, E. 'Corporate governance and incidences of listing suspension by the JSE Securities Exchange of South Africa: an empirical analysis' (1994) The International Journal of Accounting, Vol. 43, 30.

governance practices, laws, regulations, and best practices.[53] Moreover, in chapter 1, the study also highlighted the challenges faced by South Africa's parastatals. It was pointed out that some of these challenges are closely linked to fragmented corporate governance policies, political interference, and heavy centralisation of ownership.

The next section therefore aims to explore the relationship between SOEs and corporate governance. As indicated previously, it was necessary to study the logic behind the formation of SOEs. It was determined that this was to do with the contribution of SOEs to the economic growth and development of countries. Therefore, this section of the work is more interested in how corporate governance as a concept can assist parastatals to be managed effectively and efficiently, to bring about the economic growth that they were established for.

2.3.1 What is corporate governance?

There is no consistent definition of corporate governance, as evidenced by the literature. Thus, corporate governance can be defined as the process of aligning the interests of investors and managers, and ensuring that enterprises are governed to the advantage of investors.[54] According to Rehmans and Mangla, corporate governance consists of a structure that outlines the distribution of rights and responsibilities among various players in the organisation, such as boards, managers, and shareholders, as well as rules, procedures, and aid with decision-making about corporate affairs.[55] Wilcox and Schneider's definition aligns with Rehmans and Mangla's definition, because they also provide that corporate governance is essentially concerned with the appropriate distribution of authority and responsibility among a company's board of directors, executives, and shareholders.[56]

Due to the lack of a global definition of corporate governance, Mongalo suggests that every nation has the liberty to establish national legislation that seeks to guide the governance of corporations.[57] The study can now preliminarily conclude, based on the definitions provided, that corporate governance requires companies, whether they are privately or publicly managed, to have regulations that not only regulate the separation of rights and responsibilities of various stakeholders, but also require companies to have mechanisms in place to protect the interests of multiple players. In addition, the definition specifies that corporate governance necessitates that each nation tailor its corporate law legislation to govern these SOEs.[58]

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[53] Muzata, T. 'Costs of Corporate Governance Failures: Evidence from South Africa' African (2022). Journal of Business and Economic Research (AJBER) Vol 17(1).145.
[54] Rehmans, R, & Mangla, I.U 'Corporate Governance and Performance of Financial Institutions in Pakistan: A Comparison between Conventional and Islamic Banks in Pakistan' 92010) The Pakistan Development Review 49'4 Part II 46.
[55] Rehmans, R, & Mangla, I.U 'Corporate Governance and Performance of Financial Institutions in Pakistan: A Comparison between Conventional and Islamic Banks in Pakistan' 92010) The Pakistan Development Review 49'4 Part II 46.
[56] Wilcox, J., Schneider, L., & Bernal, A., 'White Paper The Importance Of Corporate Governance In State-Owned Enterprises – SOEs' (2012) Available at https://www.oecd.org/daf/ca/SecondMeetingLatinAmericaSOECAFWhitePaper.pdf (accessed 22November 2022).
[57] Mongalo T 'South Africa company law for a modern competitive global economy' (2004) SALJ 173.
[58] Mongalo T 'South Africa company law for a modern competitive global economy' (2004) SALJ 173.

It should also be mentioned that corporate governance refers to regulations that are enacted on a global and domestic scale, whose primary objective is to ensure that all companies, including SOEs, are able to fulfil their economic mandates. In addition, this thesis submits that, when a government adopts comprehensive corporate governance legislation, it should be able to enhance the performance of SOEs, while board members, shareholders and executive administrators should be able to take on corporate governance, and executive and operational decisions, without the influence and interference of one another.

However, the study seeks to broaden its understanding of the term corporate governance, and turns to the Organization for Economic Cooperation and Development (hereafter OECD). This is an intergovernmental organisation in which governments collaborate to discover answers to common difficulties, set global standards, share expertise, and identify best practices for promoting better policies.[59] The OECD has produced a comprehensive framework upon which many countries base their corporate governance development. In 2015, they published a set of principles containing a comprehensive definition of the term corporate governance.

The term is defined as follows:

> Corporate governance involves a set of relationships between a company's management, its board, its shareholders, and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.[60]

The study will use this OECD-provided definition as a foundation for investigating and benchmarking South Africa's legal framework in order to discover the origins of its failures and difficulties. The chapter so far understands what corporate governance is and what it aims to achieve at this point. The OECD definition not only states that corporate governance is the connection between different stakeholders involved in the management of a firm, and that the purpose of the board of directors is to serve the shareholders' interests exclusively. The definition stipulates that all relevant stakeholders, including shareholders, must have a structure in place that clearly states the company's intended objectives. Moreover, the OECD requires companies to have a clear plan of action for how these objectives will be implemented, as well as a monitoring system that seeks to evaluate the performance of the relevant stakeholders involved in decision-making.

In essence, a firm, whether privately or publicly owned, such as SOEs, must be directed by a legal framework that is not only strong, but also sets out clear expectations and assists such companies in achieving their primary goals. For the purposes of this thesis, it should be clear that the shareholders are the government, while the board of directors consists of appointed individuals who are bestowed with corporate powers to take corporate decisions in the interest of the shareholders, and, most importantly, in the interest of the SOEs. Another important

[59] OECD *G20/OECD Principles of Corporate Governance*, (2015)9.
[60] OECD *G20/OECD Principles of Corporate Governance*, (2015)9.

stakeholder duty falls to the executives, whose role should be the running of the day-to-day operations of the SOEs.

The significance of the preceding analysis was to lay the groundwork for the following section, which investigates these good corporate governance practices. It will be recalled that the OECD corporate governance requires SOEs to be guided by best practices of corporate governance. The following section will robustly engage these best practices in order to understand how they enhance SOEs performance and respond to the ownership issues that were highlighted at the beginning of this thesis.

2.4 Overview of international best practice on corporate governance

Corporate governance, a term that was once unfamiliar to all but a handful of academics and shareholders, is now a subject of debate in corporate boardrooms, academic conferences, and international policy circles.[61] This is because, over the past decade, internationally businesses have faced far-reaching structural changes.[62] Therefore, coping with adapting to, or attempting to shape globalisation has emerged as a central concern of policy- makers who are, therefore, interested in knowledge to assist corporate managerial activities.[63] In essence, having corporate governance challenges is a global issue, and not only for economic emerging nations. Furthermore, it is evident that nations had to respond to structural changes as mentioned, and thus required policy-makers to come up with robust policies in order to protect their fragile economies.

Although national governments continue to establish policies, they do so in the context of an ever-increasingly complex transactional network functioning at varying scales, and with mandates that frequently overlap.[64] Responding to these complex international issues, the OECD promotes the OECD Principles of Corporate Governance 2015 as a means 'to support investment as a powerful driver of growth'.[65] It would be correct for this study to assume that, on an international platform, OECD members and partners introduced these corporate principles on good governance as a blueprint to guide the formulation of corporate governance legal frameworks in their nations. For the purpose of this study, it is important to examine these principles as they will build a solid foundation for understanding internationally acceptable standards of good corporate governance.

In addition, it is crucial that this section of the work should provide proof that, in order for a country like South Africa to address its own corporate governance difficulties on SOEs, and to

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[61] Classens, S Corporate Governance and Development, The World Bank Research Observer, Volume 21, Issue 1, Spring 2006, 1.

[62] OECD Guidelines for Multinational Enterprises (2011) Available at https://doi.org/10.1787/9789264115415-en (accessed 05 June 2022).

[63] Mahan, R and Mc Bride, S 'Standardizing and disseminating knowledge the role of OECD in global governance' (2009) European Political Review Available at https://doi.org/10.1017/S1755773909000058 (accessed 05 June 2022) 83.

[64] Mahan, R & Mc Bride, S 'Standardizing and disseminating knowledge the role of OECD in global governance' (2009) European Political Review Available at https://doi.org/10.1017/S1755773909000058 (accessed 05 June 2022).

[65] OECD *G20/OECD Principles of Corporate Governance* (2015)3.

have the best acceptable good corporate governance practices, it would be necessary for the country to interact with international agencies like the OECD, in order to understand how to implement strong corporate governance frameworks.

The study will now shift back to the fundamental discussion and examination of what it takes to run well-governed SOEs, which, for the purposes of the study, will be based on the OECD 2015 guidelines.

2.4.1 OECD Guidelines on Corporate Governance of State-Owned Enterprise (SOE) 2015

Although it is necessary to comprehend the specific environment in which SOEs operate and function in South Africa, it would also be prudent to explore the regulatory frameworks of comparable nations.[66] According to the OECD Guidelines on the corporate governance of SOEs (hereinafter referred to as the OECD Guidelines), a solid legal framework is a prerequisite for the effective governance of SOEs.[67] It is therefore vital for this study to critically interact with those OECD Guidelines that are universally agreed upon, as they serve as a blueprint for countries' administrations when they reform their legal systems in order to attain solid good governance principles.

This assessment of the OECD Guidelines will also allow the study to fully deal with whether they are actually what countries like South Africa require in order to have functional SOEs. If the study concludes that these are indeed what a country like South Africa needs to improve the functionality of its SOEs, it will argue that the government has not fully committed to revising its legal framework in order to achieve these international norms on good governance. This would then support the next chapter's argument, that privatisation is one of the most convincing techniques that the South African administration should engage with.

The examination of these OECD Guidelines will not follow any strict order, but what can be taken from this exercise is that they are building blocks to help in analysing the South African legal system that governs SOEs. These are the following OECD Guidelines.

2.4.1.1 Rationale for ownership and the state's role as an owner

The first two standards acknowledge the state as the owner and shareholder of these SOEs. As the government has a trustee duty towards these SOEs, the OECD urges that the state should exercise its ownership in the best interest of the general public.[68] It is suggested that the state should act as an engaged and active owner and establish a strong and coherent ownership

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[66] Bronstein, V & Oliver, M (2011) 'An Evaluation of the Regulatory Framework Governing State-Owned Enterprise (SOEs) in The Republic of South Africa' (2011). Available at https://www.researchgate.net/publication/272676645_AN_EVALUATION_OF_THE_REGULATORY_FRAMEWORK_GOVERNING_STATE_OWNED_ENTERPRISES_SOEs_IN_THE_REPUBLIC_OF_SOUTH_AFRICA_Annexure_to_the_Presidential_Review_Committee_Report_on_State_Owned_Enterprises_2011 (accessed 05 June 2022).

[67] Kikeri S (2018) Overcoming the Legacy of Exclusion in South Africa, available at https://openknowledge.worldbank.org/bitstream/handle/10986/30029/127288.pdf?sequence=1&isAllowe d=y (accessed 5 May 2022) 4.

[68] OEDC OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) Available at https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm (accessed 14 June 2022) 9.

policy, guaranteeing that the governance of SOEs is carried out with the required sense of professionalism and efficiency.[69]

According to Bouchez, in analysing these first two Guidelines, the OECD standard requires governments to design and reveal a transparent ownership policy for SOEs.[70] The most essential aspect of this policy should clearly specify the ownership functions that will be carried out by the government, and it should also minimise political influence in the operation of the SOEs.[71]

The study appreciates the first two guiding principles, that if a state can comprehend its responsibility as a trustee and represent its citizens as the rightful owners and if the state has a clear and rational ownership policy that aims to serve its citizens, then this would be one of the first ways that a government could work toward good corporate governance. Government must also have a well-thought-out ownership policy with clearly outlined tasks, aims, and mandate, since this would reduce the inconsistency in South Africa's SOEs that have unclear mandates. The study also applauds the OECD Guidelines' recommendation that the government should not abruptly change the ownership policy of SOEs.[72] Instead, the government is encouraged to conduct periodic policy reviews to determine whether the public policy is still serving the mandate of the SOEs.[73]

Despite the fact that it is clear what is expected of states in terms of the first two OECD Guidelines, and how the governing policies should look, the analysis concludes that South Africa is unlikely to be able to carry out the stipulation's mandate. This argument is based on a variety of factors, including the extent of state commitment to the structural reforms that are optimal for SOEs. However, the most important factor here is the political instability that South Africa finds itself in under the administration of the governing political party. For instance, the political ideology of a government, and the doctrine, values, and aspirations that form social order, have a significant impact on state capitalism by determining the propensity of governments to prioritise economic aims over socially beneficial outcomes.[74]

This dissertation submits that well-considered ownership of SOEs cannot be separated from their political environment. During the administration of former President Jacob Zuma, calls were made for public policies that sought to establish the government as the sole owner of

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[69] Bouchez, L.C The OECD Guidelines on Corporate Governance of State-Owned Enterprises – an introduction (2015) available at https://kvdl.com/uploads/documents/Louis-Bouchez-The-OECD-Guidelines-on-Corporate-Governance-of-State-Owned-Enterprise.pdf (accessed 14 June 2022) 579.

[70] Bouchez, L.C The OECD Guidelines on Corporate Governance of State-Owned Enterprises – an introduction (2015) available at https://kvdl.com/uploads/documents/Louis-Bouchez-The-OECD-Guidelines-on-Corporate-Governance-of-State-Owned-Enterprise.pdf (accessed 14 June 2022) 579.

[71] Bouchez, L.C The OECD Guidelines on Corporate Governance of State-Owned Enterprises- an introduction (2015) available at https://kvdl.com/uploads/documents/Louis-Bouchez-The-OECD-Guidelines-on-Corporate-Governance-of-State-Owned-Enterprise.pdf (accessed 14 June 2022) 579.

[72] OEDC OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) Available at https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm (accessed 14 June 2022) 9.

[73] OEDC, OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) Available at https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm (accessed 14 June 2022) 9.

[74] Aguilera, R, 'The impact of political ideology on state-owned enterprises performance' available at https://dobetter.esade.edu/en/state-owned-enterprises-performance (accessed 14 June 2022).

strategic SOEs, whose mandate was to serve a development agenda without the possibility of integrating other stakeholders, such as the private sector.[75] This was also evident in the medium-term budget policy announcement speech of the then Minister of Finance, Mr Malusi Gigaba, in which he re-emphasised the rationale for the ownership of SAA, which was to promote international tourism for the economy of the country, as he was of the opinion that global airlines do not operate in this manner.[76] This comment was made when several political oppositions demanded a review of the state's ownership of SOEs, which were not generating profits for the state.

In order to salvage SAA, the new administration, led by President Ramaphosa's Minister of Public Enterprise, took a different approach. It negotiated a new ownership policy that tried to encourage non-state investors.[77] The conclusion that must be drawn from this comparison between these two administrations of the same political party is that, in South Africa, the new administrator appears to have his own ownership justification based on the President's 10-year mandate. Consequently, it is correct that the OECD Guidelines try to bring about stability in the ownership policy of SOEs; nevertheless, as the study suggests, this will never be achievable as long as we continue to have a governing party with a contradictory ideology regarding the nature of ownership. However, the study is also optimal in a sense that a solid ownership policy for South Africa SOEs is achievable only if these OEDC guidelines could be incorporated into the South African legal framework.

2.4.1.2. State-owned enterprises in the marketplace

Globally, there is a growing consensus that SOEs that are fully protected or rather guarded by the state as the owner against private sector counterparts are detrimental to competition and private sector development. This is due to the fact that SOEs profit from advantageous market positions, which inhibit rather than promote competition and private sector growth.[78] Hence, the OECD Guidelines recommends that, when states reform their legal frameworks for SOEs, such policies should enable competitive neutrality, where SOEs are not shielded from the market.[79] The study not only admits the recommendations, but also agrees that allowing SOEs and their counterparts to compete on an open playing field enables fair competition, which in turn ensures that SOEs generate financial returns and do not rely on state guarantees for their

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[75] Zuma, J.G. 2008. Statement of the National Executive Committee on the occasion of the 96th Anniversary of the ANC. Available at https://www.anc1912.org.za/anc-january-8th-statements-2008/ (accessed 14 June 2022).
[76] Gigaba, M., 2017, 2017 Medium term budget policy statement- speech, (accessed 14 June 2022).
[77] Business Tech 'Mboweni: Do we really need SAA?' Available at https://businesstech.co.za/news/government/450865/mboweni-do-we-really-need-saa/ (accessed 14 June2022).
[78] Balbuena, S., State-owned enterprises in South Africa: A stocktaking of reforms and challenges, OECD Corporate Governance Working papers (2014) No.13, Available at https://www.oecd-ilibrary.org/docserver/5jzb5zntk5r8-en.pdf?expires=1655371703&id=id&accname=guest&checksum=42762673E7DB487BA0D4FE97259A7EBB (accessed 16 June 2022) 9-16.
[79] OECD Implementing the OECD Guidelines on Corporate Governance of State-owned Enterprises: Review of Recent Developments (2020) Available at https://www.oecd-ilibrary.org/governance/implementing-the-oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-review-of-recent-developments_4caa0c3b- en (accessed 16 June 2022).

operations. This would mean that SOEs would be profitable, and that the state would not be required to bail them out financially. This would bolster the principles of good governance.

2.4.1.3 Equitable treatment of shareholders

One of the essential principles that is required in corporate governance is the enforcement of shareholders' rights, as this is essential for the attraction of capital. The very first chapter of the OECD principles deals with the preservation of shareholders' rights, and their power to influence the behaviour of firms.[80] In other words, the OECD principles call for all SOEs shareholders to be treated equally and with fairness.[81] The Principles enumerate several fundamental rights, such as the right to get pertinent information, share in residual profits, participate in fundamental decisions, receive fair and transparent treatment throughout changes in control, and utilise voting rights fairly.[82]

What is being suggested by this principle is that SOEs that are listed on stock exchanges should embrace the principle of fairness when dealing with shareholders.[83] What the equitable treatment of shareholders means is that, when SOEs have minority non-state shareholders, the majority shareholder, which is government, should ensure that minority shareholders are treated equally, especially when it comes to corporate decisions that are taken affecting the parastatals.[84]

Two conclusions should be drawn from the above OECD guideline. First, it urges SOEs to adopt corporate governance rules that safeguard shareholders in general. The OECD recommendations clearly suggest that, for SOEs to be well-governed, they must function in an environment that aims to protect the interests of all shareholders. In the event that SOEs have mixed ownership through privatisation, the OECD guidelines on the equitable treatment of shareholders suggest that minority shareholders, whether government or non-state shareholders, should receive protection and be involved in strategic corporate governance decisions at all times.

2.4.1.4. The responsibilities of the boards of state-owned enterprises

For the success of any company, a competent and highly skilled board is a prerequisite. It is also suggested that board members should play a fundamental role in company stewardship

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[80] Nestor, S & Jesover, F, 'OECD Principles of Corporate Governance on Shareholders Rights and Equitable Treatment: Their Relevance to the Russian Federal (2000) Available at https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1920683.pdf (accessed 14 June 2022). 3.
[81] OECD Guidelines 2015, 'OECD Guidelines on Corporate Governance of State-Owned Enterprise: 2015 Edition Available at https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm (accessed 14 June 2022).
[82] Nestor, S & Jesover, F,' OECD Principles of Corporate Governance on Shareholders Rights and Equitable Treatment: Their Relevance to the Russian Federal (2000) Available at https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1920683.pdf (accessed 14 June 2022).
[83] OECD Guidelines 2015, 2015 'OECD Guidelines on Corporate Governance of State-Owned Enterprise: 2015 Edition Available at https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm (accessed 14 June 2022).
[84] OECD Guidelines 2015, 'OECD Guidelines on Corporate Governance of State-Owned Enterprise: 2015 Edition Available at https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm (accessed 14 June 2022).

and performance, in determining corporate strategic and monitoring performance.[85] What the literature suggests is that, for good corporate governance, it needs to be well governed by directors who are fully aware of their mandate in executing their duties on behalf of the shareholders.[86]

For a board to successfully complete its mission, it must perform its assigned tasks. First, it is required to design or approve corporate strategies to fulfil the objectives that the state has conveyed to the SOEs, and secondly, it is required to monitor senior management's implementation of the strategies.[87] The guidelines also encourage the state to implement a policy that regulates the professionalism of SOEs' board members. Board members should be appointed based on their qualifications, which are linked to the needs of that particular SOE.[88] Furthermore, the OECD guideline on the role of the board of directors stresses the need for board members of SOEs to appoint and remove the executive office bearers of parastatals. They should also be granted the authority to determine the remuneration of office bearers such as CEOs.[89]

What is commendable about this guideline is that it places the board of directors at the centre of corporate governance, and clearly defines the role of board members in the corporate governance of SOEs.[90] The guideline further encourages the state to make it possible for boards of directors to be fully independent from the owner.[91]

In summary, the OECD Guidelines on the responsibilities of the boards of SOEs, is that SOEs must have a well governed board of directors and should not serve only the interests of the shareholders, but also those of the parastatals. The OECD Guidelines stress the need for having a legal framework that clearly stipulates the powers that are enjoyed by the board, and that such powers must be exercised by the board members independently of the shareholders, in most

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[85] Kiel, G., G. Nicholson, J.A. Tunny, & Beck. J. 'Directors at Work: A practical Guide for Boards,' 2012. Available at https://books.google.co.za/books?id=YgyzNYs5YvcC&pg=PA19&lpg=PA19&dq=Kostyleva,+V.+and+H.+Lehued%C3%A9+(2012),+%E2%80%9CBoard+Formation:+Nomination+and+Election+in+OECD+Countries+and+Russia%E2%80%9D,+OECD+Working+Paper,+Sep&source=bl&ots=DSr5n8d7Xh&sig=ACfU3U2LLsiZA4LZPgqaD0oXHA 3JaN-48Q&hl=en&sa=X&ved=2ahUKEwjd8sHKoq74AhVMZ8AKHQsoBm8Q6AF6BAgCEAM#v=onepage&q=Kostyleva%2C%20V.%20and%20H.%20Lehued%C3%A9%20(2012)%2C%20%E2%80%9CBoard%20Formation%3A%20Nomination%20and%20Election%20in%20OECD%20Countries%20and%20Russia%E2%80%9D%2C%20OECD%20 Working%20Paper%2C%20Sep&f=false (accessed 15 June 2022) 17.

[86] OECD Guidelines 2015, 'OECD Guidelines on Corporate Governance of State-Owned Enterprise: 2015 Edition Available at https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm (accessed 14 June 2022).

[87] OECD, 2014 Guidelines on the Governance of State-owned enterprises for Southern Africa. Available at https://www.oecd.org/daf/ca/SOE-Guidelines-Southern-Africa.pdf (accessed 15 June 2022) 28.

[88] OECD, 2014 Guidelines on the Governance of State-owned enterprises for Southern Africa. Available at https://www.oecd.org/daf/ca/SOE-Guidelines-Southern-Africa.pdf (accessed 15 June 2022) 28.

[89] OECD, 2014 Guidelines on the Governance of State-owned enterprises for Southern Africa. Available at https://www.oecd.org/daf/ca/SOE-Guidelines-Southern-Africa.pdf (accessed 15 June 2022) 28.

[90] OECD, 2015 Guidelines on Corporate of State-Owned Enterprises Available at OECD-Guidelines-CG-SOEs-2015_E.pdf (accessed 15 June 2022) 26.

[91] OECD, 2015 Guidelines on Corporate of State-Owned Enterprises Available at OECD-Guidelines-CG-SOEs-2015_E.pdf (accessed 15 June 2022) 72.

cases the government. Lastly, it is expected that the board of directors should account to the shareholders, while they also enjoy the powers to appoint and remove executive officer bearers.

2.4.1.5 Disclosure and transparency

The OECD Guidelines include a number of essential recommendations that pertain to the disclosure of information to the public, and openness on the part of SOEs. In particular, it is envisioned that SOEs shall provide material fiscal and non-fiscal information on the parastatals in accordance with high quality internationally recognised norms of corporate transparency, including areas of considerable importance for both the state as an owner, and the general public.[92] Material facts can be utilised as a source, to eliminate fraud, collusion, corruption, and nepotism. This information also serves another purpose – the prevention of crime.[93] It would be correct for the study to conclude that the recommendations of disclosure and transparency require states to adopt policies that seek to promote transparency for the benefit of all stakeholders that have an interest in the performance of these public entities. The recommendations stress the need for states to ensure that financial and non-financial disclosure of information should be implemented in a manner that meets global standards on reporting.

This chapter concludes the first part of chapter 2, which was devoted to understanding SOEs in a global perspective by evaluating globally accepted corporate governance best practices by adopting OECD guidelines. The following observations are made:

- SOEs indeed have a crucial role in developing and strengthening a nation's economy, provided that clear intentions for the establishment are mostly dedicated to commercial activities.
- SOEs on a global scale can positively contribute to countries' economies if they are grounded on corporate governance best practices.
- The OECD Guidelines on corporate governance of SOEs have assisted this first part of the chapter to appreciate good corporate governance best practices. All OECD members and partner states are encouraged to use these guidelines as a blueprint to assist their policy-makers in improving their domestic corporate governance legal frameworks.
- This first section argues that the 2015 OECD Guidelines on corporate governance of SOEs are required in any country that seeks to reform or improve its domestic legal frameworks, as they effectively address the challenges of corporate governance. These OECD Guidelines also cater for SOEs that are partially privatised, where there is a mixed ownership between government and non-state investors. This is what this thesis advocates for South African SOEs.

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[92] Derevyanko, B. & Zakharchenko, A. 'On the implementation of OECD Guidelines for corporate Governance of State-Owned Enterprises in The Legislation of Ukraine' ECONOMIC AND LAW PARADIGM OF MORDERN SOCIETY, 202, Issue 1.
[93] Nasution. A.H, Nasution. B, and Saidin. O. K, 'Transparency of Information Disclosure in Management of State-Owned Enterprises (2020) Advances in Social Science, Education and Humanities Research, volume 413 26.

This section finishes with the essential point that, in a South African context, these international ideals can only be fulfilled if state administrators are willing to make a solid commitment to them. The study also argues that such a commitment can only be attained if the governing party can consolidate its policy ideology on the ownership of SOEs, since it was previously argued that the country has had two heads of state from the same political party, with contradictory ideologies on the ownership of SOEs.

The last part of this chapter seeks to examine the South African legal framework, especially in the context of ownership. This part will examine legislation that empowers the state as shareholder, to examine how this has negatively affected the functioning of SOEs in South Africa. The statutes governing SOEs will be examined closely so as to understand centralisation as a model that the country has adopted. The study will also explore whether there have been any commitments from the government towards adopting the OECD Guidelines in attempt to reform the struggling SOEs. This exploration will strengthen chapter 3's examination of whether privatisation is the solution to rescuing SOEs or not.

2.5 Legal framework governing South Africa's SOEs

In order to have a comprehensive understanding of the issues that South Africa SOEs are confronted with, and what the appropriate solutions would be, it is recommended that the philosophy of state ownership be investigated first.

2.5.1 The historical development of centralisation from state capitalism theory

There is no universal or accurate definition of the centralised ownership model. It is further noted by scholars that centralisation of ownership can be understood from either the state capitalism or the authoritarian capitalism theory.[94] Sallai and Schnyder, in attempting to consolidate the two terms, define authoritarian capitalism as 'governmental action that denies certain individual's fundamental political and economic rights …'.[95] In addition, they contend that authoritarian capitalism is the outcome of an on-going renegotiation and redefining of the boundary between public and private spheres, not only in the political sphere, but also in the economic sphere.[96]

What the study seeks to take from the latter definition is that authoritarian capitalism involves a process where government draws boundaries on the engagement of the private sector in the economy. On the other hand, state capitalism is characterised by the existence of close relationships between the government and business leaders.[97] According to Bremmer, state capitalism is a form of economic system that has gained support mostly in less developed and

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[94] Sallai. D, & Schnyder. G, 'What is 'Authoritarian' About Authoritarian Capitalism? The Dual in State-Dominated Business' System, Business & Society (2021) Vol 60(6) 1313.
[95] Sallai. D, & Schnyder. G, 'What is 'Authoritarian' About Authoritarian Capitalism? The Dual in State-Dominated Business' System, Business & Society (2021) Vol 60(6) 1314.
[96] Sallai. D, & Schnyder. G, 'What is 'Authoritarian' About Authoritarian Capitalism? The Dual in State-Dominated Business' System, Business & Society (2021) Vol 60(6) 1314.
[97] Bremmer, I., 'State Capitalism Comes of Age – The end of The Free Market' (2009) Foreign Affairs Vol 88:33 44.

emerging economies and is characterised by the state's heavy interference in the market signifying a strategic rejection of free-market doctrine.[98]

It would be appropriate to draw the conclusion that centralisation, based on the examination of these two terms, is the process through which government introduces policies that enable it as an active player in economic activities that are typically reserved for the private sector. Moreover, the centralisation of ownership is mostly motivated by the need for government to utilise parastatals for the purpose of driving developmental agenda. As a result, the centralisation theory, which encourages government as the absolute shareholder of SOEs, has negatively affected the corporate governance of SOEs in South Africa. This can be traced to the fact that in South Africa, the Minister of Public Enterprises is the shareholder of SOEs,[99] while some line ministers of different ministries also enjoy shareholders' roles in SOEs that falls under their ministries.

There is a problem with the centralisation of ownership theory in the South African context. Ministers, apart from providing oversight over parastatals, also formulate legislation and regulations for SOEs.[100] From a corporate governance perspective this has led to many challenges. These will be discussed further when the next chapter closely engages the legislation that governs parastatals on the appointment and removal of boards of directors and executive officers. This chapter, now that it has defined the term 'centralisation', and mentioned the challenges it presents to the governance of South Africa SOEs, will focus on the examination of several statutes that regulate South Africa's parastatals, in order to properly analyse how this form of ownership has contributed to the poor state of these parastatals.

2.5.2 Constitution of the Republic of South Africa

The Constitution of the Republic South Africa, 1996[101] is the supreme law of the land, meaning that all legislation must be aligned with it. The Constitution does not explicitly guide us on how SOEs should be regulated, or how its governance should be regulated. However, since the study has already mentioned above that SOEs are government entities, and that the Minister of Public Enterprises and line misters are responsible for public entities as shareholders, it is very important to unpack the Constitution, in order to see what it expects from ministers as public administrators, and what mechanisms they are expected to employ when accounting to the general public. For the purpose of this study, we will examine three specific sections, which empower members of parliament, as public representatives, with an oversight mechanism. These are the following sections:

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[98] Bremmer, I., 'State Capitalism Comes of Age – The end of The Free Market' (2009) Foreign Affairs Vol 88:33 40.
[99] Section 1 of the PFMA.
[100] Department of Public Enterprises. Available at https://dpe.gov.za/about/ (accessed 23 November 2022).
[101] The Constitution of the Republic of South Africa, 1996.

> Section 42(3) The National Assembly is elected to represent the people and … (i)t does this … by providing a national forum for public consideration of issues, by passing legislation … and overseeing executive action.[102]

Basically, section 42(3) empowers the national assembly to hold the cabinet executive accountable for the executive powers they are entrusted with by the constitution and other regulations. Since the study has already stated that the centralisation of SOEs empowers line ministers with shareholder rights over public entities, and since such powers fall under their executive duties, the national assembly is tasked with the duty of holding the ministers accountable for the running of these SOEs.

Furthermore, the Constitution also stipulates:

> Section 55(2) The National Assembly must provide for mechanisms: (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of (i) the exercise of national executive authority … and (ii) any organ of state.[103]

According to section 55, the national assembly is additionally granted the authority to hold ministers accountable. Importantly, this provision supplements section 44, but it must also be noted that it encourages the national assembly to establish a framework to ensure that all executive organs of the government are accountable to the legislature.

Lastly, the Constitution also provides that:

> Section 92(b) Members of the Cabinet are accountable … for the exercise of their powers and the performance of their functions. (3) Members of the Cabinet must ... (6) provide Parliament with full and regular reports concerning matters under their control.[104]

The preceding clause reiterates that ministers must account to the national assembly for their exercise of executive authority. What distinguishes this section from the two previously cited sections is that it provides a clear expectation for the national assembly that ministers will be held responsible through the provision of reports on a regular basis.

What the study seeks to understand is how effective these mechanisms provided by the Constitution are in ensuring that ministers are held accountable for their executive duties when it comes to parastatals. This is based on the understanding that parliamentary sessions do not take place daily. Therefore, what happens when the ministers who have ministries with SOEs take decisions that are not in line with good governance or not in the interests of the general public? These are questions that the study seeks to examine through understanding the challenges and the evident failures of the legal framework that governs SOEs. What is important is that the study has managed to establish that the Constitution is silent on the running

[102] The Constitution of the Republic of South Africa of 1996, S24(3).
[103] Section 55(2) of the Constitution.
[104] Section 92(2) of the Constitution.

of these public entities, and that it only speaks to the powers that the national assembly is granted in holding accountable line ministers with SOEs in their ministries.

2.5.3 Public Finance Management Act 1 of 1999

The Public Finance Management Act 1 of 1999 (PFMA),[105] was introduced by the government to bring about a properly coordinated mechanism for handling public finances in public entities.[106] As a starting point for comprehending the legal framework that rules South Africa's parastatals, it is evident from this chapter that the PFMA is one of the pieces that governs SOEs. The PFMA Section 1 defines the SOEs as 'national government business enterprises', which means 'an entity which (a) is a juristic person under the control of the national executive'.[107]

What is clear from the above definition is that the ownership of these SOEs is under the control of ministers. To strengthen the statement, the PFMA definition clause provides a definition for the ownership of these national government business enterprises.

The definition provides that

> 'ownership control', in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities: (a) To appoint or remove all, or the majority of, the members of that entity's board of board of directors or equivalent governing body and …' (b) to appoint or remove Chief Executive Officers (CEOs).

These two definitions are interesting in two ways. First, the definition of SOEs as per the PFMA confirms that South Africa's parastatals operate under the centralisation theory that was discussed earlier, because the definition locates the powers in the national executive, in this case, ministers. In addition, the national executive has absolute majority rights as a shareholder.

Secondly, the ownership control definition also gives another interesting dynamic to the corporate governance of SOEs in South Africa. PFMA-controlled ownership brings about a three-layered role of government in SOEs' corporate governance. The PFMA gives ministers the powers to appoint and remove boards of directors and executive managers of SOEs. In addition, the ministers are expected to provide oversight, and formulate legislation and regulations for these SOEs.[108]

After examining the OECD Guidelines on corporate governance, this thesis submits that the PFMA does not represent the principles of good corporate governance. As a result, South Africa's SOEs have suffered because this section of the PFMA has brought about political interference in the management of SOEs. For instance, during the state capture commission, the former minister of Public Enterprises, Barbara Hogan testified before the commission as to how the former President Jacob Zuma interfered with the board members in appointing the

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[105] Public Finance Management Act 1 of 1999.
[106] Public Finance Management Act 1 of 1999.
[107] Section 1 of the Public Finance Management Act 1 of 1999.
[108] Department of Public Enterprises. Available at https://dpe.gov.za/about/ (accessed 23 November 2022).

CEO of Transnet.[109] The minister in her testimony further pointed out that private companies entrust the board, rather than shareholders, with the powers to appoint and remove CEOs.[110] This is a clear indication of the fact that the PFMA, as it stands, has had a negative impact on the management of SOEs. The PFMA should never have given the ministers, who are the shareholders, the power to appoint and remove the CEO. As was highlighted in the OECD Guidelines, this is a power that should belong to the board members of SOEs.

The chapter submits that, when one analyses the ownership and control of South Africa SOEs, comrade deployment can be observed. Ministers are political appointments and it is very likely that they will appoint boards of directors that support their political parties, without considering whether they have the required skills to execute such duties. This argument can be supported by the state capture commission report. The report noted that the ministers had failed to appoint the 'right kind of people' for SOEs,[111] and that many shareholders' appointments were politically linked and have effectively collapsed the parastatals.[112]

Section 3(3) of the PFMA states that, in the event of a conflict between the PFMA and other laws governing the regulation of SOEs, the PFMA always takes precedence.[113] The purpose of section 3 is to confirm, for the purposes of this study into the legal framework governing the operations of the public entities specified in schedules 2 and 3, that the PFMA is superior to all other statutes that govern the activities of SOEs. It must be noted that this brings about an interesting dynamic for the governance of South African parastatals.

Lastly, section 63(2) of the PFMA stresses that executive authorities that have public entities within their ministries are encouraged to extract their executive authority to guarantee that public entities are able to fulfil their mandates.[114] However, it becomes difficult in South African SOEs for ministers to fulfil these mandates when the same ministers have triple roles in the SOEs. This also encroaches on the board of directors' duties to appoint and remove executive managers of SOEs.

An examination of the PFMA as one of the pieces of legislation that govern SOEs, yields the following observations:

- A section 3 examination has proven that PFMA is the overarching legislation that governs SOEs.

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[109] News 24. 'Government Should let State-Owned Companies appoint their own COEs', Available at https://www.news24.com/news24/government-should-let-state-owned-companies-appoint-their-own-ceos-20181125 (accessed 22 November 2022).

[110] Department of Public Enterprises. Available at https://dpe.gov.za/about/ (accessed 23 November 2022).

[111] IoDSA broadly supports Zondo Commission's recommendation for an Appointment Committee, Available at https://www.iodsa.co.za/news/610074/IoDSA-broadly-supports-Zondo-Commissions-recommendation-for-an-Appointment-Committee.htm (accessed 23 November 2022).

[112] IoDSA 'IoDSA broadly supports Zondo Commission's recommendation for an Appointment Committee', Available at https://www.iodsa.co.za/news/610074/IoDSA-broadly-supports-Zondo-Commissions-recommendation-for-an-Appointment-Committee.htm (accessed 23 November 2022).

[113] Section 3(3) of the Public Finance Management Act 1 of 1999.

[114] Section 63(2) of the PFMA Act 1 of 1999.

- When defining and examining the terms of ownership, the examination shows clearly that the South African model of parastatal ownership is that of centralised ownership. The definition clause stipulates that members of South African SOEs' boards, as well as their CEOs, are appointed and removed by the government via the relevant political minister as a shareholder.[115]
- Although the PFMA is silent on the mechanism for appointing board and executive managers, it directly vests the authority in the minister at his or her own discretion.[116]

The third piece of legislation that will be examined is the Companies Act 71 of 2008 (Companies Act).

2.5.4 Companies Act 71 of 2008

The Companies Act aims to create a legal framework for all South African companies to operate under.[117] In addition, the Act's primary objective is to inspire companies to create high transparency requirements and corporate governance that are suitable for the governance of companies.[118] However, the Act pertains only to SOCs and not to all SOEs. The distinction between the two will be discussed later in this chapter.

PWC analysis indicates that the Companies Act should apply to all SOEs.[119] In addition, the PWC notes that the Act embodies the concepts of accountability, openness, fairness, and responsibility, and emphasises that it must be incorporated into the corporate governance of SOEs.[120] Wandrag also acknowledges legislators' efforts in recognising the need for the Companies Act to control SOEs.[121]

Without examining the Companies Act, it will be hard to comprehend the legal framework that governs SOEs in South Africa, as has been demonstrated by the aforementioned researchers dealing with corporate governance. Consequently, the following section will briefly examine a few provisions of the Companies Act pertaining to the roles of shareholders, directors of boards, and executive managers of SOEs. In order to do so the section will also provide a few definitions pertaining to SOEs.

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[115] Thomas, A., 'Governance at South African state-owned enterprises: What do annual reports and the print media tell us?' (2012) Social Responsibility Journal, Vol 8 No. 4. 450.
[116] de Visser J & Waterhouse S (2020) 'SOE Boards and Democracy'. Available at https://dullaromarinstitute.org.za (accessed 19 July 2022).
[117] S7 of the Companies Act 71 of 2008.
[118] S7 of the Companies Act 71 of 2008.
[119] PWC. 'State-Owned Companies: The New Companies Act, PFMA and King III in perspective' Steering Point Companies Act Series No:4, Available at https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point- 4.pdf (accessed 23November 2022).
[120] PWC. State-Owned Companies: 'The New Companies Act, PFMA and King III in perspective' Steering Point Companies Act Series No:4, Available at https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point- 4.pdf (accessed 23November 2022).
[121] Wandrag, R. 'Legal Framework for SOEs Boards: ESKOM, PRASA and the SABC' (2019) available at https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towardstransparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf

2.5.5 Companies Act Procedure on the Appointment and Removal of Boards of Directors, and executive managers in SOCs & the Role of Board of Directors and Shareholders on SOCs

The Companies Act section 1 defines state-owned companies (SOCs)[122] as follows: 'a "state-owned company" means an enterprise that is registered in terms of this Act … (a) is listed as a public entity in schedule 2 or 3 of the public Finance Management Act'.[123] Section 1 of the Act further provides a definition of shareholders as follows: 'a "Shareholder", subject to section 57(1), means the holder of a share issued by a company ...'.

The Act defines SOCs as companies that must be incorporated under the Act or SOEs specified in schedule 2 or 3 of the PFMA Act. This definition has double implications. First, the Companies Act does not apply to non-incorporated SOEs, and the terms of the Act also refer to SOEs as SOCs. Secondly, the Act has applications for SOCs specified in schedules 2 or 3 of the PFMA Act. The study acknowledges efforts to regulate SOCs listed in schedules 2 or 3, but suggests that it will always be challenging for the Companies Act to regulate these SOCs. This is because, as previously explored, the PFMA Act takes precedence in cases of inconsistency. Notwithstanding this, this complex topic will be discussed in further detail later in the chapter. On the other hand, the Act properly guides the chapter by providing a clear definition that a shareholder is someone who is the holder of shares that are issued by a company. In SOCs, the shareholders are the line ministers with national business enterprises that fall under their ministries.

Turning back to the main task of this section, the chapter will now critically analyse certain provisions of the Act that regulate the powers and the appointment of boards of directors and executive managers, while also examining the powers of the shareholders. In doing so, the chapter seeks to better understand the role played by the Companies Act in regulating SOCs, and whether the provisions which will be examined meet the OECD Guidelines corporate governance best standards.

2.5.5.1. The role, appointment, removal of boards of directors and executive managers

Section 66(1) of the Act stipulates that the SOC's operations and affairs must be handled by or under the direction of its board, which is granted the responsibility to exercise all of the company's powers and carry out all of its duties, except to the extent prohibited by the Act or Memorandum of Incorporation (MOI) of the SOC.[124] Section 66 (2)-(b) requires the boards of SOCs to have three directors.[125] The section provides that a SOC MOI can regulate the appointment and removal of board of directors.[126] In addition, the provision indicates that the

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[122] As described above, the term 'SOC' is used in this thesis to refer to the specific provisions of the Companies Act of 2008 that apply to registered SOCs. The word will also continue to be used for broader contexts, such as references to national public entities under the PFMA.
[123] S1 of the Companies Act 71 of 2008.
[124] S66(1) of the Companies Act 71 of 2008
[125] S66(2)-(*b*) of the Companies Act 71 of 2008.
[126] S66 (4) (*a*) (i) of the Companies Act 71 of 2008.

board members of SOCs must be appointed by 50% of shareholders at an annual general meeting.[127]

The interpretation of section 66 provides that boards of directors are recognised as the key drivers of SOCs, who are entrusted with all the corporate governance duties unless limited by the Act or MOI of the SOCs. The provision also provides a clear procedure for the appointment of directors, which requires shareholders to appoint the boards of directors by voting at a shareholders meeting.

Section 68 of the Act outlines the procedures that must be followed when selecting directors for a company.[128] According to the provision, each director of a company must be chosen by individuals who are eligible to participate in the election and to cast a vote for that director.[129] The thesis submits that section 68 complements section 66, as it confirms that shareholders must appoint the directors through shareholders' meetings.

The Companies Act does not define executive managers of SOCs. It is also silent on who has the authority to nominate and remove executive managers of SOCs. Wandrag suggests that these are powers which fall within the power of boards of directors and that should also be the case with SOCs.[130] The preceding argument is based on the fact that these are powers granted by Section 66 of the Act.[131] The dissertation agrees with the argument that SOEs' boards of directors, by virtue of section 66, should be entrusted with the powers to appoint the executive managers of SOCs. They should account directly to the board of directors, while the directors would normally report to shareholders through shareholders meetings.

2.5.5.2.The role and powers of the shareholders in SOCs

Section 57(1) of the Act states that shareholders of SOCs have the ability to vote on issues pertaining to SOCs.[132] Section 61, on the other hand, provides a platform for shareholders to participate in shareholder meetings in order to exercise their rights.[133] This on its own gives shareholders the ability to hold boards of directors accountable based on section 66(2) duties. Section 71(1) also specifies how shareholders can remove boards of directors.[134] This provision states that directors of SOCs can be removed from their duties by passing an ordinary resolution at a shareholders meeting, provided this is not in conflict with the SOC's MOI and the

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[127] Wandrag, R. 'Legal Framework for SOEs' Boards: ESKOM, PRASA and the SABC' (2019) available at https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towardstransparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf
[128] Section 68 of the Companies Act 71 of 2008.
[129] Werksmans Attorney 'Companies Act No. 71 of 2008 Duties and Liabilities of Directors' Available at https://www.werksmans.com/wp-content/uploads/2013/04/Director-duties-and-liabilities-FINAL-updated-electronic.pdf (accessed 23 November 2022).
[130] Wandrag, R. 'Legal Framework for SOES Boards: ESKOM, PRASA and the SABC' (2019) available at https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towardstransparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf
[131] 132 Wandrag, R. 'Legal Framework for SOES Boards: ESKOM, PRASA and the SABC' (2019) available at https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towardstransparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf
[132] Section 57(1) of the Companies Act.
[133] Section 61(2) of the Companies Act.
[134] Section 71(1) of the Companies Act.

agreement between shareholders and board members.[135] Finally, section 71(2) obliges shareholders to provide board members who are subject to removal with reasonable notice of their dismissal, as well as the opportunity to make a presentation at the shareholders' meeting.

This thesis asserts, based on the preceding examination of the Companies Act on SOCs' corporate governance, that the Act contains robust measures for effective corporate governance when measured against the OECD Guidelines. In addition, this thesis argues that if all South African SOEs had been governed by the Companies Act, the Act would have strengthened the legal framework governing SOEs. However, a prior examination of PFMA provisions, specifically section 3, shows that the Companies Act is superseded by the PFMA in the event of conflicting provisions between the two statutes.

It would be erroneous for this thesis to assert that the Companies Act addresses all SOCs corporate governance failures. For instance, the Act specifies the shareholders' duties and authority in appointing and removing the board of directors. The difficulty is that, despite their clarity, they are not appropriate for SOC shareholders. In the context of SOCs, a shareholder meeting that allows shareholders to appoint and remove directors refers to the line minister, who is the sole shareholder. This means that the Companies Act does not address the issue of SOC shareholder centralisation of power. Consequently, the Companies Act's principles regarding the appointment and removal of directors are only suitable to business corporations with multiple shareholders, and not to SOCs with a single minister holding shareholding rights.

2.5.6 King IV Report on Corporate Governance for South Africa (Soft law)

The purpose of the King IV Report is to reinforce the notion that good corporate governance is a comprehensive and interdependent set of arrangements that must be understood and implemented holistically.[136] Unlike those of King III, King IV principles have adopted an approach of apply and explain rather than apply or explain.[137] Thus, the introduction of the King IV codes enhances the current legal framework that governs the corporate governance of all companies including SOEs. This is based on the fact that the King IV code is applicable to all SOEs, including those listed in PFMA schedule 2 & 3.[138]

The King IV report contains an entire section explaining how SOEs can apply 16 of the report's principles. The sectoral supplements are intended to promote the acceptability of corporate governance, and to ensure that corporate governance is applicable across all sectors regardless of the type of organisation, its size, complexity, or available resources.[139] The sectoral

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[135] Section 71(2) of the Companies Act.

[136] PWC. 'King IV – Steering points: A Summary of the Kings IV Report on Corporate Governance for South Africa,' https://www.pwc.co.za/en/publications/king4.html (accessed 18 June 2022).

[137] Chauke, K.R., and Sebola, M.P., 'Risk Management: Can it be a Panacea for State-Owned Enterprises Ills?' The 3rd Annual International Conference on Public Administration and Development Alternatives Stellenbosch University, Saldahna Bay, South Africa. 04 - 06 July 2018, 294.

[138] King IV Report on Corporate Governance for South Africa (2016) 111.

[139] King IV Report on Corporate Governance for South Africa (2016) 111.

supplements are the 16 out of 17 principles summarised and tailored to fit the SOEs. For the purpose of this dissertation only seven principles will be examined.

- **Principle 1: The accounting authority should lead effectively**

All the members of the SOE's board of directors, individually and collectively, are expected to lead the parastatal through the principles of transparency, ethics and, most importantly, with integrity and competence.[140] What this principle recommends is that, for SOEs to be effective, the board of directors should set the tone for leading the parastatal with a clear mandate to serve the SOE's interests fairly and competently.

- **Principle 2: The accounting authority should govern SOEs in a way that supports the establishment of an ethical culture**

Read with principles 1 and 2 of King IV, and principle 2 of the sectorial SOEs, boards of directors should go beyond leading ethically but promote a culture within all the SOEs that is ethical.[141] This means that a board of directors should put in place ethical principles of corporate governance for all of those involved in the running of SOEs.

- **Principle 3: The accounting authority should ensure that the SOE is and seen to be a corporate citizen**

By definition, SOEs are public entities owned by citizens, and their fiduciary duty is bestowed on the government. So, principle 3 of King IV suggests that boards of directors should manage the affairs of SOEs in a manner that the parastatals are seen as entities that are good corporate citizens.[142] This means that board members are expected to take corporate decisions that are in the best interest of the country, and not self-enriching. This is based on the fact that SOEs are publicly and privately funded by taxpayers, and that all public parastatals are accountable to citizens.

- **Principle 5: The accounting authority should ensure that reports issued by SOEs enable stakeholders to make informed assessments of the SOE's performance and its short-, medium- and long-term prospects**

SOEs should at all times produce reports that allow all those who have interests in the performance of the SOEs to make sound examinations of the SOEs performance.[143] Principle 5 seeks to allow all stakeholders who have vested interests in the performance of SOEs to be in a position to make informed decisions about the short-, medium- and long-term prospects of

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[140] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for State-Owned-Entities, Principle 1. 'The governing body should set the tone and lead ethically and effectively'.

[141] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for 'Principle 2: 'The accounting authority should govern the ethics of SOEs in a way that supports establishment of an ethical culture'.

[142] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for Principle 3 'The accounting authority should ensure that SOE is and seen to be a corporate citizen'.

[143] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for Principle 5: 'The accounting authority should ensure that reports issued by SOE's enable stakeholders to make informed assessments of the SOEs performance and its short-, medium- and long-term prospects'.

SOEs. This recommendation places an obligation on the board of directors to assist those who are expected to produce reports to do so in a manner that is acceptable.

- **Principle 6: The accounting authority should serve as a focal point and custodian of corporate governance in the SOE**

All SOEs directors are entrusted with fiduciary duty as a result of section 50(1)(*a*)(*b*) of the PFMA[144] and section 76(3) of the Companies Act.[145]` Principle 6 requires the directors of SOEs to always act in a manner that upholds the principles of good corporate governance as a natural consequence of the fiduciary duty bestowed on them.[146] This embodies the principles of good corporate governance, as it encourages SOEs to act with due diligence in the interests of the parastatals.

- **Principle 7: The accounting authority should comprise the appropriate balance of knowledge, skills, experience, diversity, and independence for it to discharge its governance role and responsibilities objectively and effectively**

This is one of the most crucial principles, which seeks to address some of the challenges that are faced by South African SOEs. The principle suggests that, when directors are being recruited, the level of competence should be taken into consideration, and therefore directors should possess the necessary qualifications and talent that are required to serve that particular SOE.[147]

This means that principle 7 calls for a solid accounting body that has diverse skills in a rich and diverse environment and, most importantly, is independent of influence. The principle suggests that when directors are being recruited, the shareholders and existing directors should work closely in identifying new directors through committees.[148] What is addressed by this principle is that shareholders (in the case of SOEs, ministers) should not unilaterally appoint a board of directors without proper consultation with existing board members.

- **Principle 16: In the execution of its governance and responsibilities, the accounting authority should adopt a stakeholder-inclusive approach that balances the needs, interests, and expectations of material stakeholders with the best interests of an SOE over time**

Principle 16 is the only principle that acknowledges what this thesis refers to as centralisation of ownership, that is bestowed on government over the ownership of SOEs. The principle acknowledges that ministers with parastatals within their ministries are not only shareholders

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[144] 50(1)(*a*)(*b*) of the Public Finance Management Act 1 of 1991.
[145] S76(3) of the Companies Act 71 of 2008.
[146] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for Principle 6 'The accounting authority should serve as a focal point and custodian of corporate governance in the SOE'.
[147] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for Principle 7: 'The accounting authority should comprise the appropriate balance of knowledge, skills, experience, diversity, and independence for it to discharge its governance role and responsibilities objectively and effectively'.
[148] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for Principle 7: 'The accounting authority should comprise the appropriate balance of knowledge, skills, experience, diversity, and independence for it to discharge its governance role and responsibilities objectively and effectively'.

concerned with financial viability, having powers to appoint and remove both board of directors and executive managers, but also the policy-makers who get to implement the laws and the regulators that have to exercise the oversight.[149]

The King IV principle even acknowledges the overlap of duties when it comes to the execution of duties that pertain to SOEs corporate governance decisions.

King IV attempts to address this triplicate power dynamic. It could be argued that the report is aligned with the argument of this thesis, that this arrangement has negatively contributed to the poor performance of SOEs. The principle encourages accounting authorities to put in place corporate governance mechanisms that permit them to engage with the government as a shareholder, policy-maker and regulator in an effective manner, in the best interests of the parastatals that they are leading.[150]

2.5.6.1 Reflection on the King IV sectorial principles for SOEs

It goes without saying the King IV sectorial principles serve as a blueprint for good corporate governance of SOEs. Moreover, if King IV were not a voluntary set of principles, but of mandatory application in all SOEs, some of the corporate governance challenges that continue to be faced by SOEs would be resolved. What is also commendable about these principles is that they clearly empower board members with corporate duties, unlike the PFMA which bestows these on the shareholder who has multiple roles to play.

What must be noted, though, is that as much as principle 16 seeks to resolve the triplicate powers that government has as a shareholder of parastatals, the principle does not necessarily provide solutions for this centralisation of ownership over SOEs. The principles are silent on who exactly should appoint boards of directors and CEOs of SOEs. The principles only recommend that, when directors are to be appointed, if the accounting authorities themselves do not have those powers, they should ensure that they are part of the process. It is difficult to be optimistic that, under the current legal framework that governs SOEs, ministers would voluntarily transfer the powers to appoint and remove boards of directors and other executive managers to accounting authorities, or in consultation with them.

2.5.7 SOEs' founding legislation

The majority of SOEs were established under their own founding legislation, and, for the purpose of attempting to understand the legal framework that governs these SOEs legal framework, this section will focus on examining the South African Broadcasting Corporation (SABC)'s legislation. The purpose of this examination is to see how the SABC's founding

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[149] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for Principle 16: 'In the execution of its governance and responsibilities, the accounting authority should adopt a stakeholder- inclusive approach that balances the needs, interests, and expectations of material stakeholders in the best interests of the SOE over time'.

[150] King IV Report on Corporate Governance for South Africa 2016, Part 6 Supplement for Principle 16 'In the execution of its governance and responsibilities, the accounting authority should adopt a stakeholder- inclusive approach that balances the needs, interests, and expectations of material stakeholders in the best interests of SOE over time'.

legislation deals with the appointment of a board of directors and executive managers, and how it deals with the heavy centralisation of power by the line minister.

2.5.7.1 Brief overview of the SABC

The SABC is a public broadcaster SOC, fully owned by South African government, under the Minister of Communications and Information Technology.[151] The SABC was formed in 1936 and later incorporated as a limited company. It is at present governed by the Broadcasting Act of 1999 (Broadcasting Act).[152] It would be correct to submit that the SABC, as a SOC, is governed by three pieces of legislation, namely the Companies Act, because it is a SOC, the PFMA, since it is listed in PFMA schedule 2, and the Broadcasting Act. Additionally, since the Companies Act requires all business enterprises to have memorandums of incorporation (MOI), the SABC as a SOC is also guided by its MOI.

It is vital for the following section to analyse the process that is provided by the Broadcasting Act in the appointment of directors and executive managers.

2.5.7.2 Appointment of board of directors and executive managers of the SABC

Section 12 of the Broadcasting Act provides that the board must consist of 12 non-executive members and a CE, Chief Financial Officer (CFO) and Chief Operating Officer (COO).[153] Unlike with the PFMA and the Companies Act, the Broadcasting Act also mentions executive managers in the composition of their board. They are regarded as members of the board. Section 13 provides for the procedure that must be followed in appointing these 12 non-executive members. The disappointing fact is that the Act does not provide a mechanism for the appointment of these executives referred to in section 12 of the Act.

13(1) provides that the President of the country should appoint the board members in consultation with the NA.[154]

Furthermore, section 13(2), stipulates that the appointment of the non- executive members must be conducted in an open and transparent manner and be carried out in a manner that encourages public participation in nominations, and that the successful candidates' names must be published.[155]

Section 13(3) states that, from the 12 board members, the President should appoint one member as chairperson of the board and one member as a deputy chairperson of the board.[156]

As a result of these three provisions the President of the country is bestowed with the power to appoint directors of the SABC. On the 18 April 2023, President Ramaphosa released a media

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[151] Wandrag R, 'Legal Framework of SOE Boards' (2019) Available at wandrag_legal_framework_v4-1-3-for-electronic-use-1 Part 1.pdf (accessed 06 March 2022) 21.
[152] Wandrag R, Legal Framework of SOE Boards' (2019) Available at wandrag_legal_framework_v4-1-3-for-electronic-use-1 Part 1.pdf (accessed 06 March 2022) 21.
[153] Section 12 of the Broadcasting Act 4 of 1999.
[154] Section 13 of the Broadcasting Act 4 of 1999.
[155] Section 13(2) the Broadcasting Act 4 of 1999.
[156] Section 13(3) the Broadcasting Act 4 of 1999.

statement publishing the names of the new non-executive members of the SABC.[157] The President, in his statement, quoted section 13(3), naming his choice for the chairperson of the board of the SABC.[158] From a corporate governance perspective, the Broadcasting Act is far from the principles of good corporate governance. The Act further perpetuates the centralisation of state ownership. Since the President makes the appointment, this thesis is left with the view that the SABC's board of directors is not immune from interference by the President and ministers.

This is confirmed by concerns that were raised by opposition parties, questioning the credibility of this appointment process. Opposition parties criticised the President for delaying the appointment of this board for six months.[159] Furthermore, opposition parties claim that the President involved ministers that have been accused of political interference in the appointment of SABC board members.[160] The President's recent appointment of Phathiswa Magopeni, the former chief of news at the SABC, as a non-executive director at the SABC is disappointing, because she had been found guilty of failing to understand her responsibilities there. Phathiswa Magopeni's written reply, according to the head of the disciplinary committee, 'demonstrated a lack of understanding of her role in the sphere of accountability and corporate governance'.[161] It is not clear why the President would appoint someone who has been found to lack understanding of corporate governance to be part of a new board.

As mentioned above, Section 13 of the Act does not provide for the procedure of the appointment of executive directors. Section 14, however, provides that the affairs and operations of the SABC are under the leadership of the executive committee. The executive committee consists of the CEO, CFO and COO. Section 14(2) provides that the executive committee is accountable to the board of directors of the SABC, and section 14(3) provides that the executive committee must perform duties as determined by the board. What can be deduced from these three provisions of section 14 is that if the executive managers' functions are determined by the board and they account to the same board, on principles of corporate governance this it is the same board that should be appointing and removing the executive managers, since the Act is silent about their appointment and dismissal.

In reality, this is not the case, as it should be remembered that PFMA is also an applicable piece of legislation, as SABC is listed in schedule 2 of the PFMA Act. As a result, the PFMA grants the minister the authority to appoint the executive managers of SABC, rather than the board of

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[157] The Presidency of South Africa, 2023 President Cyril Ramaphosa appoints SABC Board of Directors Available at https://www.thepresidency.gov.za/press-statements/president-ramaphosa-appoints-sabc-board-directors#:~:text=%2D%20Ms%20Palesa%20Kadi (accessed 26 April 2023).

[158] The Presidency of South Africa, 2023 President Cyril Ramaphosa appoints SABC Board of Directors Available at https://www.thepresidency.gov.za/press-statements/president-ramaphosa-appoints-sabc-board-directors#:~:text=%2D%20Ms%20Palesa%20Kadi (accessed 26 April 2023).

[159] Eyewitness News 'Ramaphosa Appoints New SABC Board' Available at https://ewn.co.za/2023/04/18/ramaphosa-appoints-new-sabc-board (accessed 26 April 2023).

[160] Eyewitness News, 'Ramaphosa Appoints New SABC Board' Available at https://ewn.co.za/2023/04/18/ramaphosa-appoints-new-sabc-board (accessed 26 April 2023).

[161] News24, 'SABC head of news found guilty of misconduct' available at https://www.news24.com/news24/southafrica/news/sabc-head-of-news-found-guilty-of-misconduct- 20211223 (accessed on 26 April 2023).

directors. This conflict has not only caused perplexity regarding the appointment of the SABC's directors and executive manager, but has also significantly contributed to the board's corporate failures. This matter will be revisited later in the chapter.

2.5.7.3 Removal of board of directors and executive managers of the SABC

The removal of SABC board members is covered by sections 15 and 15A, while section 16 provides reasons for the removal of the board.

Section 15(a) states that the President, who serves as the appointing head under section 13, has the authority to remove a member from office due to improper conduct and the inability to carry out their duties effectively, based on an investigation and the board's recommendations.[162] On the other hand, under Section 15(b), the President is required to remove a member from office based on investigation findings made by the portfolio committees of the Parliament if the member has violated the provisions of Section 15A.[163]

It should be remembered that the SABC is incorporated in terms of the Companies Act and is also an SOC listed in terms of schedule 2 of the PFMA. It is further bound by its founding legislation. All of this legislation overlaps when it comes to the appointment of the board of directors and executive managers. As a result, for years the board of the SABC has encountered corporate governance failures as the PFMA and Companies Act also empower line ministers of the SABC to appoint and dismiss. While the Companies Act does not deal with the appointment or dismissal of executives, the PFMA grants the power to appoint and dismiss board members and executives to the minister. However, to address these conflicting legalisations the following section will examine the SABC court case which dealt with this conflicting legislation.

2.5.7.4 SABC court judgment on conflicting legislation

In *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*,[164] the court dealt with two applications involving Minister Faith Muthambi, the former minister of communication, based on the findings of the SABC ad hoc committee that was investigating the fitness of the SABC board, was accused of interfering with the SABC board's operations, and of abusing her authority to appoint, discipline, and remove board members.[165] The ad hoc committee also discovered that the minister had unlawfully amended the MOI in order to further centralise the

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[162] Section 15(a)of the Broadcasting Act 4 of 1999.
[163] Section 15(a) of the Broadcasting Act 4 of 1999.
[164] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017).
[165] Parliament of the Republic of South Africa Interim Report of the Ad Hoc Committee on the SABC Board Inquiry into The Fitness of the SABC Board (2017) 13.

authority of the ministry.[166] Thus, the court had to determine the lawfulness and the constitutionality of these powers of the Minister.

The court had to decide in the first application whether the 2014 MOI, as amended by the then Minister Faith Muthambi, was in compliance with the Broadcasting Act.[167] Although the appointment of the SABC's non-executive members is mandated by Section 13 of the Broadcasting Act, which was previously discussed, the Broadcasting Act is silent regarding the appointment of executive directors.[168] The then Minister argued that, because of the silence in the Broadcasting Act, section 66 of the Companies Act granted her powers to appoint executive directors as the shareholder, and that the Companies Act overrides the Broadcasting Act.[169] Basically, the 2014 amended MOI had diverted all the operating and administrative powers to the Minister.

The court, per Matojane J, ruled that the powers granting the Minister to appoint, remove and discipline the SABC board undermined the independence of the board.[170] The court argued that the MOI 2014, granting the Minister powers to appoint executive directors, was inconsistent with the principles of independence that the SABC is expected to uphold.[171] Matojane J also ruled that S 13(11) places the affairs and the operations of the SABC in the hands of non-executive directors and not the Minister, and therefore it is the non-executive directors that are entrusted with powers to appoint executive directors without the approval of the Minister.[172] Thus, the court declared that the amended was MOI invalid and not consistent with the Broadcasting Act.

The second application, the court was required to determine whether the non-executive directors' removal by the Minister in terms of section 71 of the Companies Act, was consistent

[166] Parliament of the Republic of South Africa Interim Report of the Ad Hoc Committee on the SABC Board Inquiry into The Fitness of the SABC Board (2017) 41.
[167] Cassim, R 'Removing Directors of State-owned Companies: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited (81056/14) (2017) ZAGPJHC 289 (2019). (2019) 40(1)' Obiter Available at SSRN: https://ssrn.com/abstract=3679420 148.
[168] Cassim, R 'Removing Directors of State-owned Companies: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited (81056/14) (2017) ZAGPJHC 289 (2019). (2019) 40(1)' Obiter Available at SSRN: https://ssrn.com/abstract=3679420 148
[169] Cassim, R 'Removing Directors of State-owned Companies: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited (81056/14) (2017) ZAGPJHC 289 (2019). (2019) 40(1)' Obiter Available at SSRN: https://ssrn.com/abstract=3679420 148
[170] 171 SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 117.
[171] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 117.
[172] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 146.

with the Broadcasting Act.[173] The Broadcasting Act, section 15 and 15A, stipulates that the removal of the directors is a power of the President in consultation with the NA.

The court ruled that section 71 of the Companies Act was not applicable to the SABC board.[174] The court also dealt with the Minister's submission that in the event of conflict between the Broadcasting Act and the Companies Act, that the latter legislation overrides the former. The court held: 'The Broadcasting Act is not listed under Section 5(4)(b)(i) of the Companies Act, according, (sic) none of the provisions of the Broadcasting Act, is made applicable in the event of inconsistency with the Companies Act'.[175] What the court was basically submitting was that the Minister's argument that the Companies Act is applicable in an event of conflict between the Companies Act and Broadcasting Act, and that the latter is applicable because it is not listed in the Companies Act. The court argued that the procedure provided by section 71 of the Companies Act undermined the independence of the SABC board.[176] Moreover, it would not be correct for a board to be unilaterally removed at the instance of the Minister being the only shareholder.[177] As a result, the court declared that the members of the SABC board may not be removed by the Minister only, in accordance with the section 15 and 15a of the Broadcasting Act.[178]

The intriguing aspect of this SABC court ruling is that it was predicated on the 2014 MOI, which the SABC ad hoc committee discovered to be invalid because the minister had failed to register it with the Companies Intellectual Property Commission (CIPC). The judge entirely disregarded the potential application of the PFMA, which gives only the minister the authority to appoint and remove the board of directors and executive officers.

The thesis asserts that if the constitutionality of the PFMA on the application of SABC appointment and removal had been challenged, the court may have ruled PFMA inapplicable as it did with section 71 of the Companies Act. As a consequence, the court missed the opportunity to address the problematic effects of the PFMA on the appointment and removal of directors and executive managers at SOEs and SOCs.

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[173] Cassim, R (2019) 'Removing Directors of State-owned Companies: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited (81056/14) (2017) ZAGPJHC 289 (2019). (2019) 40(1)' Obiter Available at https://ssrn.com/abstract=3679420 149.

[174] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 141.

[175] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 145.

[176] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 141.

[177] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 145.

[178] SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others V South African Broadcasting Corporation SOC Limited and Others 81056/14 (2017) ZAGPJHC 289 (17 October 2017) par 146.

2.6 Attempts to reform SOEs

The South African government has for many years acknowledged the weakness shown in the corporate governance of SOEs, to the extent that many reforms have been attempted. However, the study submits that there has been little commitment to implementing the reforms.

The Presidential Review Commission (PRC) was founded in 2010, and the commission was entrusted with examining the failures and obstacles that impede the success of these parastatals, and with bolstering their developmental agenda.[179] In addition, the PRC was tasked with evaluating the legal structure of these parastatals and, most crucially, developing a robust legislative framework to enhance the governance of these SOEs. Three years later, the PRC issued 31 recommendations.[180] The recommendations acknowledged the current shortfalls of the current legal framework that regulates SOEs as a result of the lack of a coherent legal framework to govern them, as their governing laws are fragmented and contradictory.

The crucial recommendation made was that policy-makers must create a comprehensive ‘SOE Act’ that would remove all existing laws.[181] This study is being conducted nine years after the adoption of these recommendations. One would have expected that such legislation would have been passed and be in place by now.

In his first state of the nation address, in 2018, President Cyril Ramaphosa proclaimed a ‘new dawn’. The President’s message gave the impression that he had a plan for resolving the difficulties confronting national institutions. For instance, the speech acknowledged SOE-centred corruption, political meddling, the manner in which board members are appointed, and the necessity to remove ministers from the procurement process.[182] In addition, the President reassured the public that SOEs would no longer rely on state aid and that alternative funding models would be established.[183] This study asserts unequivocally once more that the government of the present president has accomplished next to nothing, but the ‘new dawn’ reveals that SOEs are in such a dire position that they are failing to meet even the most fundamental mandates.

The following section seeks to evaluate one of the most long-awaited bills, which aims to synchronise and decentralise the ownership of SOEs while enhancing the legal framework that governs South Africa’s parastatals.

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[179] Helen Suzman ‘Notes on the Report of the Presidential Review Committee on State-Owned Enterprises’ Available at https://hsf.org.za/publications/hsf-briefs/notes-on-the-final-report-of-the-presidential-review-committee-on-state-owned-enterprises (accessed 06 July 2022).
[180] Parliamentary Monitoring Group, 2013 State-Owned Enterprises: Presidential Review Committee Report Available at https://pmg.org.za/committee-meeting/15992/ (accessed 06 July 2022).
[181] Parliamentary Monitoring Group, 2013 State-Owned Enterprises: Presidential Review Committee Report Available at https://pmg.org.za/committee-meeting/15992/ (accessed 06 July 2022).
[182] Sunday Times ‘Read Cyril Ramaphosa’s first State of the nation address’ Available at https://www.timeslive.co.za/politics/2018-02-16-in-full--read-cyril-ramaphosas-first-state-of-the-nation-address/ (accessed 06July 2022).
[183] Sunday Times ‘Read Cyril Ramaphosa’s first State of the nation address’ Available at https://www.timeslive.co.za/politics/2018-02-16-in-full--read-cyril-ramaphosas-first-state-of-the-nation-address/ (accessed 06July 2022).

2.6.1 SOE Shareholder Management Bill

The study so far has clearly demonstrated the failure of the regulatory system that oversees SOEs. In addition, it argues that the government has done little or nothing to execute the recommendations made by commissions such as the PRC. It would, however, be inappropriate for the study to ignore the present efforts to introduce a new SOE shareholder management bill.

The Public Enterprises Minister, Pravin Gordhan, in his 2022 vote budget speech confirmed that the ministry would be presenting an SOE shareholder bill to the executive for approval.[184] It intends to implement a consistent governance, financial management, and performance indicators framework for all SOEs.[185] What can be deduced from this is that the Bill will harmonise the laws governing SOEs.

This Bill proposes a number of intriguing provisions that have the potential to improve the condition of SOEs. According to different reports and remarks by public representatives, the Bill intends to implement a new ownership paradigm. The Public Enterprises Minister and the Presidential SOE Council have suggested that the government implement a central shareholder model for its major commercial SOEs. The Bill's centralised shareholder management approach intends to remedy the absence of comprehensive SOE regulation.[186]

President Ramaphosa stated that the new SOE bill should have the following features:

- First, a holding corporation that is fully owned by the government.
- Secondly, a shareholder-driven approach that actively sets, monitors, and assesses SOE performance regarding its business and development goals.
- Thirdly, ensuring that SOEs have minimal or no dependency on the fiscus while maintaining commercial viability.
- Fourthly, creating a suitable financing model for the holding company to guarantee the success and sustainability of each SOE.[187]

The Bill has the potential to address the challenges that are currently facing these parastatals, as the approach that has been taken by this Bill, on face value, embodies the principles of corporate governance and most importantly is not far from the 2015 OECD Guidelines for governance of SOEs. Furthermore, this Bill, it is said, will minimise the possibility of widespread corruption, increase competency, and manage state assets in a way that preserves

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[184] SabinetLaw 'Draft Shareholder Bill on SOEs in the Pipeline' Available at https://legal.sabinet.co.za/articles/draft-shareholder-bill-on-soes-in-the-pipeline/ (accessed 06July 2022).
[185] SabinetLaw 'DPE Shine Light on State-Owned Companies' Available at https://legal.sabinet.co.za/articles/dpe-shines-light-on-state-owned-companies/ (accessed 06 July 2022).
[186] SabinetLaw. 2022. 'Draft Shareholder Bill on SOEs in the Pipeline' Available at https://legal.sabinet.co.za/articles/draft-shareholder-bill-on-soes-in-the-pipeline/ (accessed 30 November 2022).
[187] BUSINESS TECH, 'South Africa is getting a new state-owned company- what you should know' Available at https://businesstech.co.za/news/government/569414/south-africa-is-getting-a-new-state-owned-company-what-you-should-know/ (accessed 07 July 2022).

shareholder value.[188] It will also isolate the state's ownership responsibilities from its legislative and operational functions.[189]

There are few remarks that this study is obliged to make concerning the success and qualities it attempts to promise. As was stated before, prima facie, this measure could be the ground-breaking legislation that South African SOEs need. One of the crucial features of this Bill is that it calls for centralised ownership of SOEs, to fall under one company separate from ministers. This would be a good way of deregulating the triplicate role that ministers have when it comes to SOEs currently. It also calls for different categories of SOEs, meaning that SOEs that are designed for commercial activities will be separated from SOEs with non-commercial activities. The implication of this Bill is that SOEs with commercial activities will fall under the ownership of the shareholding company, and that they will exist solely for commercial activities.

Furthermore, it is believed that the measure could also ensure a clear ownership rationale, while at the same time, it will split the triple powers allocated to line ministers. This would be a prudent step by the government as the chapter has convincingly shown the dangers when a minister has such unfettered powers.

However, the study warns individuals in charge of the governance of SOEs that this is useless unless it has been submitted to the legislative branch for enactment. This is not the first time that the nation has been presented with great legislation that epitomises solid governance, only to have it remain a suggestion. Moreover, as was stated earlier, this is not the first time that this Bill has been presented. Therefore, it will require committed policy-makers to ensure that this Bill is passed into law.

2.7 Conclusion

After examining the legal framework that currently governs SOEs in South Africa, it can be seen in this chapter that this framework is fragmented. This has crippled the ability of SOEs to fulfil both their commercial and their developmental agenda. This can be observed through the conflicting laws, political interference, and most importantly through the centralisation of ownership that gives line ministers multiple powers. Parliamentary oversight has also been addressed, and it can be seen that it is not an effective mechanism for holding SOEs' shareholders accountable because of the number of sittings that parliament has in a year.

The study has acknowledged the international trends on the governance of SOEs, especially the 2015 OECD Guidelines on the matter. When the study unpacked these guidelines what became clear is that South African SOEs need such guidelines to be incorporated in order to improve the governance of SOEs. However, the study submits that this can only be achieved if

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[188] Pravin Gordhan 'Budget Vote Speech 2022' by Minister Pravin Gordhan, 20 May 2022, Available at https://www.gov.za/speeches/minister-pravin-gordhan-public-enterprises-dept-budget-vote-202223-20-may-2022-0000 (accessed 07 July 2022).

[189] Pravin Gordhan 'Budget Vote Speech 2022' by Minister Pravin Gordhan, 20 May 2022, Available at https://www.gov.za/speeches/minister-pravin-gordhan-public-enterprises-dept-budget-vote-202223-20-may-2022-0000 (accessed 07 July 2022).

government commits to the incorporation of these guidelines into domestic laws. However, this does not seem to be promising, as the study has also illustrated many occasions where the government undertook SOEs with no implementations.

The present Bill that is with the department of public enterprises is a promising piece of legislation that could save these parastatals, but this will depend on the willingness of the government to pass it into legislation. While this chapter ends with many doubts about the government's commitments, the next chapter will seek to look at privatisation as a solution for South Africa's SOEs.

Chapter 3 Privatisation and Privatisation Methods for SOEs

3.1 Introduction

In chapter 2, the study stated that for a country like South Africa to successfully operate SOEs under government control, the state must be committed to changes that create a strong legislative framework that prohibits excessive centralisation of ownership. The policy makers will need to enact overarching legislation to free the oversight of SOEs from the line ministers. Given the political instability and corruption that have afflicted South Africa's parastatals, as well as leaders' lack of commitment to good governance, it is not easy to be optimistic that the country will one day enjoy well-governed parastatals.

In light of this, chapter 3 analyses whether privatisation could be the solution to saving struggling SOEs. In addition, the aim of this chapter is to advocate for a mixed ownership arrangement between the government and the private sector in managing privatisation, and to determine whether such an arrangement would improve corporate governance in South Africa's parastatals.

In an effort to answer the preceding assertion, this study will investigate a theoretical understanding of privatisation's origins, in order to discover what motivates governments to consider privatising parastatals and what benefits can come from doing so. This chapter will also discuss two privatisation techniques available to nations for privatising SOEs, as well as the rationale behind such a move.

In addition, the study will investigate the concept and understanding of privatisation in South Africa, followed by a thorough examination of the country's previous attempts to privatise SOEs, so that the study can understand why these attempts failed. It is also essential for this chapter to define the term privatisation, by examining the definition given by international scholars and international organisations. This is because the chapter also seeks to understand if South Africa's definition fits the model that this chapter advocates. In doing so, the chapter will recommend expanding the definition of privatisation in South Africa to conform to the model of privatisation proposed in this chapter.

This chapter also seeks to examine whether the privatisation of SOEs has the potential to prohibit political interference and corruption; and, most importantly, will allow SOEs to be financially independent.

This will assist the following chapter, which will analyse the problems and accomplishments of nations that have privatised, so that South Africa can learn lessons to help in privatising its failing state entities.

The study will then summarise its findings and give recommendations that could potentially contribute to the body of literature on privatisation. The study could also serve as a blueprint for South African policy-makers.

3.2 Defining privatisation

The available literature on privatisation displays a variety of meanings, and an absence of any definitive definition. It would therefore be correct to argue that each nation has its own conception and meaning of privatisation, as well as its own techniques for bringing it about. Consequently, it is essential that this chapter investigate several definitions of privatisation, including the one used by South Africa. In chapter one, the term was defined briefly; in this chapter, however, the definition will be extensively explored in order to establish a comprehensive understanding of the term and allow the study to improve its understanding of the definition. More importantly, it will help enhance this dissertation's earlier argument, that South Africa's definition of privatisation must be broadened in order to embrace privatisation techniques that are efficient and responsive to the country's economy.

In an attempt to define privatisation, the section that follows offers both a narrow and comprehensive definition. Both the narrow and comprehensive definitions provide different elements of what constitutes privatisation, and both definitions will be essential to the chapter's understanding of privatisation as a technique for deregulating the ownership of SOEs. In addition to these two definitions, the chapter will also provide the South African definition so that it can be compared to the other two. This will be of assistance in determining whether South Africa's definition should be expanded in order to guide policy-makers when privatising SOEs.

3.2.1 Narrow meaning of privatisation

Narrowly defined, privatisation refers to the transfer of control of a company to the management of the private sector.[190] The government is no longer the actor, but is merely the regulator and the policy-maker.[191] This definition attempts to correlate with what is known as full privatisation, which refers to the process through which the state sells the full ownership of parastatals to the private sector.[192] According to this definition, the government sells SOEs to the private sector, relinquishing its ownership rights. The government then assumes the role of policy-maker, as specified by the definition.

Having examined the literature on privatisation, it is clear that privatisation is not limited to the sale of parastatals to the private sector; therefore, the following section attempts to define privatisation more extensively, so as to comprehend all the elements that constitute privatisation.

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[190] Khajar, I. 'Model of State-Owned Enterprise (SOE's) Privatization Through New Common Stock and Its Implications Towards Financial Performance Period 2005-2012' (2014) The International Journal of Organizational Innovational VOL 7 NUM2 29.
[191] Khajar, I. 'Model of State-Owned Enterprise (SOE's) Privatization Through New Common Stock and Its Implications Towards Financial Performance Period 2005-2012' (2014) The International Journal of Organizational Innovational VOL 7 NUM2 29.
[192] Steytler, J. 2009 Privatisation Cross Country Experience. 11th Annual Symposium 2009 Privatisation, From Public Ownership To Private Ownership, 17 September Windhoek 21.

3.2.2 Comprehensive meaning of privatisation

Defining the term privatisation broadly, the study borrows the definition of Megginson. Megginson refers to privatisation, broadly defined, as entailing the transfer of SOEs' assets or stock to internal or external private investors in exchange for cash payment.[193] Megginson further defines privatisation as the process by which the government lists the shares of parastatals on the securities exchange.[194] This means that privatisation entails selling 'newly issued shares to private sector investors' without relinquishing state authority over these firms.[195] This is known as partial privatisation.

It is evident from the above comprehensive yet narrow definition of privatisation that the term has different meanings in different jurisdictions. Before this section of the chapter attempts to deconstruct these definitions and place them within the context of the study, it is essential that the chapter consult the South African definition and understanding of the term privatisation. After defining privatisation in the South African context, this chapter will benchmark the South African definition against the previous definitions, to determine if it is comparable.

3.2.3 South Africa's definition of privatisation

Attempting to define privatisation according to the South African concept is much more challenging. The Budget Review report 2018 defines privatisation as 'the whole or partial sale of SOEs to private individuals or companies'.[196] What can be gleaned from this definition is that it describes two simple forms: either the state sells all of its assets to the private sector, or a portion of its assets are sold to the private sector.

Now that the chapter has provided various definitions, from scholars and from various jurisdictions, it is important that this chapter unpack these definitions for the purpose of understanding privatisation, and to ask whether the definition provided by South Africa is sufficient or needs to be extended. It would be correct to state that privatisation is a broad notion and that, as stated previously, each nation has its own interpretation.

The literal definition of privatisation is the process by which the state sells its national enterprises to private investors. If the chapter were, to follow the literal meaning of this definition, it would mean that the state transfers all ownership rights to the private sector and no longer has any control over the enterprise. The government becomes only the policy-maker and regulator of these parastatals.

However, if the study examines the comprehensive definition that Megginson has laid out, the term privatisation takes on a new meaning. Privatisation is the process through which the state sells a share in parastatals to either domestic or foreign investors, via stock exchange facilities or directly to the investors. In contrast to the first definition, the Megginson definition specifies

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[193] Megginson, W.L (2010) 'Privatization and finance' (2010) Annual Review of Financial Economic 2 2.
[194] Gan, J. 'Privatization in China: Experience and Lessons' (2008) JEL Classification: G34, L3 1.
[195] Megginson, W.L (2010) 'Privatization and finance' (2010) Annual Review of Financial Economic 2 2.
[196] National Treasury 2018 'The Budget Review 2018' available at www.treasury.gov.za. (accessed 13 July 2022) 178.

that the state may sell these entities or its shares piecemeal. Moreover, it is suggested that when a state engages in privatisation, it can do so by offering voters the opportunity to purchase shares. This differs from the first definition because it does not limit the sale of the state to corporations. The study reveals that private investors can participate in the sale and purchase of state company shares. Consequently, based on the definition provided by Megginson, this thesis argues that the state can either decide to sell all the shares, or to issue a certain number of shares to private or public investors. This definition implies that the state can retain a certain number of shares while issuing a certain number to private investors. This scholar's definition simply indicates that the state can retain a portion of the shares while providing for mixed ownership between the government and private investors. Consequently, this broader definition also includes partial privatisation.

In addition, the South African definition is ambiguous and limiting, as it only defines privatisation as the sale of parastatals to private investors, whether in full or in part. The definition lacks the mechanisms that can be used to sell SOEs; therefore, for the purposes of this chapter, the South African privatisation definition should be expanded to include the sale of SOEs through the use of shares using the stock exchange. Therefore, for the purpose of this thesis, the Megginson definition will be utilised, as the chapter tries to advocate for partial privatisation through the selling of SOEs shares.

3.3 Historical development of privatisation

The chapter has provided definitions of privatisation above. As a result, the chapter has adopted a comprehensive definition of privatisation of SOEs from the numerous definitions of privatisation provided in the chapter. This section of the chapter will now conduct an in-depth analysis of the origins of privatisation; as a result, the chapter will have a thorough understanding of the factors that have led nations to privatise their SOEs. The chapter will first explore foreign jurisdictions, and will then also trace the development of privatisation in an African context.

3.3.1 Privatisation in the United Kingdom

The word 'privatisation' has been widely used since the early 1980s.[197] Numerous academic researchers acknowledge that privatisation by means of economic policies began in the United Kingdom (UK) in the 1980s, and spread throughout the world in the 1990s.[198] When Margaret Thatcher became the Prime Minister of the UK in 1979, her government was vigorously committed to economic change and embraced privatisation.[199] During this time, the UK was

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[197] Parker, D. 'Debate: History of Privatisation' (2009) Public Money & Management, 29:3 140.

[198] Wang.S, Hague.M & Lamb.S, 'Does transfer of control rights and private benefits of control increase efficiency? Evidence from China's privatization of the SOE's. (2016) Journal of Chinese Economic AND Studies, Vol. 14, NO 4, 329.

[199] Stevens, R. 'The Evolution of Privatisation as an Electoral Policy, c.1970-90' (2004) Contemporary British History, 18:2 52.

aware of the poor performance of its SOEs.[200] When governments sold SOEs in industrialised economies, especially in the 1980s and 1990s, their typical objectives were to promote economic efficiency by enhancing firm performance, to reduce state interference, and to establish competition in monopolistic market sectors.[201]

From the literature, it can be concluded that the privatisation of parastatals by developed countries was to reduce government intervention in markets allocated for the private sector. It is important to note, however, that this radical decision to privatise was also prompted by the poor performance of SOEs, their inability to be financially sustainable, and their need to be unprotected from the market in order to operate on a level playing field.[202]

As indicated previously, privatisation has been largely acknowledged as a means to improve the performance of SOEs and narrow the performance gap between SOEs and private firms. It has been stated that privatisation also reduces political involvement, and infuses professionalism and efficiency into the corporate culture of SOEs.[203] Countries that implemented privatisation, such as the UK, recognised the significance of establishing privatisation, not only as a tool to reduce the role of government in the market, but also with a full appreciation of the benefits that could result from transferring ownership of certain or all parastatals to the private sector, in order to improve good governance.[204]

3.3.2 Privatisation in sub-Saharan Africa

Africa is not unfamiliar with marketplaces or private ownership of resources. During the debt problems and the deteriorating fiscal budget performance of the late 1970s and early 1980s, privatisation in developing nations arose as a policy issue.[205] In sub-Saharan Africa (SSA), privatisation and reform of parastatals took a major position in the adjustment agenda from the late 1980s, as SOEs, despite attempts at reform, presented a bleak picture of inefficiency, losses, budgetary constraints, substandard products and services, and inadequate achievement of their non-commercial aims.[206]

Nonetheless, the involvement of the private sector in the national economies of SSA nations has been constrained by the purposeful choices made by governments in their pursuit of the

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[200] Roland. G, 'Privatization: Successes and Failures' (2008) Available at https://policydialogue.org/files/publications/papers/Foreward_to_Privatization_Successes_and_Failures_Stiglitz.pdf (accessed 10 July 2022).
[201] Estrin, S & Pelltier, A 'Privatization in Developing Countries: What Are The Lessons of Recent Experience'. (2018) available at https://openknowledge.worldbank.org/bitstream/handle/10986/32175/wbro_33_1_65.pdf?sequence=1&isAllowed=y (accessed 10 July 2022).
[202] Edward, C., 'Margaret Thatcher Privatization Legacy' (2017). Cato Journal, Vol. 37, No. 1. 89-90.
[203] Rakham, F. 'Can Partially Privatized SOE's Outperform Fully Private Firms? Evidence from Indonesia (2018) Research in International Business and Finance. Vol.54 87.
[204] OECD Privatising State-Owned Enterprises: An Overview of Policies and Practices in OECD Countries. (2003) OECD Publishing 21.
[205] Kubi, K.A. 'State-owned enterprises and privatisation in Ghana' (2001) The Journal of Modern African Studies, 39, 2 197.
[206] Nellis, J. R. Public Enterprise in Sub-Saharan Africa. Washington (1986) DC: World Bank Discussion Paper No.1 Washington, DC: World Bank Discussion Paper No.1. (2015) 7.

optimal path to economic growth and development.[207] African countries, including South Africa, hold different views about the privatisation of SOEs. For example, political observers, policy-makers, and economists are divided on how and which economic changes may be implemented to save the countries in the South, which has significant unemployment and a decelerating rate of economic growth. Those in favour of privatisation argue that, in order for a country to strengthen its economy, SOEs must be market oriented, which will aid their stability and, in turn, allow the economy to adapt to socioeconomic challenges.[208] Contrary to this belief, some believe that the centralisation of parastatals is crucial to a country's economic development and progress.[209]

In the South African context, as highlighted in Chapter 2, the current legal framework indicates that the country's policy-makers are opposed to privatisation, as the policies monopolise the ownership of SOEs by leveraging parastatals as vehicles for achieving development objectives.

Since the chapter has now developed a basic understanding of the historical development of privatisation, and how it arose in the African context, the study will seek to use this information to strengthen its understanding of privatisation. The following section of this chapter will critically discuss some of the privatisation methods adopted by countries when engaging in the privatisation of parastatals. This chapter analyses the methods of privatisation in order to gain a better understanding of the ways of doing this. The following section will greatly assist this chapter in making informed submissions as to whether privatisation is the best solution for saving struggling South African SOEs, by interacting with these various methods of privatisation. This will help to determine which methods of privatisation would be most suitable for the South African economy.

3.4 Methods of privatisation

From the narrow meaning to the comprehensive definition of privatisation, it is clear that the term coexists with privatisation techniques. This section, therefore, examines the privatisation techniques available to nations when they are reforming their economic policies, and bringing parastatals under the control of the private sector. Through this, the dissertation will embrace one of the privatisation approaches, and urge policy-makers in South Africa to adopt it for the privatisation of the national business enterprises. Only the SIP and SEP methods of privatisation will be examined.

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[207] Paschal, S. 'Privatization in the Name of Public Private Partnership: The case of Tanzania Breweries Ltd., and Evaluation' (2015) Vol 5:2 Juridical Trib 70.

[208] News24 'Opinion SOE's must stay state controlled and out of the hands of the business' available at https://www.news24.com/news24/columnists/guestcolumn/opinion-soes-must-stay-state-controlled-and- out-of-the-hands-of-business-20200128 (accessed 12 July 2022).

[209] News24 'Opinion SOE's must stay state controlled and out of the hands of the business' available at https://www.news24.com/news24/columnists/guestcolumn/opinion-soes-must-stay-state-controlled-and- out-of-the-hands-of-business-20200128 (accessed 12 July 2022).

3.4.1 Share issue privatisation model (SIP)

SIP is a method where all or most of a state's shares in an SOE are offered to purchasers through a public offering, often known as privatisation initial public offers (PIPOs).[210] As a technique for privatising parastatals, this style of privatisation appears to have and continues to enjoy hegemony in numerous nations. This sort of privatisation has been recorded as the most prevalent form of privatisation in international stock exchange institutions.[211] One might ask why this seems to be the preferred form of privatisation. In order for the study to positively answer this question it is important for the study to examine in detail what SIP entails.

As previously stated, through SIP the government, through a privatisation transaction, is free to determine the number and price of shares to sell the public through PIPO. Investors then make an application for the amount of stock they intend to acquire.[212] Government, in determining the number of shares to offer to the public, reserves the right to retain a golden share that provides it with a portion of the power over parastatal decisions, or it may establish a regulatory framework over which it exercises future influence.[213] This is significant, since it prevents private investors from taking over the entire enterprise. Importantly, government can still maintain majority control over the parastatals.

It is evident why many states favour this sort of privatisation, as the government retains control over the SOEs and may still pursue political or rather developmental goals. What can be appreciated from this model is that it deregulates the state centralisation of ownership, which is absolute in the case of South Africa, and introduces what this thesis refers to as mixed ownership. This means that line ministers would have to share shareholding rights with private shareholders, and through this model it introduces a new dynamic because the state will no longer have the liberty to do as it pleases. The study strongly argues that this is the model of privatisation that South Africa needs in order to assist some of the struggling SOEs that are affected by corruption, poor governance and, most importantly, are in a bad financial state.

The state can offer a number of primary shares to the public, which, when purchased by investors, will expand the capital market for parastatals.[214] Vermooten contends that this sort of privatisation is advantageous since it enables the SOEs in question to quickly raise capital to finance their financial demands.[215] This means that SOEs could be able to raise their own market capital without having to rely on government bailouts.

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[210] Megginson, W.L & Netter, J.M, 'From State to Market: A survey of empirical studies on privatization' (2000), Journal of Economic Literature Vol 39(2), 339.
[211] Megginson, W.L & Boutchkova, M.K 'The Impact of Privatization on Capital Market Development and Individual Share Ownership.' (2000) Available at https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/2668393.pdf (accessed 14 July 2022) 2.
[212] Dewenter, K.,& Malatesta, P.H., 'Public offerings of state-owned and privately-owned enterprises: An international comparison' (1997) Journal of Finance 52 (4) 1661.
[213] Dewenter, K.,& Malatesta, P.H., 'Public offerings of state-owned and privately-owned enterprises: An international comparison' (1997) Journal of Finance 52 (4) 1661.
[214] Vertmooten, J, 'Options for the restructuring of the state ownership of South African Airways' (2018), Journal of Transport and Supply Chain Management 12(0), a412, 3.
[215] Dewenter, K.,& Malatesta, P.H., 'Public offerings of state-owned and privately-owned enterprises: An international comparison' (1997) Journal of Finance 52 (4) 1663.

After issuing the primary shares through an IPO, the state must additionally commit to listing the parastatal(s) on a stock exchange institution.[216] However, it should be noted that there is a debate surrounding this approach, as some scholars firmly believe that in order for SIP to be successful, SOEs must be listed on international stock exchanges, whereas other have noted that states tend to sell their SOEs to domestic investors in order to gain political advantage.[217]

Fantini and Scarpa strongly encourage emerging economies to list SOEs on multinational stock exchanges.[218] They note that one of the benefits of doing so is that developing economies get to be exposed to the global economic system; and that since developing nations typically have limited access to bank financing, going global with SOEs benefits these nations.[219] Biais and Perotti note that the government chooses to issue shares to domestic investors rather than international investors since doing so can boost domestic public support for market-oriented policies.[220]

Based on the above scholars' observations the study does not attempt to take a position on the scholars' dispute, but to significantly contribute to this debate. The dissertation suggests that it would be good for South Africa if it were to privatise SOEs through SIP and consider listing its SOE shares on international stock exchanges. This is because South Africa's SOEs have been damaged by their failure to sustain themselves financially. They are dependent on financial backing from government, which puts financial pressure on taxpayers. As a result, listing South Africa's SOEs on international stock exchanges may attract wealthy investors, which in turn might ensure SOEs' monetary independence from the government. Positioning SOEs on an international platform would also improve governance of SOEs, because the governance of SOEs would have to conform to international good practice. International investors could also bring the essential capabilities for the oversight of SOEs. More significantly both government and foreign investors will share interest on the returns of the SOEs.

This study is aware of the history of South African inequities and lack of opportunities. The study also fully agrees that, should the government denationalise the parastatals, they should also be listed on local stock exchanges. For instance, if government were to list these firms on the Johannesburg Stock Exchange (JSE), an exchange institution in Africa, South Africa's investors would have the opportunity to buy their shares. This would allow the government to guarantee that domestic investors are considered in the ownership of these SOEs. Most significantly, such economic transformation will garner public support.

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[216] Jia, J, Sun, Q & Tong, W.H.S 'Privatization through an Overseas Listing: Evidence from China's H-Share Firms' (2005) Financial Management, Autumn, 2005, Vol. 34, No. 3 7.
[217] Bortolotti, B., Fantini, M & Scarpa, C. 'Why Do Governments Privatize Abroad?' (2002) International Review of Finance, 3:2, 133 -134.
[218] Bortolotti, B., Fantini, M & Scarpa, C. 'Why Do Governments Privatize Abroad?' (2002) International Review of Finance, 3:2, 132.
[219] Bortolotti, B., Fantini, M & Scarpa, C. 'Why Do Governments Privatize Abroad?' (2002) International Review of Finance, 3:2, 132.
[220] Biais, B. & Perotti, E. 'Machiavellian Privatization,' (1997) American Economic Review 92, 252.

Such privatisation demands a unification strategy, where both international and domestic investors are offered the opportunity to engage in the purchase of a stake in these SOEs. This will assist good governance by bringing diverse shareholders with different understandings of good governance under one roof to ensure that the oversight of SOEs is effective. The JSE would play a vital role in ensuring that these listed privatised SOEs comply with corporate governance principles, as the exchange has rules that seek to strengthen South African companies listed on their stock exchange. For instance, JSE rules require that listed companies that are not performing well financially be delisted from the JSE.[221] Any shareholders at risk of deregulatory action would want guarantees that the appointment and removal of board members, the handling of incumbent bids, and the compensation of operation officer holders are done in accordance with the law.

Lastly, it should be noted that SIP is a transparent procedure that is unlikely to unfairly distribute shares to government-affiliated individuals or entities, since all participants are on the same level.[222]

3.4.2 Private sale of shares: Strategic equity partnership (SEP)

The chapter has so far revealed that parastatals can be privatised through SIP, which entails the state listing the SOE's shares on a stock exchange for private investors to purchase a stake. The study will now examine the partial or complete private sale of shares through SEP as an additional method open to nations that seek to deregulate and privatise SOEs.

Under the private sale of shares method, the state sells the entire or a portion of its shares in a wholly or partially SOE to a single buyer or group of purchasers who have been chosen beforehand.[223] Unlike the SIP, which requires the government to sell SOE shares to the public through PIPO, this technique allows the government to pre-identify an individual or group of investors to whom they would sell the shares. The sole similarity between this method and the SIP is that the government can sell these shares in whole or in part. In addition, private sale of shares method transactions can take numerous forms, including a direct acquisition by another private corporation or a private placement aimed at a specified group, such as institutional investors.[224] It is said that the government may find it advisable to sell to a preselected buyer without competitive bidding.[225] Officials may determine that additional bidding is unnecessary if a good strategic investor has submitted a bid that fulfils the government's price and other standards.[226] So it would be accurate for the study to submit that this form of privatisation enables government to carefully explore a potential private partner or partners with whom the

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[221] JSE Limited Listings Requirements.
[222] Jones, S., L., Megginson., Nash, R., C., & Netter, R. C. 'Share issue privatizations as 'financial means to political and economic ends' (1999) Journal of Financial Economics 53 240.
[223] Vuylsteke.C, Techniques of privatization of state- owned enterprises Washington (D.C) (1988), 16.
[224] Vuylsteke.C, Techniques of privatization of state- owned enterprises Washington (D.C) (1988), 16.
[225] Vuylsteke.C, Techniques of privatization of state- owned enterprises Washington (D.C) (1988), 16.
[226] Berg, A & Berg E 'Methods of Privatization' (1997) Journal of International Affairs Editorial Board Vol. 50, No. 2, 369.

state may desire to share control ownership rights of the parastatal if the government does not intend to sell the entire shareholding.

The evaluation of the aforementioned methods of privatisation aims to determine which form South Africa has adopted, or rather has been employing, in the privatisation of certain of its SOEs. The study is certain that the South African government has been utilising the private sale of shares in parastatals. In the context of South Africa, this type of privatisation is known as SEP. It is important for the study to also mention the fact that SEP has not been well studied within the laws of privatisation, and so the study will attempt to unpack it to the best of its ability.

In the context of privatisation, a strategic partnership is a privatisation model based on an institutional link between the government and international corporations as strategic investors.[227] The fundamental objective of strategic partnerships is to acquire funding, boost productivity, and enhance professional management, among other things.[228] Strategic equity partnerships and the private sale of shares have similar definitions. They allow the state to carefully search for a strategic partnership with which it wants to participate in the shareholding of the company. However, it must be noted that SEP in the South African context is not only limited to international investors, as will be discussed later in the chapter.

In an attempt to unpack SEP in order for the study to prove the argument that it fits with the private sale of shares method, the study will have to examine the process by which SOEs are privatised through SEP.

These are the following features of SEP:

- **Consortium:** A consortium is a group of two or more people, companies, or governments working together to accomplish a common objective.[229] Entities that participate in a consortium share resources but have sole responsibility for the obligations stipulated in the consortium agreement.[230] Typically, in a strategic partnership, risks, profits, losses, and governance are shared by two or more partners.[231] In the privatisation context, a consortium could be considered as group of private

[227] Mujezinovic, S 'Strategic Partnership As A model Of Privatisation Under Serbia's Privatisation Law' Available at https://www.mondaq.com/investment-strategy/823308/strategic-partnership-as-a-model-of-privatisation- under-serbia39s-privatisation-law (accessed 03 September 2022).
[228] Mujezinovic, S 'Strategic Partnership As A model Of Privatisation Under Serbia's Privatisation Law' Available at https://www.mondaq.com/investment-strategy/823308/strategic-partnership-as-a-model-of-privatisation- under-serbia39s-privatisation-law (accessed 03 September 2022).
[229] Kenton, W 'Consortium' Available at https://www.investopedia.com/terms/c/consortium.asp (accessed 3 September 2022).
[230] Kenton, W 'Consortium' Available at https://www.investopedia.com/terms/c/consortium.asp (accessed 3 September 2022).
[231] Kenton, W 'Consortium' Available at https://www.investopedia.com/terms/c/consortium.asp (accessed 3 September 2022).

investors having the needed resources and operational expertise to strategically invest in sectors of their interest.[232]

- For instance, in South Africa the Minister of Public Enterprises, in seeking to deregulate South African Airways (SAA), entered into a consortium agreement with a group company called Takatso, for it to acquire some of the shares in SAA as a means of privatising the parastatal.[233] A consortium is one form that proves that SEP is similar to the private sale of the shares of parastatals. Most importantly, it allows the state to strategically search for a preferred individual or group of investors it intends to sell the shares to, whether wholly or partially. Through this consortium, the government disposes of these shares not to the public, but through private sale. However, this does not stop the privatised parastatals from being listed in the future.[234]
- **Equity ownership:** Private sale of parastatal shares through the private sale of shares method can be partial or complete, depending on the government's privatisation goals. If the state decides to participate in partial privatisation of shares, the state and its private strategic investors will share ownership of the parastatals. Strategic Equity encompasses this type of partial privatisation as well. This means that either the private investor or the government will determine who will own the majority or minority of shares in the privatised parastatal. This is evidenced by the recent privatisation of the SAA, in which the Takatso consortium acquired 51% of the parastatal, and the government retained 49%.[235] This simply means that the state and private investors will share the equity of the parastatals through the private sale of shares and a strategic equity partnership following partial privatisation.

One of the primary objectives of this chapter was to outline some privatisation techniques that can be employed by a state seeking to decentralise SOEs under government ownership. The study has managed to analyse the privatisation methods available for countries when engaging in the privatisation of SOEs. The dissertation has analysed the SIP and SEP approaches. The reason for the examination of these two methodologies is to answer the dissertation's primary question, which is whether privatisation could be the solution for some struggling South African SOEs. The study argues that South African policy-makers must explore the privatisation of SOEs in order to achieve mixed ownership. What is evident at this stage is that

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[232] South African Government (2022) Minister Pravin Gordhan clarifies term of disposal of 51% stake in SAA SOC LTD. 12 May 2022. Available at https://www.gov.za/speeches/minister-pravin-gordhan-clarifies-terms-disposal-51-stake-saa-soc-ltd-12-may-2022-0000 (accessed 3 September 2022).
[233] Engineering News 'Takatso Consortium Remains Committed to SAA acquisition' Available at https://www.engineeringnews.co.za/article/takatso-consortium-remains-committed-to-saa-acquisition-2022- 08-15/rep_id:4136 (accessed 05 September 2022).
[234] South African Government (2022) Minister Pravin Gordhan clarifies term of disposal of 51% stake in SAA SOC LTD. 12 May 2022. Available at https://www.gov.za/speeches/minister-pravin-gordhan-clarifies-terms-disposal-51-stake-saa-soc-ltd-12-may-2022-0000 (accessed 3 September 2022).
[235] African Business 'Consortium buys 51% of South African Airways' Available at https://african.business/2021/06/trade-investment/takatso-consortium-buys-south-african-airways-stake/ (accessed 05 September 2022).

should South Africa engage in privatisations of parastatals, it would be crucial for policy-makers to carefully choose the model of privatisation used.

The study has so far demonstrated that it prefers SIP over SEP. The following section of this chapter is devoted to a case study of South Africa's past and present privatisation efforts. This section will examine the failures and successes of South Africa's privatisation in depth. In addition, it will serve as a guide for the dissertation's recommendations regarding the form of privatisation South Africa should employ in the future.

The only way to arrive at such recommendations is for the next section to focus on the methods South Africa used in privatising Telkom and SAA, two of the largest SOCs in South Africa to have been privatised. The following section also seeks to determine whether, in cases where South Africa has privatised SOEs, the corporate governance of the SOEs improved and whether such SOEs are positively contributing to the economy of the country.

3.5 Critical analysis of South Africa's privatisation of SOEs

There have been a number of interesting cases of privatisation of parastatals in South Africa, with some being fully or partially privatised.[236] Despite the fact that these privatisations occurred in different circumstances and time periods,[237] examining them will not only benefit this thesis, but also provide South African policy-makers with sufficient evidence to decide whether or not to privatise.

For the purposes of this dissertation, this section of the chapter will examine only partially privatised SOEs. One of the questions this thesis seeks to answer is whether privatisation could save and improve the corporate governance of failing parastatals. The thesis also argues that if South African policy-makers were to privatise SOEs, a partial privatisation model that invites private investors could be one of the solutions for dismantling the line ministers' centralisation of ownership. In order to investigate the mixed ownership of SOEs, this section will focus exclusively on partially privatised parastatals. The Telkom and SAA SOEs will be examined because they are the most noteworthy parastatals to have undergone partial privatisation in South Africa.

3.5.1 Telkom: History and process of privatisation

Telkom SA SOC (Telkom SA) is one of South Africa's most prominent telecommunications service providers.[238] It was founded in 1991, when the Department of Post and

[236] News24 'Iscor. Sasol. Telkom. Here's what history taught us about privatisation' Available at https://www.news24.com/citypress/voices/iscor-sasol-telkom-heres-what-history-taught-us-about-privatising-parastatals-20181112 (accessed 1November 2022).
[237] News24 'Iscor. Sasol. Telkom. Here's what history taught us about privatisation' Available at https://www.news24.com/citypress/voices/iscor-sasol-telkom-heres-what-history-taught-us-about-privatising-parastatals-20181112 (accessed 1November 2022).
[238] Market Screener 'Telkom SA SOC Limited (TKG)', available at https://www.marketscreener.com/quote/stock/TELKOM-SA-SOC-LIMITED-1413419/company/ (accessed 2 December 2022).

Telecommunications that existed prior to the end of apartheid was abolished.[239] Subsequently, under the post-apartheid government, Telkom was separated from the South African Post Office, as both SOEs were commercialised.[240] Telkom was then incorporated in accordance with the old Companies Act 61 of 1973 and in accordance with the Telkom MOI as a public liability company, and remained wholly government-owned.[241]

Telkom SA was the largest telecommunications company to be partially privatised in 1991. As a demonstration of its commitment to globalisation and foreign investment, the ANC government sold 30% of Telkom's shares through a consortium agreement with Telkom Malaysia and SBC communication.[242] With 70% of Telkom's shares, the government remained Telkom's largest shareholder.[243] This dissertation must acknowledge that it was crucial for the South African government to commercialise Telkom SA prior to initiating the privatisation project. The chapter also notes that, after transforming Telkom SA into a public company, the South African government carefully privatised a portion of this parastatal through SEP. The state then introduced what this thesis refers to as a mixed ownership when it sold 30% of Telkom shares to foreign investors, as this examination demonstrates. It could be argued that, by inviting foreign shareholders, they intended to align the parastatal with international standards of corporate governance, which was one of the reasons they opted for foreign shareholders.

The South African government entered a second phase in 2002, when Telkom SA was privatised. This time, the government informed the public of its intention to partially privatise the parastatal through the use of SIP.[244] In other words, the state intended to list Telkom through an IPO,[245] which is the model advocated by this thesis for reviving South Africa's current struggling SOEs. In fact, the Minister of Public Enterprise, Jeff Radebe, announced in 2003 that 20% of Telkom shares would be made available on the public market by listing Telkom shares on the New York Stock Exchange and the JSE, the primary stock exchanges.[246] It is believed that one of the reasons the South African government entered the second phase of partially privatising Telkom SA was to signal its commitment to liberating the economy and

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[239] Staff Writer 30 Years of Telkom. Available at https://mybroadband.co.za/news/telecoms/416282-30-years- of-telkom.html (accessed 02 December 2022).
[240] Barber, J., Fung, A., Toshniwal, S., Voorheis, B & Harvey, C., R. (1991), 'Telkom South Africa' Emerging Market Quarterly. Available at https://www.academia.edu/11198780/Telkom_South_Africa (accessed 2 December 2022) 1.
[241] Barber, J., Fung, A., Toshniwal, S., Voorheis, B & Harvey, C., R. (1991), 'Telkom South Africa' Emerging Market Quarterly. Available at https://www.academia.edu/11198780/Telkom_South_Africa (accessed 2 December 2022) 1.
[242] Daily Maverick 'Telkom's turnaround shows potential for privatising tax guzzling SOEs' Available at https://www.dailymaverick.co.za/article/2019-05-28-telkoms-turnaround-shows-potential-for-privatising-tax-guzzling-soes/ (accessed 2 December 2022).
[243] Department: Communications & Digital Technologies, Available at https://www.dcdt.gov.za/portofolio-organizations/telkom-shareholding.html (accessed 2 December 2022).
[244] News24 'Govt Kicks off Telkom IPO' Available at https://www.news24.com/fin24/govt-kicks-off-telkom-ipo- 20021003 (accessed 2 December 2022).
[245] News24 'Govt Kicks off Telkom IPO' Available at https://www.news24.com/fin24/govt-kicks-off-telkom-ipo- 20021003 (accessed 2 December 2022).
[246] News24 'Govt Kicks off Telkom IPO' Available at https://www.news24.com/fin24/govt-kicks-off-telkom-ipo- 20021003 (accessed 2 December 20022).

attracting foreign investors, so that the parastatal could meet international telecommunications standards.[247] In 2003, Telkom shareholders consisted of a mix of South African government and domestic and international investors.[248] The partial privatisation of Telkom in 2002 and 2003 provides a blueprint for policy-makers and those interested in corporate governance with a valuable case study that could potentially resolve some of the economic and governance issues currently confronting South African SOEs, like SAA and ESKOM.

The dissertation reflects on the Telkom transition that occurred from the early 1990s to the middle of the 2000s. It is evident that this parastatal can serve as a model case study for South Africa's privatisation. As previously stated, in order for the government to position telecommunications in a globalised world, it was obvious that the telecommunications company would need to be privatised. It was therefore a commendable move to partially privatise the government entity, a move that this thesis considers a significant milestone for the country's privatisation efforts. The effects of these two phases of privatisation resulted in a mixed ownership structure for Telkom SA, which is precisely what this study proposes for the current struggling SOEs. According to reports, the public and international investors were offered 20% of Telkom's stock upon its listing. It is intriguing to consider why the state initially opted for the SEP approach, and then offered public shares by listing them on the stock exchange. The limited literature that has addressed Telkom SA's privatisation is unclear as to what led to the SEP and later SIP privatisation method. From the above examination of the history of Telkom's privatisation, it is clear that the South African government's privatisation of SOEs was a crucial step in introducing a competitive industrialised market.

After dealing with Telkom's partial privatisation, it is important for the following section to examine the parastatal's post-privatisation performance, by looking at the performance of the parastatal from 2002 to the present. In addition, emphasis will be placed on Telkom's corporate governance, meaning the relationship between the shareholders and Telkom's board of directors. The Telkom procedure for appointing and removing directors and executive management also needs to be understood. Following partial privatisation, the following section will also provide a brief analysis of the sector's contribution to the South African economy.

3.5.1.1 Telkom post privatisation (performance, corporate governance structure – relationship between stakeholders)

- **Ownership structure**

As a result of Telkom SA's partial privatisation, the thesis argues that the shareholder structure of the parastatal was decentralised. According to Telkom SA's integrated report for the year ending 31 March 2022, the government directly controls 40.5% of the shares, while institutional shareholders controls 49.2%, treasury has 3.7% of the shares, and the other 6.6% of the shares are under the ownership of non-institutional shareholders.[249] What is even more

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[247] Business Technology Media Company 'IPO needed for true telecoms liberalisation, says UUNet' Available at https://www.itweb.co.za/content/LPp6VMr4djBvDKQz (accessed 2 December 2022).
[248] Giddy, I., 'The IPO Telkom South Africa Case Study' Available at https://pages.stern.nyu.edu/~igiddy/cases/telkomsa.htm (accessed 2 December 2022).
[249] Telkom SA SOC Ltd Telkom Integrated Report 2022 (2022) 154.

interesting about the Telkom integrated report is that it further breaks down the institutional shareholding by geography, with 70.6% being local shareholders and 29.4% being foreign shareholders.[250] Two things can be appreciated from the Telkom SA share allocation. The government is a minority shareholder, although it indirectly controls 14.8% institutional shareholding under the control of the Public Investment Corporation (PIC). This is a parastatal under the Minister of Finance that manages government assets wholly owned by the government.[251] This on its own is an indication that, unlike with other parastatals, the line minister of Telkom SA does not have the absolute right to make decisions on behalf of the parastatal. Furthermore, what can be appreciated from the geographical breakdown of Telkom shares is that South African investors were preferred when Telkom was privatised, and also that private investors were given opportunities. With the decentralisation of Telkom SA, and mixed ownership through SIP, the next two things that this thesis will look at are the performance of the SOC, and the legal framework that guides the appointment and removal of Telkom SA's board of directors and executive managers. This will assist the thesis to understand the gains of SIP in the context of good corporate governance.

- **Overall performance**

Reports indicate that Telkom SA, unlike other SOEs, is thriving and commercially viable.[252] Even though the SOE is partially owned by the government, it has created a successful turnaround strategy.[253] Based on their 2009 financial performance, the notion that Telkom SA could serve as a model for the privatisation of struggling SOEs such as SAA and ESKOM is raised. During the 2019 fiscal year, the parastatal was reported to have made a remarkable profit, which commentators argued would contribute to the country's fiscus, while financial records also indicated that Telkom SA was able to pay shareholders dividends and the government received R750 million in returns.[254] Malgas, who conducted research that monitored the financial performance of SOEs such as ESKOM, SAA, and Telkom, argues that Telkom SA's financial reports indicate that the parastatal has been performing well, and that it has exhibited no corporate governance weaknesses.[255]

- **Telkom SA's legal framework on the appointments of directors and executive managers**

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[250] Telkom SA SOC Ltd Telkom Integrated Report 2022 (2022) 154.
[251] Public Investment Corporation. Available at https://www.pic.gov.za/who-we-are/about-us (accessed 2 December 2022).
[252] Daily Maverick 'Telkom's turnaround shows potential for privatising tax guzzling SOEs' Available at https://www.dailymaverick.co.za/article/2019-05-28-telkoms-turnaround-shows-potential-for-privatising-tax-guzzling-soes/ (accessed 23 November 2022).
[253] Daily Maverick 'Telkom's turnaround shows potential for privatising tax guzzling SOEs' Available at https://www.dailymaverick.co.za/article/2019-05-28-telkoms-turnaround-shows-potential-for-privatising-tax-guzzling-soes/ (accessed 23 November 2022).
[254] Daily Maverick 'Telkom's turnaround shows potential for privatising tax guzzling SOEs' Available at https://www.dailymaverick.co.za/article/2019-05-28-telkoms-turnaround-shows-potential-for-privatising-tax-guzzling-soes/ (accessed 23 November 2022).
[255] Malgas, M., 'Transformation of Governance in State-Owned Companies: Case of South Africa as a Developing Country' (2021) Achieves of Business Research, Vol9(7) 167.

To understand the legal procedures governing the appointment and removal of board members and executive managers of Telkom SA, this thesis will briefly revisit the exercise that was conducted in chapter 2. There, SOCs were defined as businesses enterprises incorporated in terms of the Companies Act.[256] Telkom as a SOC is governed by the Companies Act, and therefore appointments and removals of the board of directors are done by Telkom SA shareholders. Since Telkom SA has a mixed ownership, all shareholders, through sections 57, 61 and 71 of the Companies Act, are offered the opportunity to attend shareholders meeting, where they get to appoint and remove directors.

In 1991, when the government began the process of privatising Telkom SA, and with the introduction of PFMA, the SOC was listed under PFMA schedule 2, as the government was the entity's largest shareholder.[257] Consequently, following the second and third phases of privatisation in 2002 and 2003 and the subsequent listing of Telkom SA on the JSE, the government was no longer the entity's largest shareholder.[258] In 2003, however, the JSE granted the government extraordinary rights to appoint the board chairperson and six directors of Telkom SA for a period of eight years, in accordance with Telkom SA's memorandum of incorporation.[259] Telkom SA, however, had requested that the entity be exempt from a number of PFMA provisions. Interestingly, the line minister was granted the authority to designate the chairperson and board of directors of Telkom SA for a period of eight years, despite the fact that Telkom SA was privatised during this time. In addition, Telkom SA was exempt from the application of certain PFMA Act provisions.

For a period of eight years, the Telkom SA line minister was designated as the appropriate individual to appoint and remove directors and the chair of Telkom SA. Telkom SA was exempted from certain provisions of the PFMA Act. Telkom SA further applied for delisting from the PFMA in 2013, arguing that, since the government was no longer the majority shareholder, the partially privatised SOC should be completely be exempted from applying the PFMA.[260] In response to the request, the Public Enterprise minister in 2013 published two exemptions in the government gazette.[261] The first exemption further exempted the entity from the applicability of certain PFMA provisions, and in that December, Telkom was completely delisted from the PFMA.[262] The government delisted Telkom from schedule 2 of the PFMA for

[256] Section 1 of the Companies Act
[257] ITWeb Business Technology Media Community, 'Telkom now free of 'rigid legislation' Available at https://www.itweb.co.za/content/KrxP3jqB8p57A2ye (accessed 31 May 2023).
[258] ITWeb Business Technology Media Community, 'Telkom now free of 'rigid legislation' Available at https://www.itweb.co.za/content/KrxP3jqB8p57A2ye (accessed 31 May 2023).
[259] IOL, 'Telkom exempted from the laws' Available at https://www.iol.co.za/business-report/companies/telkom-exempted-from-laws-2044745 (accessed 31 May 2023).
[260] IOL, 'Telkom exempted from the laws' Available at https://www.iol.co.za/business-report/companies/telkom-exempted-from-laws-2044745 (accessed 31 May 2023).
[261] Department of Public Enterprises (South Africa)2013. Public Finance Management Act (1/1999) Exemption in terms of section 92—Telkom SA SOC. (Notice NO 985). Government Gazette 37123 13 December.
[262] Department of Public Enterprises (South Africa)2013. Public Finance Management Act (1/1999) Exemption in terms of section 92—Telkom SA SOC. (Notice NO 985). Government Gazette 37123 13 December.

as long as Telkom SA was listed on the JSE, and for as long as the state did not control the majority of the company.[263]

As a result of these developments and Telkom SA's delisting from schedule 2 of the PFMA, the procedure for appointing and removing board members is not governed by the PFMA, but by the entity's shareholders. Consequently, this thesis asserts that PFMA has no application to Telkom's corporate governance, and that the line minister lacks the absolute authority to appoint and remove the board of directors and executive managers, as these are powers governed by the Companies Act. This argument is strengthened by the 2022 Telkom 30th Annual General Meeting (AGM), at which new directors of Telkom SA were to be appointed. Certain board members were reappointed by the majority shareholder for a second term on the grounds that they possessed the requisite skills to lead the SOC.[264]

However, the minister at the time, Khumbudzo Ntshavheni, who was the majority shareholder but did not have an absolute shareholding right, voted against the preferred candidates.[265] Nevertheless, those shareholders who supported the re-appointment of the board of directors adopted the resolution, despite the fact that the line minister had opposed the candidates.[266] This is a clear indication that the corporate governance of Telkom SA, which is based on the Companies Act and PFMA for the appointment of directors, is effective, as directors are not appointed unilaterally by the line minister. Consequently, this thesis contends that privatisation through SIP appears to improve the corporate governance of SOEs, while also fostering a culture of transparency and accountability. Furthermore, through SIP, Telkom SA has managed to negotiate an exit from the regulation of the PFMA. This has not only enhanced the corporate governance of SOEs, but also decentralised the ownership of Telkom SA.

As was argued in chapter 2 of this thesis, the Companies Act does not define executive managers of companies nor does it provide a procedure for the appointment and removal of executive managers. However, with the guidance of section 66, which grants the board of directors the powers to remove a board of directors, and the fact that the board is entrusted with the operations and the governance tasks of SOCs, boards of directors are the correct stakeholders to appoint and remove executive managers.[267] It would be correct to state that the appointment and removal of Telkom SA executives are powers that are given to the board. To strengthen this argument, Telkom SA has recently adopted a 2023 Board Charter (Charter). The charter begins by handing the management of the SOC to the Telkom SA board, subject to

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[263] Department of Public Enterprises (South Africa)2013. Public Finance Management Act (1/1999) Exemption in terms of section 92—Telkom SA SOC. (Notice NO 985). Government Gazette 37123 13 December

[264] South African Government, 2022 Minister Khumbudzo Ntshavheni on the outcome of the 30th Annual General Meeting (AGM of Telkom) Available at https://www.gov.za/speeches/statement-minister-communications-and-digital-technologies-outcome-30th-annual-general (accessed 31 May 2023).

[265] South African Government, 2022 Minister Khumbudzo Ntshavheni on the outcome of the 30th Annual General Meeting (AGM of Telkom) Available at https://www.gov.za/speeches/statement-minister-communications-and-digital-technologies-outcome-30th-annual-general (accessed 31 May 2023).

[266] South African Government, 2022 Minister Khumbudzo Ntshavheni on the outcome of the 30th Annual General Meeting (AGM of Telkom) Available at https://www.gov.za/speeches/statement-minister-communications-and-digital-technologies-outcome-30th-annual-general (accessed 31 May 2023).

[267] Section 66 of the Companies Act.

restrictions imposed by the Companies Act, JSE rules, and the MOI.[268] Additionally, the charter stipulates that the Telkom board and its board committees are entirely responsible for all executive manager appointments, as the entity has been delisted from the PFMA.[269]

Lastly, the charter encourages stakeholders' engagement between the directors and shareholders. It is provided that decisions reserved for shareholders by the Companies Act and provided by the MOI, are first considered by the board of Telkom, and provide shareholders with recommendations for consideration.[270] This is a commendable provision in the context of corporate governance stakeholders approach, because it can be argued that if the board of directors of Telkom takes part in recommending to the shareholders who should be on the board, this means that all stakeholders are considered during corporate decision-making.

What can be appreciated about the privatisation of Telkom through SIP is that the SOC has a solid legal framework that governs the appointment and removal of the board of directors and the executive management. What has also been shown is that, although Telkom is governed by multiple legislation examined above, they do not overlap, but rather complement each other. The roles of shareholders and the board of directors of Telkom are well governed, and are in line with the principles of the OECD Guidelines and King IV sectoral principles. It must be highlighted though that, due to the scope of this thesis, only crucial legislation that governs Telkom SA, has been examined.

3.5.1.2 Case study: South Africa's experience of the privatisation of SAA

There is limited reported literature on the establishment of SAA, and on the privatisation that took place in the early 1990s to the 2000s. However, SAA was once a privately owned company, established by Union Airways in 1929.[271] In 1932 the apartheid government nationalised Union Airways, and the airline was renamed SAA.[272]

After the apartheid regime, SAA became a Transnet subsidiary fully owned by the state.[273] It is reported that in the early 1990s, the airline re-entered the open market at the end of anti-apartheid sanctions.[274] It should be noted that the dissertation is not concerned about the state of SAA before the democratic dispensation. This section serves merely as the background to the establishment of SAA.

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[268] Telkom SA SOC Ltd, Board Charter Available at https://group.telkom.co.za/ir/Governance/Governance.shtml (accessed on 26 April 2023).
[269] Telkom SA SOC Ltd, Board Charter Available at https://group.telkom.co.za/ir/Governance/Governance.shtml (accessed on 26 April 2023). 271
[270] Telkom SA SOC Ltd, Board Charter Available at https://group.telkom.co.za/ir/Governance/Governance.shtml (accessed on 26 April 2023).
[271] Chilenga, A State-Owned Enterprise: A policy Analysis of South African Airways (SAA) (Unpublished master's thesis, University of KwaZulu Natal,2016) (2016) 43.
[272] Chilenga, A State-Owned Enterprise: A policy Analysis of South African Airways (SAA) (Unpublished master's thesis, University of KwaZulu Natal,2016) (2016) 43.
[273] News 24 'SAA Privatization regresses' available at https://www.news24.com/fin24/saa-privatisation-regresses-20020512 (accessed 23 November 2022).
[274] Chilenga, A State-Owned Enterprise: A policy Analysis of South African Airways (SAA) (Unpublished master's thesis, University of KwaZulu Natal,2016) (2016) 43.

3.5.1.3 SAA SEP privatisation (ongoing privatisation)

In mid-2021, the South African government announced to the public that they had reached consensus on privatising the majority of SAA's assets through a consortium.[275] In an online media briefing, the Minister of Public Enterprise announced: 'Having evaluated the current environment, the government has agreed to the (strategic equity partnership), owning of 51% of the shareholding and government 49'.[276] Having examined the two methods of privatisation, it is clear that SAA was to be privatised through SEP since the government announced that the privatisation would be through a consortium.

The reasons for privatising this parastatal range from its poor financial performance corporate governance to fraud, political interference and huge debts. In 2020 it was reported that SAA was struggling to keep its operational activities going, and that the state had to approach banks for a 12-billion-rand loan in order to sustain SAA.[277] SAA was also at the centre of corruption and political interference. The Minister of Public Enterprise testified in the state capture commission that the ex-chairperson of board of directors, Dudu Myeni, had forcefully terminated a lucrative route and given the SAA route to the Indian airline Jet Airways, for the benefit of the Gupta family.[278] SAA's financial reports indicate that the airline has repeatedly failed to balance its assets and liabilities, and, most devastatingly, SAA last recorded a profit in 2011.[279] C0nsidering SAA's unappealing state, it was commendable for the government to turn to privatisation of the parastatal.

After the announcement of the plans to privatise the parastatal, the Department of Public Enterprise announced Takatso consortium as its preferred strategic partner.[280] The department stated that this was a negotiated partnership, and that the rationale for their choice of Takatso was based on the fact that they had the required capital to reinvent SAA.[281] It was also stated that Takatso consortium partnership would augment the finance and technology that was required by SAA.[282] In the joint media briefing, the CEO of Takatso, the majority (51%) shareholders, said the consortium would bring their long-standing aircraft and operational

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[275] CGTN 'Government agrees to Privatize South Africa Airways' Available at https://africa.cgtn.com/2021/06/11/government-agrees-to-privatize-south-african-airways/ (accessed 23 November 2022).
[276] Write for Wion 'South Africa agrees to privatise South African Airways' Available at https://www.wionews.com/world/south-africa-agrees-to-privatise-south-african-airways-391005 (accessed 23 November 2022)
[277] Business Insider SA 'EXPLAINER: How SAA landed in such a mess' Available at EXPLAINER: How SAA landed in such a mess | Business Insider (accessed 23 November 2022).
[278] Business Insider SA 'EXPLAINER: How SAA landed in such a mess' Available at EXPLAINER: How SAA landed in such a mess | Business Insider (accessed 23 November 2022).
[279] Business Tech 'SAA Counts R16 Billion in losses over three years' Available at https://businesstech.co.za/news/government/398403/saa-counts-r16-billion-in-losses-over-three-years/ (accessed 23 November 2022).
[280] South African Government (2021). Minister Pravin Gordhan announces preferred strategic equity partner for SAA SOC LTD (accessed 23 November 2022).
[281] South African Government (2021). Minister Pravin Gordhan announces preferred strategic equity partner for SAA SOC LTD (accessed 23 November 2022).
[282] South African Government (2021). Minister Pravin Gordhan announces preferred strategic equity partner for SAA SOC LTD (accessed 23 November 2022).

experience, and the required capital, to revive SAA.[283] It was stated that government would carry the historical debt that SAA had, and that the finalisation of SAA's privatisation would be conducted after due diligence had been conducted by the Takatso consortium.[284]

Reflecting on the choice of privatisation, one might think that the strategic partner was chosen because it was suitable. At the time of this writing a year later, it is disappointing that the privatisation of SAA has not been finalised. Various media reports give different reasons for the delay.

For instance, a letter written to the editor of IOL lambasted the privatisation efforts of SAA, calling it a 'false privatisation'. The letter alleged that the majority of the shareholders of Takatso consisted of former Cabinet ministers and their family members, close to the ANC, thus questioning the credibility of the deal.[285] The former CEO of Takatso publicly announced his resignation from the consortium just 18 months after the deal was struck to privatise SAA.[286] The former CEO accused the majority shareholders of concealing information pertaining to the SAA privatisation deal, stating that as a board member and CEO of the consortium, he had a fiduciary duty to access information, and was being kept in the dark to the detriment of his duties.[287]

The deal between government and Takatso has also been under scrutiny. This was seen when Toto Investment Holdings filed for an interdict to halt the finalisation of the sale between Takatso and government.[288] Toto Investment Holdings is one of the consortiums that had

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[283] South African Government (2021). Minister Pravin Gordhan announces preferred strategic equity partner for SAA SOC LTD (accessed 23 November 2022).

[284] South African Government (2021). Minister Pravin Gordhan announces preferred strategic equity partner for SAA SOC LTD (accessed 23 November 2022).

[285] IOL, 'Letter to the Editor: SAA's 'false privatisation'' Available at https://www.iol.co.za/business-report/opinion/letter-to-the-editor-saas-false-privatisation-fead4a60-4e25-4192-8db5-4b769a186e20 (accessed 23 November 2022).

[286] Daily Maverick ' SAA privatisation in a tailspin as key player Gidon Novick resigns' Available at https://www.dailymaverick.co.za/article/2022-11-14-saa-privatisation-in-a-tailspin-as-key-player-gidon- novick-resigns/?utm_medium=email&utm_campaign=New%20Template%20for%20Business%20Maverick_15%20November%202022_Tuesday_Nedbank&utm_content=New%20Template%20for%20Business%20Maverick_15%20November%202022_Tuesday_Nedbank+CID_8bd7f7f5fd71d85db8587d850b20dcf6&utm_source=TouchBasePro&utm_term=SAA%20privatisation%20in%20a%20tailspin%20as%20key%20player%20Gidon%20Novick%2 0resigns (accessed 23 November 2022).

[287] Daily Maverick ' SAA privatisation in a tailspin as key player Gidon Novick resigns' Available at https://www.dailymaverick.co.za/article/2022-11-14-saa-privatisation-in-a-tailspin-as-key-player-gidon- novick-resigns/?utm_medium=email&utm_campaign=New%20Template%20for%20Business%20Maverick_15%20November%202022_Tuesday_Nedbank&utm_content=New%20Template%20for%20Business%20Maverick_15%20November%202022_Tuesday_Nedbank+CID_8bd7f7f5fd71d85db8587d850b20dcf6&utm_source=TouchBasePro&utm_term=SAA%20privatisation%20in%20a%20tailspin%20as%20key%20player%20Gidon%20Novick%2 0resigns (accessed 23 November 2022).

[288] Daily Maverick ' The private (not public) lid may be lifted on the details of the sale of SAA' Available at https://www.dailymaverick.co.za/article/2022-10-04-the-private-not-public-lid-may-be-lifted-on-the-details- of-the-sale-of-saa/?utm_medium=email&utm_campaign=New%20Template%20for%20Business%20Maverick_Wednesday%2005%20October%202022_APS&utm_content=New%20Template%20for%20Business%20Maverick_Wednesd ay%2005%20October%202022_APS+CID_e686f15abea2b51f85f75b7251ce660f&utm_source=TouchBasePro &

submitted their bids but were rejected by the Department of Public Enterprise with no explanation.[289] Since no explanations had been provided by the department, the consortium approached the Western Cape High Court to request details of the confidential deal between the department and Takatso. The consortium's application to the high court was to request two things, first to interdict the sale of SAA to Takatso Consortium, and secondly to compel the Public Enterprise Minister to disclose the confidential documents concerning the sale of SAA to Takatso Consortium by the Minister of Public Enterprise.[290] Judge Nathan Erasmus dismissed the request to interdict the sale of SAA to Takatso. However, in his judgment, he compelled the Minister of Public Enterprise to release the confidential documents detailing the sale of SAA to all the parties involved in the litigation.[291]

The above shows that the SEP privatisation method has its own shortfalls. What is even more interesting is that South Africa continues to opt for this form of privatisation, although it is not the first time that it had encountered problems with this form of privatisation. In 1999, the same Department of Public Enterprise entered into a strategic partnership with Swissair, resulting in that company purchasing 20% of SAA's shares. However, due to financial challenges, the consortium sold the 20% back to the SA government.[292] This on its own was a step back for South Africa's commendable privatisation efforts. It is clear that this form of privatisation is not the right way to privatise SOEs, especially in a country like South Africa which has parastatals that are in dire need of capital and of corporate governance rescue. It should also be noted that this form of privatisation is not transparent when compared to SIP For example, the CEO of Takatso had to leave because of the secrecy and the bullying by majority shareholders. Lastly, the SAA SEP privatisation with Takatso has already been lambasted for the presence of individuals close to the ANC. What makes this worse is that the minister had to be taken to court to release the documents concerning the selection of the consortium of choice.

This section of the chapter concludes the examination of the two selected methods of privatisation, it goes without saying that SIP is the preferred method. This is not only based on

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utm_term=The%20private%20not%20public%20lid%20may%20be%20lifted%20on%20the%20details%20of%2 0the%20sale%20of%20SAA (accessed 24 November 2022).

[289] Daily Maverick 'The private (not public) lid may be lifted on the details of the sale of SAA' Available at https://www.dailymaverick.co.za/article/2022-10-04-the-private-not-public-lid-may-be-lifted-on-the-details- of-the-sale-of-saa/?utm_medium=email&utm_campaign=New%20Template%20for%20Business%20Maverick_Wednesday%2005%20October%202022_APS&utm_content=New%20Template%20for%20Business%20Maverick_Wednesd ay%2005%20October%202022_APS+CID_e686f15abea2b51f85f75b7251ce660f&utm_source=TouchBasePro& utm_term=The%20private%20not%20public%20lid%20may%20be%20lifted%20on%20the%20details%20of%2 0the%20sale%20of%20SAA (accessed 24 November 2022).

[290] News24. 'Court compels Gordhan to provide confidential documents on SAA sale' Available at https://www.news24.com/fin24/economy/court-compels-gordhan-to-provide-confidential-documents-on- saa-sale-20221003 (accessed 24 November 2022).

[291] News24 'Court compels Gordhan to provide confidential documents on SAA sale' Available at https://www.news24.com/fin24/economy/court-compels-gordhan-to-provide-confidential-documents-on- saa-sale-20221003 (accessed 24 November 2022).

[292] City Press. 'The greatest SAA debate' Available at https://www.news24.com/citypress/business/the-great-saa-debate-20160309 (accessed 25 November 2020).

the theory that was examined earlier in the chapter. It is based on the fact that South Africa once used the SIP method of privatisation when it privatised Telkom. Based on the analysis of Telkom's performance, the privatisation has been reported to have contributed to the enhancement of the company's corporate governance and financial performance. What is not clear though, is why the country did not use the same approach with SAA.

3.6 Conclusion

The objectives of this chapter were to assist with answering the main question of this dissertation, which is whether the transformation of South Africa's parastatals could be better brought about through privatisation or mixed ownership. The chapter has gathered enough evidence to show that there is no hope for the rescue of these parastatals through legislation in its current form. This chapter then looked at the possibility of privatisation as a solution. What the analysis showed was that if a country is committed to privatisation, this does offer a variety of solutions to SOEs plagued by poor corporate governance and financial performance. The chapter also noted the role played by privatisation in decentralising the state ownership of SOEs by bringing in the private sector to participate in the shareholdings of the parastatals. Privatisation can be full or

partial, where the state sells shares to the private sector through listing them on the stock exchange. What has also been shown in the chapter is that for a country to achieve successful privatisation, the method of privatisation is important, as was discussed above. Having examined the recent privatisations of SAA through SEP, and of Telkom through SIP, it is clear that SIP is the better method of privatisation. This is based on the fact that Telkom SA, since it was privatised, continues to perform well when compared with other SOEs. Most importantly, what has been discovered in the writing of this thesis is that the Telkom governance framework not only decentralised ownership of the entity, but that the legal framework that guides the appointment of board of directors is neither fragmented nor overlapping.

This chapter has gathered valuable information about privatisation which shows that privatisation does indeed have a role in assisting and enhancing parastatals, while ensuring that state ownership is decentralised. The next chapter seeks to examine China as a country that has radically privatised its SOEs through SIP. What is intended in the next chapter is to examine some of the challenges and successes of the Chinese privatised SOEs, and to see what lessons South Africa could learn from these.

Chapter 4: Lessons from China: Successes and Challenges Faced by China's Privatised SOEs

4.1 Introduction

The purpose of the previous chapter was to develop the central research question of the thesis, which is whether privatisation of the South African faltering SOEs is the answer to their problems. In order to address the primary research question, this chapter had to cover a variety of themes. The historical evolution of privatisation and the methods used were also examined, in order to comprehend what motivates a country to privatise and its choice of privatisation model. Chapter 3 considered the benefits of adopting the SIP model against that of the South African model known as the SEP model. It was concluded that if South African policy-makers were to privatise parastatals, it would be advantageous for the country to broaden its understanding of privatisation to include SIP, as it provides economic benefits, and, more importantly, appears to strengthen the corporate governance of SOEs. The chapter concluded that, after examining privatisation, it could be the potential answer to the problems of South Africa's SOEs, provided that the state is committed to such reforms.

In chapter 4, the objective is to consult the empirical literature on the obstacles and triumphs faced by China, which has committed to restructuring the ownership of SOEs by extending the ownership rights of the SOEs to private investors. The chapter acknowledges that mixed ownership reforms of SOEs have their own unique problems.[293] These should be examined, as this will contribute to the literature on the privatisation of SOEs, and mention some of the problems that South African policy-makers could possibly avoid when reforming SOEs through privatisation. The study will advocate that South Africa policy-makers should imitate some of the successes that have been enjoyed by China with regard to SOEs.

4.2 China as a case study: Reasons

As mentioned above, China will be examined regarding its successes and challenges in relation to the corporate governance of SOEs under the auspices of partial privatisation. The rationale for choosing China is because their SOEs have captured the attention of various countries globally and, most importantly, they have been reported to be effectively contributing to the economy of China.[294] According to the World Bank report, China as a developing country has the fastest sustained economic growth that has ever been observed in history.[295] Therefore, exploring the Chinese model for privatisation is critical for the study because both South Africa and China have the status of developing countries. It must be noted though that various authors

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[293] Wang, J & Tan, H, C, 'Mixed Ownership Reform and Corporate Governance in China's State- owned Enterprises' 2020 Vanderbilt Journal of Transnational Law Volume 53 1105.

[294] Varottil. U, Puchniak W.D & Han. C, T 'State-Owned Enterprises in Singapore: Historical Insights into A Potential Model for Reform' (2015) Columbia Journal of Asian Law (28) 2 62.

[295] Anthony, H.C., Arleigh. A.B & Molt.M 'Trees Don't Grow to the Sky' (2019), Center for Strategic and International Studies 139.

do not agree whether China is a developing or a developed country.[296] Because of the limitations of this study, the study will rely on the World Bank's report. It would be beneficial to South Africa to be benchmarked alongside a country that once saw its SOEs struggling because of the centralisation of the economy by the state.[297]

It is also important for this chapter to build on the previous chapter's brief examination of countries' experiences of privatisation. The examination will consider experiences of privatisation from both developing and developed countries (DC).

In determining the success and challenges of privatised SOEs in China, the following themes will guide the chapter's examination. First, there are the implications of partial privatisation, that creates a new share controlling power between the state and the private sector. Secondly there is the system deployed in appointing and removing board of directors and operational officers of SOEs. Thirdly, the chapter will also examine whether privatisation through partial privatisation in China has improved the corporate governance of SOEs and, if there have been challenges, what South Africa can learn from them.

4.3 Overview of privatisation of SOEs in developed and developing countries

Given the intricacy of privatising parastatals, the thesis contends that a developing economy like South Africa cannot utilise a blanket strategy to privatise its parastatals. In this section of the dissertation, it is essential to assess the limited literature that has addressed the privatisation of parastatals in both developing and developed countries (DC). This will assist the study to comprehend the failures, problems, and triumphs of the privatisation of SOEs in industrialised and developing nations from a broader perspective. China will be used as a case study in the thesis, to attempt to understand why it is regarded as one of the most successful countries with privatised SOEs. The examination will also be very helpful in understanding how China has dealt with the problems of privatisation.

It is asserted that privatisation initiatives in numerous developing countries (DEC) have been delayed, been inconsistent, and beset by numerous impediments.[298] The literature implies that the unfavourable economic climate is one of the greatest obstacles to the privatisation of parastatals in developing nations.[299] In addition, Parker and Kirkpatrick suggested that a part of the failures of economic reforms in DEC countries could be linked to the fragility of the internal institutions that oversee these parastatals.[300] Furthermore, it is said that DECs tend to proclaim their intentions to introduce privatisation policies, but few governments adhere to

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[296] China Power. Lampton, M., D., Wallance, J, and Conrad, B, 'Is China a Developed Country?' Available at https://chinapower.csis.org/is-china-a-developed-country/ (accessed November 2022).
[297] Yusuf, Shahid; Nabeshima, K; & Perkins, H.D Under New Ownership: Privatizing China's State-Owned Enterprise (2006) 1.
[298] Cheng, K. 'Institutional Framework of Public Utility Privatisation in Developing Countries' (2014) International Journal of Management and Innovation Volume 6 Issue 2. 73.
[299] Cheng, K. 'Institutional Framework of Public Utility Privatisation in Developing Countries' (2014) International Journal of Management and Innovation Volume 6 Issue 2. 74.
[300] Parker, D., & Kirkpatrick, C. 'Privatization in developing countries: A Review of the evidence and the policy lessons' (2003) Journal of Development Studies, Journal of Development Studies, 41:4, 513-541, DOI: 10.1080/00220380500092499 526.

such changes. The nature of private sector ownership in these parastatals relative to the function of the state is also questionable.[301]

On the other hand, DCs are more devoted to open market economic policies.[302] For instance, the OECD countries consider themselves to be more liberal, with less capital control.[303] In addition to that, countries such as the United States (US), Germany and Great Britain underwent economic reforms in the 1970s that lessened their involvement in the market, creating a better environment for the private sector.[304]

What can be gleaned from the above is that countries whose economic ideology is based on the notion that the state has a role in the control of the market are likely to have difficulties when adopting privatisation reforms. In contrast, DCs are distinguished by policies that assure the success of privatisation by fostering an open market environment that enables the private sector to compete not only freely, but also fairly. The conclusion that can be drawn from this section of the work, moving on to the individual successes and challenges of privatisation, is that, regardless of whether a country is a developed or developing nation, privatisation not only requires relevant policies to be in place for SOEs to be fully effective and efficient. It also requires the government to be committed to allowing the marketplace to open. This is only possible if policy-makers implement progressive measures. In order for developing nations to gain from privatisation in the same manner as developed nations, there must be a degree of state surrender in SOE ownership control.

The following section of this chapter will examine China's privatised SOEs. Their triumphs and difficulties will be addressed in depth.

4.4 Chinese privatisation reforms

This section will give an overview of the steps taken by China into privatisation. This acknowledges the fact that Chinese privatisation was a work in progress that required more than just selling SOEs. It also ensured that suitable economic policies for privatisation were in place. The section will also aid South Africa in understanding that privatisation can be achieved if the correct policies are put in place.

This argument is based on the fact that, in contrast to the 'big bang' reform in post-communist Eastern Europe and the former Soviet Union, the reform in China proceeded in a controlled but progressive manner.[305] The study will follow the historic chronology of China's four economic reform phases. The first stage dates back to the late 1970s and represents the substantial

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[301] Shirley, M.M, 'Bureaucrats in Business: The Roles of Privatization Versus Corporatization in State-Owned Enterprise Reform' (1999) World Development Vol.27, No 1.119.
[302] Ritingo, Lu State-owned Enterprises, Privatization and Capital Controls in Emerging and Developing Countries (Unpublished PhD Thesis. University of California2021) 4.
[303] Ritingo, Lu State-owned Enterprises, Privatization and Capital Controls in Emerging and Developing Countries (Unpublished PhD Thesis. University of California2021) 4.
[304] Ritingo, Lu State-owned Enterprises, Privatization and Capital Controls in Emerging and Developing Countries (Unpublished PhD Thesis. University of California2021) 4.
[305] Li, W., 'The Impact of economic reform on the performance of Chinese state enterprises, 1980-1989' (1997) Journal of Political Economy 105, 1080.

centralisation of ownership of Chinese SOEs. The second stage, which occurred in the 1980s, represents the decentralisation of SOE management to managers and employees, along with performance-based incentives. Lastly came the period from the early 1990s until the end of 2002, which was characterised by open market policies and partial privatisation through SIP, which was coupled to the reforms of the system for managing state owned assets.

4.4.1 China's economic reforms in relation to SOEs 1970s-1980s

Prior to the commencement of economic reforms and trade liberalisation about forty years ago, China maintained policies that kept the economy extremely impoverished, stagnant, centrally managed, incredibly inefficient, and largely isolated from the world economy.[306] China continued a centrally managed economy well into the late 1970s, with the government regulating and planning virtually every aspect of capital allocation, as well as production plans, labour market conditions, and market structures.[307] Consequently, SOEs were exceedingly ineffective and unprofitable.[308] The maximisation of profits was completely missing from SOEs.[309] Lin believes that it was apparent that the objectives of SOEs concentrated on achieving the government's economic and social goals, such as employment.[310] Moreover, prior to the privatisation reforms, the appointment and removal of corporate managers of parastatals in China were powers that could only be exercised by the government and such executives had no autonomy.[311] The study concludes that from the early 1970s to the late 1980s, SOEs were managed rigidly and carefully by the state as the sole shareholder. This is identical to the current South African system. In addition, the SOEs operated in a non-competitive market, and their primary goal was to assist the Chinese government's growth plan.

It was only in the 1980s that the Chinese adopted various measures aimed at reforming the parastatals.[312] The primary purpose of these policies was to provide the administration of SOEs more discretion in operating their companies, and to connect the goals of SOE management with those of the government.[313] Specifically, 1984 was the year that the Chinese government's third plenary session of the 12th Central Committee of the Communist Party of China (CPC)

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306 Morrison, W.M 'China's Economic Rise: History, Trends, Challenges, and Implications for the United States' (2019) Available at https://www.everycrsreport.com/files/20190625_RL33534_088c5467dd11365dd4ab5f72133db289fa10030f.p df (accessed 06 October 2022) 2.

307 Jiang, G, Yue, H., & Zhao, L, 'A re- examination of China's Share Issue Privatization' (2009) Journal of Banking & Finance 33 2324.

308 Lin, Y., Cai, F., & Zhou, L., 'Competition, policy burdens, and state- owned enterprises reform' (1988) American Economic Review 88, 423.

309 Jiang, G, Yue, H., & Zhao, L, 'A Re- Examination of China's Share Issue Privatization' (2009) Journal of Banking & Finance 33 2324.

310 Lin, Y., Cai, F., & Zhou, L., 'Competition, policy burdens, and state- owned enterprises reform' (1988) American Economic Review 88, 423.

311 Xie, F., Chi, J & Liao, J. 'From Share issue privatization to non-tradable share reform: a review of privatization in China' (2016) Asian Pacific Economic Literature Volume 30, Issue 2 94.

312 BBC News 'Q&A: China's Third Plenum' Available at https://www.bbc.com/news/world-asia-china-24846812 (accessed 07 October 2022).

313 Koo, Y. C., 'The Contract Responsibility System: Transition from a Planned to a Market Economy' (1990). Economic Development and Cultural Change, Vol 38 No 4,797.

began reforming the urban economic sector, and emphasised the necessity to segregate ownership and operational rights in SOEs.[314]

The reform was typically referred to as the contract responsibility system (CRS), and it was modelled after successful tests in Sichuan Province.[315] Under the scheme, farmers agreed to produce and market certain quantities of goods to the state at low rates.[316] They were then also free to sell on the open market anything produced in excess of the stipulated quantity.[317] The system amounted to a lump-sum tax on agricultural products or a near zero tariff on yield increments.[318] According to Li, these tactics were partially successful.[319] However, the CRS system was short-lived because the contracts to farmers or rather the managers of SOEs were for between three to five years.[320]

Regarding the corporate governance of China's SOEs, China's economic reforms contain only a few significant and intriguing characteristics. In the late 1970s, the Chinese government adhered to state capitalist policies that were socialist in nature, according to the study. During this time period, the state strongly believed that SOEs should be directly controlled by the state and should only respond to socially oriented state economic projects, without considering their inefficiency caused by excessive centralisation.

Even though the Chinese government adopted commendable corporate governance ownership policies in the early 1980s, decentralising the management of SOEs by contracting farmers as managers of the agriculture sector and granting them the freedom to produce on behalf of the state, the results were mixed. As stated previously, several authors highlighted the high productivity of SOEs through CRS arrangements in which the SOEs had positive financial performance.[321] On the other hand, some scholars suggested that the nature of the contracts handed to these SOEs' management necessitated a brief duration for this arrangement.[322] As a result, these reforms were doomed to fail since there was no long-term continuity.

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[314] Koo, Y. C., 'The Contract Responsibility System: Transition from a Planned to a Market Economy' (1990). Economic Development and Cultural Change, Vol 38 No 4,797.
[315] Koo, Y. C., 'The Contract Responsibility System: Transition from a Planned to a Market Economy' (1990). Economic Development and Cultural Change, Vol 38 No 4,797.
[316] Koo, Y. C., 'The Contract Responsibility System: Transition from a Planned to a Market Economy' (1990). Economic Development and Cultural Change, Vol 38 No 4,797.
[317] Koo, Y. C., 'The Contract Responsibility System: Transition from a Planned to a Market Economy' (1990). Economic Development and Cultural Change, Vol 38 No 4,797.
[318] Koo, Y. C., 'The Contract Responsibility System: Transition from a Planned to a Market Economy' (1990). Economic Development and Cultural Change, Vol 38 No 4,797.
[319] Li, W., 'The Impact of economic reform on the performance of Chinese state enterprises, 1980-1989' (1997) Journal of Political Economy 105, 1080.
[320] Lin, J. K., Lu, X., & Zhang, J. and Zheng, Y. 'State- owned enterprises in China: A review of 40 years of research and practice' (2020) China Journal of Accounting Research 7.
[321] Lin, J. K., Lu, X.,& Zhang, J. and Zheng, Y. 'State- owned enterprises in China: A review of 40 years of research and practice' (2020) China Journal of Accounting Research 7.
[322] Lin, J. K., Lu, X.,& Zhang, J. and Zheng, Y. 'State- owned enterprises in China: A review of 40 years of research and practice' (2020) China Journal of Accounting Research 7.

4.4.2 China's privatisation of SOEs: Introduction of open market policies (1992-2002)

The most intriguing period of the Chinese economy occurred in the 1990s, when SOEs were at the centre of transformation.[323] The Chinese government decided to transform SOEs into corporations to use free market policies to solve the problems of the SOEs that were experiencing a precipitous profit decrease through the many responsibilities they had taken on.[324] It has been argued that China's privatisation policies reforms were of a gradual character, in contrast to other nations that implemented privatisation on a greater scale.[325] Beginning in the 1990s, China implemented the reforms outlined below.

4.4.2.1 People's Republic of China Company Law 1992-2002

In 1992, the PRC introduced the People's Republic of China Company Law (hereinafter Company Law).[326] The central objectives of the company law was to reform the institution and administration of SOEs to solve major, chronic, and seemingly intractable problems of inefficiency; to encourage competitiveness and productivity; and to remove the state from the detailed control of business operations.[327]328 In addition, the introduction of the company law was also intended to include the implementation of a national legal framework that would govern the formation of limited liability firms.[328] In order for government and private firms to participate in the Chinese economy, they were required to be incorporated as limited liability corporations.[329] The company law required the Chinese parastatals to become independent corporations with their own management autonomy.[330] The Company Law also provided a mechanism for the establishment of internal stock exchange institutions for the supervision of both public and private businesses.[331] The legislation additionally emphasised the necessity of having policies that would attract foreign investors, and the need for measures to ensure that China is an investment-friendly nation.[332]

It can be claimed that the Chinese government's implementation of the company law was the first economic reform to recognise the significance of a country having corporate governance

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[323] Song, L 'State- owned enterprise reform in China: Past, Present and Prospects' China's 40 years of reforms and Development 1978-2018 (2018) 345.
[324] Gan, J 'Privatization in China: Experience and Lessons' (2018) JEL Classification, 3.
[325] World Economic Forum 'How reform has made China's State-Owned Enterprises Stronger' available at https://www.weforum.org/agenda/2020/05/how-reform-has-made-chinas-state-owned-enterprises-stronger/ (accessed 2 December 2022).
[326] Art, R.C, & Gu, M. 'China Incorporated: The first Corporation Law of the People's Republic of China' (1992) Yale Journal of International Law Vol.20 274.
[327] Art, R.C, & Gu, M. 'China Incorporated: The first Corporation Law of the People's Republic of China' (1992) Yale Journal of International Law Vol.20 274.
[328] Sunny. H, 'The company Law of the People's Republic of China' (1995) UCLA Pacific Basin Law Journal, 13(2) 376.
[329] Sunny. H, 'The company Law of the People's Republic of China' (1995) UCLA Pacific Basin Law Journal, 13(2) 376.
[330] Sunny. H, 'The company Law of the People's Republic of China' (1995) UCLA Pacific Basin Law Journal, 13(2) 376.
[331] Sunny. H, 'The company Law of the People's Republic of China' (1995) UCLA Pacific Basin Law Journal, 13(2) 376.
[332] Sunny. H, 'The company Law of the People's Republic of China' (1995) UCLA Pacific Basin Law Journal, 13(2) 376.

standards that guide the performance and management of parastatals. Moreover, the Chinese policy-makers were quite deliberate in their efforts to become open-market operating business entities. This is shown by the fact that the company law was designed to promote the transformation of these highly centralised parastatals into commercial limited liability companies. In addition, the legislation advocated the separation of powers between the state as shareholders, and board members. A further essential aspect of this legislation was the state's desire to move towards an open market in which the private sector was recognised as the primary participant in the development of the economy, since the legislation required the implementation of foreign investment-attracting regulations.

Importantly, the Act required the establishment of internal stock institutions so that some SOEs transformed to limited corporations could be listed on these stock market institutions. The chapter submits that the establishment of the two stock exchange institutions that will be covered in the following section of the work, was a sign of commitment to privatisation by the Chinese government.

4.4.2.2 Shanghai and Shenzhen Stock Exchanges

Due to the enactment of the company law, the second milestone in the Chinese economic reform was the establishment of the Shanghai and Shenzhen stock exchanges. It is said that the introduction of these stock exchanges in the 1990s marked a turning point through the reintroduction of this component of the PRC's financial system.[333] According to Marszk, both the Shanghai and Shenzhen stock exchanges are among the largest in the world.[334] In 2020 research published by Zheng, Zhang, and Lu, it was determined that more than one thousand SOEs are listed in Shanghai and Shenzhen.[335] According to the World Bank, it is advantageous for SOEs to be listed on stock exchanges in order to gain access to both global and domestic capital markets.[336] It can be argued that the introduction of these two stock market exchange institutions was another commitment from the Chinese government to improve the SOE's corporate governance. Furthermore, since the government had initially wanted to attract both the domestic and foreign capital markets, the introduction of these two institutions showed that they are committed to financial standards which are determined by the public and not the government. Lastly, it is said the Chinese government was also moving towards the privatisation of SOEs,[337] hence these two institutions were introduced in order to enable the SOEs to go public, which will be discussed in detail in the next section of the chapter.

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[333] Marszk, A., 'The transformation of the Chinese stock market between 1990 and 2012' (2014). International business and Global Economy, No 3 341.
[334] Marszk, A., 'The transformation of the Chinese stock market between 1990 and 2012' (2014). International business and Global Economy, No 3 340.
[335] Lin, J. K., Lu, X., & Zhang, J. and Zheng, Y. 'State- owned enterprises in China: A review of 40 years of research and practice' (2020) China Journal of Accounting Research 8.
[336] World Bank 'Listing of State- owned enterprise in Emerging and Developing Economies' Available at https://www.worldbank.org/en/events/2021/06/14/listing-state-owned-enterprises-in-emerging-and- developing-economies (accessed 11 October 2022).
[337] Li, M. Three Essays on China's State-Owned Enterprises: Towards an Alternative to Privatization (Unpublished PhD Thesis, University of Massachusetts2008) 18.

4.4.3 China's economic reforms: Privatisation of SOEs 1992-2002

Examining China's privatisation of SOEs is not a simple endeavour, and this must be stated up front. It is essential that this chapter begin with a systematic historical review of the Chinese economic reform measures. This is why the foregoing discussion was devoted to the evolution of these economic reforms. The study strongly commends China's piecemeal strategy for preparing SOEs for privatisation. This will be unpacked in this section. Contrary to the limited literature that might suggest that China's gradual approach to privatisation of SOEs was a delaying tactic,[338] this dissertation argues that the Chinese government was only laying down solid corporate governance standards, so that when they began to privatise SOEs, such changes would take place in a robust economy with the right measures in place.

This part of the chapter will focus on the privatisation of Chinese SOEs. As discussed previously, China began preparing for privatisation in the 1990s. However, Chinese policy-makers were cautious in their approach, as they never explicitly said that the country was adopting privatisation. Instead, they embraced the euphemism 'restructuring' of the SOEs.[339] Therefore, it is essential to study the policies that show how the Chinese government was pushing toward privatisation. Sam, having conducted research on Chinese's privatisation, critiques the Chinese government for not being fully committed to the privatisation of SOEs.[340] Contrary to the premise of the latter authors, examining the literature on the corporatisation of Chinese SOEs indicates that the first indication that the country's policy-makers were genuinely embracing privatisation was when they declared that the country's economy must be dominated by the public sector while welcoming multiple ownerships that must coexist inside the country's economy.[341] It would therefore not be correct that China has firmly backed the idea of changing SOEs to accommodate privatisation. What could be argued though, is that the Chinese had embraced the partial privatisation of SOEs, which is a form of privatisation that was fully discussed in the preceding chapter. It might though be argued that China had felt the need to include the private sector in the ownership of their SOEs, not only for the sake of the capital market, which will be discussed in greater detail in the following section of the chapter, but also to ensure that they had diluted the state's monopoly over the ownership of SOEs.

The Chinese government's implementation of a framework for partial privatisation was also an intriguing development. The Chinese government developed a policy in 1995 on the selection of parastatals for privatisation known as 'Retain the large, release the little'.[342] The policy made it clear that small and medium-sized SOEs were permitted to quit the state sector, that the

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[338] Naughton, B. The Chinese Economy: Transition and Growth (2007),86.
[339] Naughton, B. The Chinese Economy: Transition and Growth (2007,106.
[340] Sam, Choon-Y, 'Partial privatisation and the role of state-owned holdings companies in China' (2013) Journal of Management & Governance, Volume 17 767.
[341] Parker, E. 'Prospects for The State-owned Enterprise in China's Socialist Market Economy' (1995) Asian Perspective, Vol. 19, No. 1. Page 8.
[342] Jefferson, G. (2016). State- owned Enterprise in China: Reform, Performance, and Prospects, Economics Department, Brandeis University, Working Paper Series 109. Available at https://www.brandeis.edu/economics/RePEc/brd/doc/Brandeis_WP109.pdf (accessed 13 October 2022). Page 10.

methods for exiting were flexible, and that there would be minimal government participation.[343] Some of these small and medium SOEs were privatised through creating shareholding corporations while some that were considered as ineffective were liquidated.[344] Thus, the 'Retain the large, release the little' initiative policy simply meant that the state was willing to give away these SOEs through complete privatisation, and that the state had little control over their management. This initiative policy meant that the government was voluntarily opening the marketplace for the private sector to enjoy control those sectors.[345] On the other hand, for major SOEs, the policies were clearly different, and government exercised significantly more control over privatisation decisions.[346] Although the government had also partially privatised them, the majority control of these parastatals still fell under the state.[347] However, these huge SOEs experienced an additional reform, which will be examined later in the chapter when examining the effects of Chinese partial privatisation on the corporate governance of SOEs.

This section examines the actual mechanisms that were used by the Chinese government to execute the partial privatisation. In order to provide a clear background for this, the section will look at the efforts taken by Chinese policy-makers to reform SOEs in the early 1990s. Here are the steps taken by Chinese policy-makers prior to and during partial privatisation:

Chinese policy-makers adopted policies to encourage an open market which would attract both domestic and foreign private investors, with the hope of implementing some SOE reforms to encourage mixed ownership.[348]

The purpose of the company law was to provide a national legal framework for the corporate governance of Chinese SOEs and private companies.[349]

The company law was also designed to facilitate the incorporation of SOEs, by turning them into limited liability companies in order to make them compatible with the new economy, and to ensure that they traded in a competitive economy.[350]

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343 Jefferson, G. (2016). State- owned Enterprise in China: Reform, Performance, and Prospects, Economics Department, Brandeis University, Working Paper Series 109. Available at https://www.brandeis.edu/economics/RePEc/brd/doc/Brandeis_WP109.pdf (accessed 13 October 2022). Page 10.

344 Teets, J.C., & Hurst, W. Local Governance Innovation in China: Experimentation, diffusion, and defiance (2014). 3-4.

345 Du, Ju., & Liu, X., 'Selection, Staging, and Sequencing in the Recent Chinese Privatization' (2015) The Journal of Law & Economics, Vol. 58, No. 3 660.

346 Du, Ju., & Liu, X., 'Selection, Staging, and Sequencing in the Recent Chinese Privatization' (2015) The Journal of Law & Economics, Vol. 58, No. 3 660.

347 Du, Ju., & Liu, X., 'Selection, Staging, and Sequencing in the Recent Chinese Privatization' (2015) The Journal of Law & Economics, Vol. 58, No. 3 660.

348 Coa, L., 'Chinese Privatization: Between Plan and Market' (2000) Law and Contemporary Problems Vol 63, No.4, 13.

349 Article 1 of Company Law of People's Company Law of the Republic of China of 1993.

350 Article 1 of Company Law of People's Company Law of the Republic of China of 1993.

The company law also established the two stock exchange institutions. The rationale behind this was that once the SOEs had been turned into limited companies they would be listed in order to attract capital from various private investors.[351]

It would be correct to state that, for the Chinese government to implement partial privatisation under the policy initiative of 'Retain the large, release the little', the country's economy had to be reformed first. Policy-makers also had to introduce the company law, in order to impose a sound legal framework on corporate governance and the management of SOEs. Therefore, it was necessary for the companies to be turned into commercial companies. Moreover, the two stock exchanges were essential, as the plan was to list the parastatals for partial privatisation.

4.4.3.1 Share issue privatisation: Method adopted by Chinese government

The study has given the context for the process that was followed by the Chinese in preparation for the implementation of the partial privatisation. The chapter now turns to the actual method of privatisation deployed by the Chinese government.

The SIP method was discussed in chapter 3. However, it would be useful once again to briefly discuss what this entails. SIP is one technique open to the government when implementing the privatisation of SOEs. Using this technique, the state aims to remain a stakeholder while selling a portion of its shares to private investors.[352] Governments reportedly favour SIPs because they attract a large number of domestic investors, foster populist capitalism, and contribute to the growth of capital markets.[353] According to Gupta, the stock market can act as a potent supervisory and disciplinary mechanism that enhances the corporate governance of firms.[354] It has also been argued that SIPs improve stock market stability and efficiency by encouraging local companies to go public.[355]

Immediately after the establishment of the Shanghai and Shenzhen Stock Exchanges in 1990 and 1991, the Chinese government launched SIPs by listing the SOEs on the two stock exchanges.[356] The listing of these parastatals resulted in the transfer of state ownership to the private sector through the issuance of a small fraction of shares to the general public. It must be remembered, however, that the bulk of listed SOE shares are still held by the government, and are not tradeable.[357] This partial privatisation demonstrates two important points. First, when listing the largest SOEs on the stock market, the state retained majority ownership while issuing a minority of the shares to public investors. On the other hand, the non-critical SOEs

[351] Article 8 of Company Law People's Company Law of the Republic of China of 11993.
[352] Saffar, W. 'The political economy of share issue privatization: International evidence' (2014) Journal of Multinational Financial Management,24. 1.
[353] Saffar, W. 'The political economy of share issue privatization: International evidence' (2014) Journal of Multinational Financial Management,24. 1.
[354] Gupta, N., 'Partial privatization and firms' performance' (2005) Journal of Finance Vol.60 No.2. 987.
[355] Saffar, W. 'The political economy of share issue privatization: International evidence' (2014) Journal of Multinational Financial Management,24. 2.
[356] Xie, F., Chi.,& Liao, J., 'From share issue privatization to non-tradable share reform: a review of privatization in China' (2016) Asian Pacific Economic Literature Vol.30(2) 90.
[357] Xie, F., Chi.,& Liao, J., 'From share issue privatization to non-tradable share reform: a review of privatization in China' (2016) Asian Pacific Economic Literature Vol.30(2) 90.

were listed and either fully privatised or merged.[358] Large SOEs that were considered crucial to the government's economic policies were partially privatised, allowing minority private investors to purchase shares, while the government retained the golden share and veto rights, which essentially gave them control over the companies' decisions.[359]

Next, we discuss how this process of selling shares was regulated, as this is essential to comprehending the mixed ownership through SIP when examining the corporate governance consequences of such an arrangement.

After the Chinese government had signalled its willingness to partially privatise, the People's Bank of China (hereafter PBC),[360] was tasked with allocating shares and selecting SIP investors.[361] This shows that the Chinese government wanted an independent institution to oversee the regulation of these shares as a way of decentralising the government powers which it had previously enjoyed. As the primary regulator of share allocations, the PCB devised a quota system that stipulated the number of shares listed SOEs were permitted to issue to the public every year.[362] The PCB was required to create categories for the six classes of shares in all listed SOEs, which are state-owned shares, legal person shares, foreign shares, management shares, employee shares, and individual shares.[363] Two-thirds of the total shares consisted of non-tradable state-owned and legal person shares.[364] While foreign buyers were offered foreign shares representing less than 2% of the company's capital, employees and management shares comprised less than 1% of the restricted shares of the SOEs. These accounted for less than 1% of the total shares. Lastly, private individual shares were tradable.[365]

As the chapter culminates the second phase of the Chinese SOEs reforms (1990—2002), several authors who have examined the Chinese efforts during this period have made some noteworthy findings. The chapter also submits its own observations:

- **Improvement of SOE performance**

The overall performance of the SOEs after privatisation has left many academics divided on the topic.[366] Some studies indicate that Chinese SOE performance post privatisation has

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[358] Xie, F., Chi., & Liao, J., 'From share issue privatization to non-tradable share reform: a review of privatization in China' (2016) Asian Pacific Economic Literature Vol.30(2) 90.
[359] Boubakri, N., Cosset, J. C. Guedhami, O., & Saffar, W., 'The political economy of residual state ownership in privatized firms: Evidence from emerging markets' (2011) Journal of Corporate Finance Vol 17 246
[360] Jiang, G., Yue, H., & Zhao, L, 'A re- examination of China's share issue privatization' (2009) Journal of Banking & Finance (33) 2324.
[361] Jiang, G., Yue, H., & Zhao, L, 'A re- examination of China's share issue privatization' (2009) Journal of Banking & Finance (33) 2324.
[362] Jiang, G., Yue, H., & Zhao, L, 'A re- examination of China's share issue privatization' (2009) Journal of Banking & Finance (33) 2324.
[363] Chen, G., Firth, M.,& Rui, O., 'Have China's enterprise reforms led to improved efficiency and profitability?' (2006) Emerging Markets Review 7(1); 88-89.
[364] Chen, G., Firth, M.,& Rui, O., 'Have China's enterprise reforms led to improved efficiency and profitability?' (2006) Emerging Markets Review 7(1); 88-89.
[365] Chen, G., Firth, M.,& Rui, O., 'Have China's enterprise reforms led to improved efficiency and profitability?' (2006) Emerging Markets Review 7(1); 88-89.
[366] Sun, Q., & Tong, W.F.S., 'China share issue privatization: the extent of its success' (2003) Journal of Financial Economics Volume 70 184.

drastically improved,[367] while other studies indicate that privatisation of SOEs is just on paper and has been far from successful.[368] Considering the latter arguments, and having examined the privatisation of SOEs through SIP, it is clear that China has made some commendable reforms and they have contributed to the economy of China. It is clear from the legal framework perspective that China does not seem to have solid legislation that embraces good corporate governance, but this will also be revisited when the chapter concludes its examination.

- **SOEs corporate governance: Mixed ownership**

Regarding the changes in structure of ownership of the SOEs, various studies have analysed the ramifications of SIP privatisation. It is argued that, when China implemented SIP as a technique of privatisation, two significant governance difficulties were identified.[369] First, there are the inefficient ownership structures, which include a large amount of state ownership in privatised companies, together with highly concentrated and pyramidal ownership structures.[370] Secondly, these listed SOEs function with weak internal corporate governance systems, as indicated by the inefficiency of supervisory bodies and boards of directors.[371]

These authors highlight that, due to the listing of the SOEs on the two Chinese stock exchange institutions, and because of the share categories that were developed by the PCB, some difficulties were created for the ownership managements of the SOEs. First, minority shareholders were only allocated a small portion of shares to purchase; and new shareholders are under-represented, and not protected as minority shareholders. The government as the majority shareholder still controls corporate governance key decisions. Minority shareholders do not have such powers.[372]

Berkman, Cole & Fu further argue that in such SIP arrangements, where the state has not listed more than 50% of its majority shares, the majority shareholder, which in this case is the Chinese government, has the power to appoint the executive members and the board members.[373] Secondly, the authors argue that SIP did not improve the corporate governance of these parastatals, because they did not operate under an independent supervision body.

However, the ownership structure policy of the Chinese government will be discussed in depth in the last reform that this chapter will examine. What is important here is that these were some of the problems that were observed by authors. What was also observed was that through this

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367 Groves, T., Hong, Y.,& Mc Milla., and Naughton, B., 'Autonomy and Incentive in Chinese State Enterprise (1994) Quarterly Journal of Economics Vol 109 183

368 X, XU., &Y, Wang., 'Ownership structure, corporate governance, and corporate performance' (1997) Policy Research Working Paper 1794, The World Bank, Washington, DC. 11.

369 Jiang, G., Yue, H., & Zhao, L, 'A re-examination of China's share issue privatization' (2009) Journal of Banking & Finance (33) 2324.

370 Jiang, G., Yue, H., & Zhao, L, 'A re- examination of China's share issue privatization' (2009) Journal of Banking & Finance (33) 2324.

371 Jiang, G., Yue, H., & Zhao, L, 'A re- examination of China's share issue privatization' (2009) Journal of Banking & Finance (33) 2324.

372 Jiang, G., Yue, H., & Zhao, L, 'A re- examination of China's share issue privatization' (2009) Journal of Banking & Finance (33) 2325.

373 Berkman, H., Cole, R. A. & Fu, L. J. 'Improving corporate governance where the state is the controlling block holder: evidence from China' (2014) The European Journal of Finance, 20:7-9, 757.

period of reforms, the Chinese SOEs had no supervisory boards, and the board members had no authority to manage the SOEs without the interference of the majority shareholders.[374]

4.4.3.2 China's economic reforms: Privatisation of SOEs 2003-2012

The previous section examined in depth the steps China had taken to decentralise or rather to partially privatise SOEs. One of the objectives of the Chinese government in privatising SOEs and listing them on the two stock exchange markets, was to strengthen their corporate governance, by attracting private investors through the sale of shares to minority shareholders while retaining majority ownership.

The examination has left different academic researchers about Chinese reforms with contradictory views on the implications of SIP when it comes to the strengthening of SOEs' corporate governance. As noted above, some argue that the Chinese listings did not really transform and strengthen corporate governance, nor did they enhance the SOEs' performance.[375] It is suggested that SIP can only be effective when the government surrenders the majority of its shares and becomes a minority shareholder, while private investors are given the majority of shares. This is the only way to improve corporate governance and to enhance the performance of SOEs.[376] On the other hand, as mentioned above, some seem to approve the commitment made by China's government in opening up the market for private investors.[377] They also acknowledge the corporatisation of SOEs to form limited liability companies. They further note that the listing of SOEs on the two Chinese stock exchange institutions has given Chinese SOEs the opportunity to gain some strong international corporate governance principles and such policy initiatives have enhanced these SOEs.[378]

Chinese policy initiatives have indeed drastically transformed the Chinese SOEs. The thesis commends the willingness of Chinese policy-makers for their efforts in implementing partial privatisation through SIP. Furthermore, the Chinese government has moved from being a sole shareholder to mixed ownership. This on its own is an indication that they have acknowledged the role of the private sector in the economy. However, we should acknowledge the handful of authors who argue that, although the Chinese government has restructured some SOEs, the fact is that the Chinese government is still the majority shareholder; such arrangements inhibit good corporate governance.[379] In principle the argument is valid. However, the thesis submits that the transformation has changed the nature of Chinese SOEs, and they positively contribute to

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[374] Leuttert, W., 'Challenges Ahead In China's Reforms of State-Owned Enterprises' (2016) Asia Policy No 22 92.
[375] Gao, S.S., Gao, G. &Zhang, T. 'Corporate governance reform and firm performance: Evidence from China' (2008), Research in Accounting in Emerging Economies, Vol. 8 196
[376] Sun, Q., & Tong, W.F.S., 'China share issue privatization: the extent of its success' (2003) Journal of Financial Economics 70.
[377] OECD Corporate Governance of Listed Companies in China: Self-Assessment by the China Securities Regulatory Commission (2011) OECD Publishing. http://dx.doi.org/10.1787/9789264119208-en. 9.
[378] OECD Corporate Governance of Listed Companies in China: Self-Assessment by the China Securities Regulatory Commission (2011) OECD Publishing. http://dx.doi.org/10.1787/9789264119208-en. 10.
[379] Jean C, OI., 'Patterns of Corporate Restructuring in China: Political Constraints on Privatization' (2005)' The China Journal No 53, 121.

the country's economy. The transformation might not be fully effective, but it has made some progress.

These arguments are not conclusive, as the chapter will still examine some of the reforms that China undertook in order to address some of the issues raised above. Then the thesis will make conclusive observations based on all the reforms and most critically on how the recent SOE reforms have either enhanced or derailed the corporate governance of SOEs.

The following section of the chapter will analyse Chinese policies from 2003 to 2012, in an attempt to see how the policy-makers have responded to some of the challenges raised above.

4.4.3.3 The Guidelines for Independent Directors System in Listed Companies

The Chinese Security Regulating Commission (henceforth CSRC), the regulatory agency for the two Chinese stock exchanges, adopted a number of methods in August 2001 in an effort to alleviate some of the weak internal corporate governance issues affecting listed SOEs.[380]381 The CSRC introduced the Independent Directors' Guidelines System in Listed Companies (hereafter Independent Directors' Guidelines).[381] The independent directors' guidelines were intended for all companies listed, including listed SOEs.[382] It is said that the Chinese policy-makers, in an attempt to resolve certain issues in SOEs, adopted this mechanism of independent directors' corporate governance from the US.[383] One of the difficulties that analysts of Chinese SIP reforms emphasised was that it produced insider control, where the state was the majority shareholder. As a result, minority shareholders were not effectively represented, especially when it came to the nomination of board members of the listed SOEs through SIP. It is evident that the development of independent board guidelines, a system adopted from US corporate governance, was designed to robustly respond to the domination of board members which were appointed by the Chinese state, and to further strengthen the internal corporate governance of the listed SOEs.

In an effort to comprehend the Chinese independent board guidelines, this section will first define the term, and then examine how these guidelines have improved corporate governance in the management of Chinese-listed SOEs.

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[380] Lehman law 'Notice on Issuing the Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies' Available at http://www.lehmanlaw.com/resource-centre/laws-and-regulations/securities/guidelines-for-introducing-independent-directors-to-the-board-of-directors-of-listed-companies-2001.html (accessed 21 October 2022).

[381] Lehman law 'Notice on Issuing the Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies' Available at http://www.lehmanlaw.com/resource-centre/laws-and-regulations/securities/guidelines-for-introducing-independent-directors-to-the-board-of-directors-of-listed-companies-2001.html (accessed 21 October 2022).

[382] Lehman law 'Notice on Issuing the Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies' Available at http://www.lehmanlaw.com/resource-centre/laws-and-regulations/securities/guidelines-for-introducing-independent-directors-to-the-board-of-directors-of-listed-companies-2001.html (accessed 21 October 2022).

[383] Clarke, D., C. 'The Independent Directors in Chinese Corporate Governance' (2006) Delaware Journal of Corporate Law Vol, 31 127 & 128.

- **Definition of independent directors**

Different jurisdictions have multiple interpretations of the phrase 'independent directors'.[384] The US Investment Company Act, refers to independent directors as an 'advisory board that may be nominated or elected and is unique in character from the board of directors in that such a person neither serves the enterprise nor has an interest in serving in that particular company'.[385] On the other hand some legal instruments and corporate reports use the terms 'non-executives',[386] 'independent'[387] and 'outsider'.[388] Despite the fact that each of these phrases is defined distinctively, and indicate a distinct function for the director referred to, they are commonly used interchangeably, and implications about one type of director are attributed to the other.[389]390 The thesis does not attempt to weigh in on the argument about which term is most appropriate for describing independent directors. This chapter aims merely to comprehend their role in corporate governance, and how they improve the performance of SOEs.

Now that the term 'independent director' has been defined and its role explained, it is necessary to return to the Chinese independent directors' guidelines to determine how it was intended to improve the corporate governance of the listed SOEs, particularly the partially privatised SOEs established through SIP.

The CSRC independent boards' guidelines and framework are summarised as follows:

- One of the central calls was that Chinese listed companies must have a full two third of directors and such directors must be independent directors.
- It was also highlighted that the independent directors should be individuals that do not hold any interest in the company, meaning that such person should be an outsider, not be a shareholder of the company, and must not have any links to the enterprise.
- The independent directors' guidelines also stressed the importance of the independent directors having qualifications and experience aligned to companies listed.
- The role of the independent directors are various in nature but the most crucial one in the Chinese independent guidelines, is that of acting in good faith. Moreover, they are expected to serve in the best interests of all shareholders and not a certain group of shareholders.

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[384] Section 2 of the Investment Company Act of 1940.
[385] Section 2 of the Investment Company Act of 1940
[386] Cadbury, A., 1992, Report of the Commission on: The Financial Aspects of Corporate Governance, Available at https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf (accessed 24 October 2022) 21.
[387] S15E of the Securities Exchange Act of 1934.
[388] Clarke, D., C. 'Setting Record Straight: Three Concepts of the Independent Directors' (2006) The Gorge Washington University Law School Public Law and Legal Theory, Working Paper No. 199. 1.
[389] Miwa, Y., & Ramseyer, J., M. 'Who Appoints Them, What do they Do? Evidence on Outside Directors' (2006) Available at https://ssrn.com/abstract=326460 or http://dx.doi.org/10.2139/ssrn.326460 (accessed on 24 October 2022) 11-14.

Analysing the above, it appears that the Chinese CSRC intended to dilute the dominance of board members who would ordinarily represent the majority of shareholders. However, several academic authors state that they have found it difficult to discover proof that independent directors improve corporate governance.[390] The most important aspect of this analysis, however, is the recognition of Chinese policy-makers' commitment to deploying mechanisms to strengthen their legal framework post SIP privatisation.

4.4.3.4 Establishment of state-owned assets management system

In November 2002, the sixteenth CPC congress proposed the creation of a new state assets management system that would 'Unify the responsibility for managing assets, personnel, and affairs'.[391] The proposed legislative intervention modified the government's role even further by designating particular SOEs as central SOEs, and shifting the remainder of SOEs to local government.[392] The new management system proposal outlined the duties of the central and local governments in administering various SOEs.[393] On the other hand local government was given supervision over the smaller and less important SOEs.[394]

Consequently, in 2003 China established the State-owned Assets Supervision and Administration Commission (SASAC) to further enforce the separation of the role of government from the management and operation of SOEs.[395] The establishment of SASAC was intended to serve a dual purpose, namely to decentralise the ownership of the central SOEs from the Ministry of Finance, while consolidating the SOEs under its supervision.[396] What can be appreciated from the establishment of SASAC and its role in the context of the corporate governance of SOEs, is the fact that SASAC was established to play the role of being the Chinese government shareholder representatives. SASAC further enforced the independent directors' guidelines, in ensuring that listed SOEs have independent directors who are expected to participate in the corporate governance, with the intention of protecting the shareholders, most importantly minority shareholders.[397]

What stands out concerning the establishment of SASAC is the scope of its powers, which consist of the establishment of laws and regulations regulating state-owned assets,

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[390] Clarke, D., C. 'The Independent Directors in Chinese Corporate Governance' (2006) Delaware Journal of Corporate Law Vol, 31 204.
[391] Clarke, D., C. 'The Independent Directors in Chinese Corporate Governance' (2006) Delaware Journal of Corporate Law Vol, 31 204.
[392] Lin, J. K., Lu, X.,& Zhang, J. and Zheng, Y. 'State- owned enterprises in China: A review of 40 years of research and practice' (2020) China Journal of Accounting Research 9.
[393] Lin, J. K., Lu, X.,& Zhang, J. and Zheng, Y. 'State- owned enterprises in China: A review of 40 years of research and practice' (2020) China Journal of Accounting Research 9.
[394] Lin, J. K., Lu, X.,& Zhang, J. and Zheng, Y. 'State- owned enterprises in China: A review of 40 years of research and practice' (2020) China Journal of Accounting Research 9.
[395] Mattlin, M. Chinese strategic state-owned enterprise and control ownership' (2009) Biccs Asian Paper, Vol. 4(6) 8.
[396] Lam, W., R & Schipke, A., 'State-Owned Enterprise Reform International Monetary Institute' (2016) Working paper No 1906, Available at http://www.imi.ruc.edu.cn/EN/uploads/2019/05/IMI-Working-Paper- No.-1906-EN.pdf (accessed 21 October 2022) 2.
[397] Luo, Y., 'The Way Forward for the System of Independent Directors of Chinese Companies from the Perspective of Comparative Law' (2022) Journal of Education, Humanities and Social Sciences Volume 1, 58.

administering and reorganising state assets so that their value increases, and appointing and firing the executives of SOEs (similarly to civil employees) under its oversight, at the direction of the Communist Party, which retains ultimate authority over crucial appointments.[398]

4.4 Reflection on the Chinese pathway to partial privatisation: Successes and challenges

This chapter's primary purpose was to examine the difficulties and achievements of Chinese privatisation, and what South Africa, with its struggling SOEs, may potentially learn from China. It was therefore necessary to investigate the implications of privatisation on the framework of corporate governance. When an SOE is privatised, particularly through SIP, as was discussed in chapter 3 and this chapter, this results in a mixture of state and private investor ownership. Consequently, the purpose of the final section of this chapter is to reflect on the Chinese privatisation journey in order to understand how SIP privatisation as a model has improved corporate governance; and, if there were challenges, what South African policy-makers could learn from them, so that South Africa's privatisation does not face the same challenges.

This following section is in two parts. The first part will focus on the success of Chinese privatisation; the second part will focus on lessons that South Africa can learn.

4.4.1 Success of Chinese privatisation through SIP

China's privatisation reforms and the restructuring of SOEs were implemented in a more gradual manner than in the West, according to the explanations and arguments provided by many scholars in various fields of discipline. It is impossible for this chapter to examine its success and the lessons to be drawn from it by South African policy-makers without first reflecting on the stages of reforms that China undertook. This process plays a crucial role in determining what must be done by a country prior to even committing to privatisation. In other words, what internal governance mechanisms must be implemented for a country's privatisation to be successful? Therefore, both the stages of Chinese economic transformation and their privatisation successes will be analysed simultaneously.

According to Katz and Win's 2020 study, Chinese SOEs have played and continue to play a crucial role in the expansion of the Chinese economy.[399] What can be appreciated from these findings is that, in order for a country to have effective and well-functioning SOEs, the economic policies they operate under must enable open markets. This chapter examined the development of Chinese SOEs. What was important to the government was to create an economy that was sound and showed the state's willingness to open the market for the private sector to participate in industries once monopolised by the state. As a result, SOEs were expected to participate in a competitive environment. This change enhanced the effectiveness

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[398] Mattlin, M. Chinese strategic state-owned enterprise and control ownership' (2009) Biccs Asian Paper, Vol. 4(6) 9.

[399] Qi, H. & Kotz, D.M. 'The impact of State-Owned Enterprise on China's' (2020) Economic Growth, Review of Radical Political Economics, 52(1). 96.

of SOEs, and today the Chinese government contributes positively to the economy of the country.

From the South African perspective, what can be learnt is that SOEs should not be protected by the government. This can only be achieved by sound corporate governance policies. When one consults literature concerning South Africa's corporate governance and its market economy policies, some scholars suggest that South African SOEs enjoy a privileged market position, which hinders rather than promotes competition and private sector growth.[400] It is imperative for South Africa to create better policies to enable an economy that fosters fair competition policies, and where SOEs are not protected in the market. Such policies have enabled China to benefit from an open market economy.

The second success of the Chinese economic reforms is centred on the corporatisation of SOEs. When Chinese policy makers enacted the Company law, the ultimate goal was to modernise SOEs into commercial companies. The purpose of the Company law was to divide SOEs into commercial and non-commercial entities. This was a key decision by the Chinese government, as SOEs with non-commercial obligations are reported to have ambiguous objectives, poor performance, constant dependence on the state, corporate governance challenges, and to erode managerial accountability.[401] In the South African context, as was highlighted in chapter 1, one of the major problems facing South African parastatals is the fact that they have conflicting mandates.

This has affected the corporate governance of SOEs. One of the successes of the Chinese reform is the division of SOEs into commercial and non-commercial companies. South African policy-makers can learn from this.

After the Chinese parastatals became commercial companies, they were prepared for privatisation. As was discussed above, the Chinese government was not prepared for full privatisation. After examining various privatisation models for SOEs, they opted for SIP. As discussed in chapters 3 and 4, SIP brings mixed ownership into SOEs. The Chinese government opted for this form of partial privatisation. Using SIP, Chinese SOEs were listed on the two stock exchanges. The Chinese SOEs went public, offering shares to domestic and foreign investors. This introduced mixed ownership, with the Chinese government retaining the majority of shares. South Africa's policy-makers should consider this second lesson, and extend the definition of privatisation to include SIP.

This form of privatisation allows the state to retain some form of majority ownership, while decentralising or rather diluting ownership by attracting private investors. This thesis submits that for South African government to benefit from privatisation while retaining majority of its shares, it would be beneficial for it to extend the privatisation to include SIP. It was argued in chapter 3 that some of the successes or benefits of SIP include the opportunity of raising market capital for struggling SOEs, while also ensuring that the ownership of SOEs is enjoyed by both

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[400] OECD 'Corporate Governance: State-Owned Enterprise Reforms' OECD Better Policies Series Available at https://www.oecd.org/corporate/south-africa-state-owned-enterprise-reform.pdf (accessed 26 October 2022).
[401] Vermooten, J. 'Options for the restructuring of state ownership of South African Airways' (2018) Journal of Transport and Supply Chain Management 12(0) 12.

government and private investors. This would eradicate the current sole ownership by government in South Africa. It would thus be beneficial for South African policy-makers to consider this form of privatisation. From a corporate governance perspective, it would enable the appointment and removal of board members and CEOs to be conducted not only by a minister, but with the help of the private shareholders too.

Another important reform that China's SOEs experienced, apparently successfully, was the introduction of SASAC. First, SASAC has the powers of a government agency and acts as the shareholder of the SOEs on behalf of the state. Secondly, it has the powers to regulate policies concerning SOEs, and it reports directly to the Chinese State Council. Thirdly, as a shareholder, it has the power to supervise SOEs, and to ensure that the boards of directors and their managers act in the interests of shareholders. The point of introducing this supervisory body is that the Minister of Finance, who is responsible for these SOEs, is removed from the day-to-day executive operations of the SOEs.

Such a supervisory body is a model that South Africa should adopt, because, as was highlighted in chapters 1 and 2, South Africa's parastatals operate under heavy centralisation, and interference by the line ministers. What can be learnt is that it is not enough for the South African government to partially privatise the SOEs through SIP. It would also be necessary to establish a supervisory body to curb the current interference by ministers with the day-to-day operations of SOEs.

4.4.2 Challenges of Chinese SOEs privatisation through the SIP model

From what the thesis has observed so far, it is evident that privatisation of SOEs is not an easy task for any country, regardless of the form of privatisation a country adopts. The Chinese privatisation of SOEs through SIP has also shown its own problems that have been related in this chapter. This section of the work will look at some of these challenges, and some of the lessons that the South African government can learn from this. These are some of the challenges that were encountered by Chinese government:

One of the criticisms of the Chinese SIP privatisation related to the categories of shares. As was mentioned when the chapter looked at the Chinese SIP, is that the PBC had designed six classes of shares. Out of these six classes of shares, the Chinese state only offered the public, including foreign investors, small portions of shares. This in nature did not dilute the ownership of the SOEs, and the state still had the controlling shares. This meant that minority shareholders had little or no representation in the corporate governance of SOEs. Studies conducted on China post privatisation through SIP, argue that there was little improvement in the performance of SOEs.[402] It has been reported that, although SIP has assisted Chinese SOEs in raising market capital through the selling of shares, the refusal by the Chinese government to offer a greater proportion of shares to the public did not improve the corporate governance of the SOEs.

[402] Sun, Q., & Tong, W.F.S., 'China share issue privatization: the extent of its success' (2003) Journal of Financial Economics Volume 7,186.

It is said that the powers to appoint and remove the boards of directors, including the CEOs of the SOEs privatised through SIP, were still restricted to the state, and that minority shareholders had no influence. This was a challenge for Chinese SOEs. Because this thesis argues for this form of privatisation for South Africa, it would be necessary for policy-makers to avoid offering the public insignificant shares. It would be essential for the South African government to give up 49% of the shares to the public while retaining a majority of 51% of shares.

As the chapter has reaches the end of its examination of China's model of privatisation, it is submitted that China's privatisation and choice of model is commendable. However, it would be careless for this study to omit lessons that could potentially contribute to the study of privatisation. An examination of China's privatisations indicates that China might not necessarily have had a solid legal framework in place, and hence they encountered the challenges mentioned above. When one examines the South African legal framework that governs SOEs, it is advanced when compared to the Chinese corporate governance legal framework. This does not mean that South Africa cannot draw some lessons from China's privatisation. In fact, the thesis still submits that China's privatisation has contributed to the country's economy, and this is a lesson that South Africa should learn.

4.5 Conclusion

As we conclude the examination of the successes and challenges that were shown by China's SIP partial privatisation, much was examined in order to determine the lessons that could guide South African policy-makers when privatising SOEs. The chapter appreciates the fact that China's privatisation of SOEs took a piecemeal approach when compared to that of western countries. As a result, the chapter had to extensively examine some stages of Chinese reforms in order to appreciate the reforms fully, and what motivated such an approach.

Emphasis was placed on the third reform, which took place in the late 1990s to the early 2000s. This was the period when China took bold steps towards privatising its SOEs. It was therefore crucial for this chapter to focus on this period of privatisation. This period saw China opening up the marketplace for the private sector to participate in economic activities that had once been under the monopoly of the Chinese state. China introduced the companies law to facilitate the corporatisation of the SOEs and the introduction of internal stock exchanges. All these reforms were designed for privatisation.

While examining the privatisation of Chinese SOEs, it was discovered that China had opted for partial privatisation of SOEs through SIP. SIP was carefully studied in chapter 3, and therefore the role of this chapter was to investigate how SIP improved the SOEs in the Chinese context. After examining the literature on Chinese SIP SOEs, and their impact on corporate governance, the chapter concludes that SIP, if properly implemented, does create strong internal corporate governance of SOEs. In the Chinese context the major benefit was when they listed their SOEs to stock exchange institutions, which enabled Chinese SOEs to access the capital market, at the same time attracting private investors to SOEs. The examination also discovered some corporate governance challenges that are faced by Chinese privatised SOEs. Some of the challenges are the abuse of power faced by minority shareholders, and the lack of a legislative

framework for addressing these issues. However, these corporate governance challenges were addressed through the adoption of legislation in early 2001.

However, what this chapter takes from the Chinese SOEs' partial privatisation through SIP is the fact that listing SOEs on stock exchanges subjects SOEs to strong corporate governance outside of government policies. However, what the study also discovered was that listing of SOEs must be coupled with a strong legal framework. The study therefore argues that Chinese SOEs might not be served well by their legal framework, but what cannot be taken away from Chinese SOEs is that the listing and the gains of a minority of SOEs has drastically changed and improved them.

The following chapter is the last chapter of this dissertation. It will revisit the central research question and sub-questions with the purpose of understanding whether, through this examination by these four chapters, they have been answered. The chapter will then conclude by summarising the findings of the chapter, and be followed by recommendations and further areas requiring research.

Chapter 5: Conclusion and Recommendations

5.1 Introduction

The role and the importance of SOEs on South African economic development cannot be more emphasised. As established earlier in this study, SOEs are strategic national public entities that play a critical role in ensuring that South Africans gain access to service delivery in an effective and sustainable manner.[403] The study submits that their success lies at the heart of ensuring that the legal framework that they operate under is sound in nature, and is founded on solid good corporate governance principles. The form of ownership should be one that is clear in nature, and that is exercised for the benefit of the parastatals and not for self-enrichment.[404] However, South African parastatals operate under a centralised state ownership that has not only collapsed some SOEs but that has left others under financial constraints.[405] It is difficult for the study to be optimistic that policy-makers will ever be committed to reforming them, and that partial privatisation of SOEs could potentially be the solution for their rescue.[406]

One of the arguments that was raised by this dissertation was that, for these parastatals to be reformed, a decentralisation of ownership through a partial privatisation approach should be adopted.[407] Moreover, the decentralisation of SOEs' ownership through privatisation would introduce mixed ownership that would allow a more transparent approach to the appointment and removal of SOEs' boards of directors and executive officials.[408] It would be recalled that, in chapter 1, one of the issues raised by this dissertation was that ministers tend to abuse their powers through political interference by deploying people that are incompetent to serve as board members and executive officials in these SOEs. The study therefore enquired whether decentralisation of ownership through privatisation could rescue South Africa's struggling SOEs. Therefore, chapter one had to formulate an overarching research question, research questions and research objectives in order to answer some of these questions that this study needed to answer.

The main question was whether decentralisation of ownership of SOEs would be better served under the auspices of the private sector, or through mixed ownership, taking into consideration the previous failed initiatives, and the backlashes that the South African government has received in the past.

Here are the sub-questions that needed to be discussed in order to answer the central question:

- What is the current legal framework that governs South African SOEs, and how well does it function?

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[403] Chapter 1 para 1.1.
[404] Chapter 2 para 2.4.1.
[405] Chapter 2 para 2.5.4.
[406] Chapter 3 para 3.1.
[407] Chapter 3 para 4.
[408] Chapter 3. Para 4.

- What is privatisation, and what models are available for a country to embark on privatisation?
- What are the successes and disadvantages encountered by privatised SOEs?

5.2 Objectives of the study

- To explore internationally accepted guidelines on the corporate governance of SOEs.
- To explore and examine the current legal framework that governs South African SOEs.
- To determine the successes and disadvantages encountered by privatised SOEs.
- To provide evidence for and against privatisation as a solution for SOEs.
- To give a comprehensive reform agenda that could potentially assist in reforming the current legal framework that governs SOEs, through mixed ownership privatisation.

5.3 Chapter findings

In order for this examination to be possible and to answer the above research questions, this dissertation had to formulate these following chapters:

- **Chapter 1:**

Chapter 1 served as an introductory chapter for the dissertation, where it introduced the research problem, provided the significance of the study, outlined the research questions and objectives of the study. It also served as a roadmap for a reader.

- **Chapter 2:**

Chapter two explored the legal framework that governs South African SOEs. This examination was motivated by the understanding that in order for this dissertation to provide well thought-out diagnoses, the legislation and regulations that control SOEs should be examined. The chapter was divided into two sections.

The first section explored internationally acceptable corporate governance guidelines for SOEs. OECD guidelines were examined with the intention of benchmarking these international guidelines against South Africa's legal framework, to see whether these are on par with global standards. From the examination of the OECD guidelines what became clear was the fact that every country is required to have a solid legal framework that governs SOEs as a pre-requisite.[409] The OECD also gave an insight into the importance of a state having a legal framework that clearly states the rationale of ownership, and the role that the state ought to play in the ownership of SOEs as a shareholder. The importance of having an open marketplace policy where SOEs are not protected against their counterparts was also stressed as a good principle of corporate governance for SOEs.

[409] Chapter 2 Paragraph 2.4.1.

The second part of the chapter was intended to examine the South African SOEs' legal framework. The study followed a hierarchical approach, where it first examined the South African Constitution. What was discovered from the examination was the fact that the Constitution neither regulates nor makes mention of SOEs.[410] However, since SOEs are national public entities under the control of executive members, it was enough for the chapter to conclude that ministers have a duty to account to the national assembly on matters concerning SOEs.[411]

The PFMA was also examined, and through this exploration the chapter discovered that it is an overarching legislation that regulates SOEs. This is the same legislation that directly proclaims the ministers with parastatals within their ministries as the rightful sole shareholders, with the powers to appoint and remove boards of directors and CEOs.[412] What was discovered is the fact that the PFMA does not provide any procedures to be followed by ministers when they appoint and remove boards of directors and CEOs. Moreover, the PFMA is the direct legislation that has created this heavy centralisation of ownership, while it falls short on how Ministers should account for their decisions. What is more interesting about the PFMA is that it does not provide the role that should be played by shareholders, accounting authorities and CEOs.

The chapter also turned to the examination of the Companies Act. Among some interesting discoveries was the fact that, unlike the PFMA, section 1 refers to SOEs as SOC, and that the act only applies to SOCs that have been incorporated in terms of the Act and those listed in schedules 2 and 3 of the PFMA.[413] This means that not all SOEs are governed by the Companies Act. Secondly, even when these SOCs fall under the Act, the PFMA takes precedence over the Companies Act. Various sections of the Act were explored in order to understand how they regulate the ownership of SOEs in terms of shareholders when it comes to the appointment and removal of the board of directors and executive officers. What is commendable about the Companies Act is that it clearly recognises shareholders' roles and provides a procedure that ought to be followed when they appoint and remove boards of directors. Furthermore, section 66 of the Act places the corporate governance of SOCs under the leadership and guidance of boards of directors.[414] The implication of section 66 is that boards of directors are the correct institutions to appoint and remove executive officers, which the PFMA places under the control of the shareholder.

The chapter also examined the Broadcasting Act, which is the founding legislation for the SABC parastatal. The intention was to understand how the founding legislation deals with the centralisation of state ownership on the appointment and removal of directors and executive managers of SOEs. Section 13 of the Act actually perpetuates the centralisation on the appointment and dismissal of board members as it gives the President the powers of

[410] Chapter 2 para 2.5.2.
[411] Chapter 2.5.2.2.
[412] Chapter 2 para 2.5.3.
[413] Section 1 of the Companies Act 71 of 2008
[414] Section 66 of the Companies Act 71 of 2008

appointments and removals. However, it does not provide for the appointment or removal of executives.

King IV principles are acceptable South African principles that are designed to assist private companies and parastatals with guidelines on how to ensure that they practise good corporate governance. In particular King IV has tailored 16 out of 17 principles, that SOEs should follow when executing their duties. Principle 16 of the King IV sectoral for SOEs attempts to address the issue of heavy centralisation and the absolute sole ownership that is enjoyed by ministers as shareholders of SOEs.[415] The study submits that principle 16 merely calls for a board of directors to devise a consultation plan on how to engage government as a shareholder, regulator, and policy-maker. As commendable as this is, the chapter concluded that it is not enough, as King IV fails to provide corporate governance sound practice on how these triplicate powers can be decentralised.[416] Finally, what prevents King IV from assisting with the legislation that governs South African SOEs, is that King IV is not mandatory legislation. It is a set of voluntary principles that may or not be applied by SOEs' shareholders, directors and executive officers (unless the SOE is listed on the JSE), although it provides sound corporate governance to some extent.[417]

The last part of the chapter explored the reforms that the policy-makers had engaged in and those that are ongoing, to address the shortfalls that were explored above. The chapter first examined the PRC report that was presented in 2010. The report made numerous recommendations that, even today, have not been implemented.[418] One of the outstanding recommendations advanced by the PRC, was that policy-makers should enact overarching legislation that would unify all the current legislation that is in conflict when it comes to regulating SOEs.[419] The chapter then also examined the SOE shareholder management Bill, which seeks to create a shareholding company that will decentralise the current centralised ownership of SOEs. This Bill, although it has been given attention by the current administration, is a Bill that has been in the hands of different ministers in charge of Public Enterprises, but little is being done about ensuring that it will be passed into law.

The chapter concluded by remarking that having benchmarked South Africa's SOE legislation against the OECD guidelines, South Africa fails short when it comes to good corporate governance of SOEs. What is clear is that the current legislation is fragmented in nature, and in conflict in terms of the appointment and removal of accounting authorities and executive officers. The PFMA on its own has created this centralised ownership that has given ministers with SOEs in their ministries powers that they can easily abuse.

Reverting back to the first sub-question, this chapter has managed to examine the current legal framework that governs South African SOEs. The study was not satisfied with the current legal framework. So, we turn to chapter 3, with the aim of understanding whether privatisation could

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[415] Chapter 2 para 2.6.7.
[416] Chapter 2 para 2.6.7.1.
[417] Chapter 2 para 2.6.7.1.
[418] Chapter 2 para 2.7.
[419] The Presidential Review Committee on State-Owned Entities Executive summary of the final report (2010) Volume 1 29.

be the solution to this centralised ownership, and what corporate governance benefits could potentially enhance South Africa's SOEs.

- **Chapter 3:**

Chapter 3 was formulated as a building block in answering the question of whether South African parastatals could be better served under the auspices of the private sector or through decentralisation, taking into consideration the backlash the South African government received due to privatisation. The chapter had to define and examine privatisation, the historical development of the term privatisation, the mechanisms of privatisation, South Africa's past experience of privatisation, and it considered arguments for and against privatisation. These are the findings of chapter 3, below.

The term privatisation, in the case of SOEs, can refer to a mechanism to take full ownership of parastatals from government. This happens when the state completely surrenders its shareholder ownership to the private sector.[420] On the other hand, privatisation is also used as a mechanism for diluting ownership of parastatals, when the state does not necessarily want to surrender shareholder power, but wants to decentralise the ownership by selling a certain portion of their assets or shares to private investors.[421] This is known as partial privatisation, which brings mixed ownership.

For the purpose of this dissertation two methods of privatisation were explored namely, SEP and SIP. SEP is a method that allows government to privately identify an investor who it wants to share the shareholders rights with by selling an agreed portion of the shares, bringing about mixed ownership.[422]

On the other hand, SIP is a form of privatisation that encourages the government to list the parastatals on both domestic and international stock exchange institutions.[423] This form is regarded as the preferred method of privatisation. It is argued that it is transparent in nature and moreover it allows both domestic and foreign investors to contribute capital through the purchase of shares.[424] It is also said that this form of privatisation causes privatised SOEs to enjoy good corporate governance principles, as they are subjected to international standards by the virtue of being listed on stock exchanges.[425] Moreover, SIP allows the state to keep a golden share, which protects the government from experiencing hostile takeovers of the parastatals by the private sector.

Another important feature of SIP is that it is also a partial mechanism that allows government to decide on the number of shares it wishes to list. Once again, this form of privatisation serves to decentralise ownership and introduce mixed ownership, where government and private investors get to share their shareholder powers.

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420 Chapter 3 para 3.2.1
421 Chapter 3 para 3.2.1
422 Chapter 3 para 3.4.1.2.
423 Chapter 3 para 3.4.1.1
424 Chapter 3 para 3.4.1.1
425 Chapter 3 para 3.4.1.1

The chapter also examined two of South Africa parastatals that had undergone privatisation, although one was later bought back by government due to failures after privatisation. The first SOE to be examined was Telkom. This SOE was privatised through partial privatisation by listing shares on the JSE. Through this privatisation, the South African government became the majority shareholder and private shareholders also gained some ownership.[426] The level of success of this privatisation was assessed, and it was discovered that, because the parastatal was listed, it continues to perform well and has not faced any corporate governance failures.[427] When it comes to SAA's privatisation, the study discovered that the privatisation of this parastatal was done through the SEP method. This failed dismally, as the SEP mechanism does not fully protect minority shareholders and SAA enjoyed no benefits as it was sold privately using the SEP method.[428] The conclusion of chapter 3 led this research to preliminary conclusions, that privatisation of SOEs could be the potential solution to rescuing South African parastatals. However, the method of privatisation that South Africa uses is important, and that needs to be considered by policy-makers.

- **Chapter 4:**

Chapter 4 provided a case study examination of China's SIP privatisation experience, with the intention of understanding some of the challenges and successes that China has encountered after privatisation through the SIP model. The purpose of this case study was to understand how and whether China's privatisation through SIP has enhanced the corporate governance that regulates SOEs. The chapter was also interested in how the decentralisation of SOEs is being regulated, since government had sold some of its shares to private investors. The goal of this chapter was to examine the challenges that are faced by the Chinese privatised SOEs after privatisation, while adopting the successes enjoyed by the privatised SOEs. This is in the hope that South African policy-makers can take these lessons from China as a guide to delivering the successful decentralisation of parastatals through the SIP model. Some of the findings from this chapter follow.

Chinese privatisation took the form of a piecemeal approach unlike in Western countries. Based on this examination, the Chinese privatisation through SIP gave a clear indication that South Africa has had a lot of successes it could adopt in privatising SOEs as China's privatisation is reported to be positively contributing to their economy.

After examining China's experience, it was discovered that their corporate governance legal framework was deficient, and that this was because minority private shareholders did not have full participation in corporate governance decisions. Additionally, board members were also not in a position to fully perform their duties within these SOEs. The chapter then considered some of the reforms after the privatisation of China's SOEs. Some reforms to address board of directors' duties were introduced, including the Guidelines for Independent Directors of Listed Companies.[429] The chapter also examined the period when China established SASAC, which

[426] Chapter 3 para 3.5.1.
[427] Chapter 3 para 3.5.1.1.
[428] Chapter 3.5.1.2.
[429] Chapter 4 para 4.3.2.5.1.

served to decentralise SOEs from the Minister of Finance, and make SASAC the supervisory body for these SOEs.

The chapter concluded that it is clear that the privatisation of SOEs in China through SIP has greatly improved the performance of SOEs, though it does not ignore the weaknesses when it comes to corporate governance.

5.4 Conclusion

It is clear that privatisation of SOEs is not a one-size-fits-all. Privatisation and the methods of privatisation adopted in a certain jurisdiction might not be applicable for South Africa. It is also clear from a corporate governance perspective that for parastatals to serve their mandates, they need to be founded on good principles of corporate governance. This then causes a country to have a well-thought-out legal system that clarifies the mandate of SOEs and, most importantly, clear state ownership.

This study concludes that privatisation of SOEs could indeed serve to enhance the corporate governance of SOEs, especially when it comes to South African SOEs. However, what this study has learnt is that the importance of choosing the correct form of privatisation is the recipe for success after the privatisation of SOEs.

Based on chapter two's examination of the legal framework that governs South African SOEs, and after drawing lessons from China's privatisation in chapter 4, the study submits that privatisation should coexist with a strong legal framework. Put differently, if South Africa were to privatise its parastatals, such reforms should also accommodate a complete reform of the legal system that governs these SOEs. Having studied privatisation and corporate governance, the study submits that privatisation has a guaranteed potential of attracting lucrative investments, both on an international and domestic basis. Moreover, the study is also convinced that these investors would have the potential to bring the required competency and skills needed to enhance the corporate governance of SOEs.

What this study has appreciated concerning privatisation, and its impact on the corporate governance of SOEs, is that, when choosing a correct method to privatise such as SIP, as was shown in the study, SOEs will be subjected to stock exchange institutions' principles of corporate governance that SOEs should adhere to. Through this mechanism, SOEs are expected to meet certain criteria to remain listed, and if they fail to do so they will face serious business implications. This will keep SOEs from being shielded on the market. In return they will be encouraged to perform well, both from a corporate governance perspective, and financially.

Since South African parastatals suffer from bad corporate governance, because of centralisation of state ownership, political meddling and incompetence, privatisation of them through SIP could be a potential solution. Through privatisation, South Africa will be able to break up the centralisation that currently impacts the corporate governance of SOEs. This will also allow mixed ownership between the state and the private sector, where South African SOEs will be in a position to attract the capital they need in order to function fully. This will also allow parastatals to benefit the South African economy, as they will no longer need to be protected

from the marketplace. This form of privatisation is not foreign to South Africa. It worked in the privatisation of Telkom SA. Telkom SA is now a well-performing SOE from a financial and corporate governance perspective, and most importantly, it operates under the mixed ownership of the state and minority shareholders.

This study proposes that South African policy-makers should consider privatisation of SOEs through SIP. A legal framework reform would also be essential, as the study believes that privatisation without sound legislation would be a failure. For privatisation to be successful, it requires strong commitment from the state, and it should be transparent in nature.

5.5 Recommendations

- **Recommendation 1: Establishment of new overarching legislation**

The solution for South African parastatals is to enact an overarching legislation that will serve to deregulate the central powers bestowed on line ministers on the appointment of boards of directors and executive members. This legislation would remove the line ministers from directly appointing and removing boards of directors and executive managers; this will be further explained under recommendation 3.

The new legislation should regulate and rectify the current convoluted and fragmented legislation that governs South African SOEs when it comes to appointing and removing boards of directors and executive managers. Put simply, the new law would be the only law governing the appointment and dismissal of boards of directors and executive officers. Consequently, the PFMA, Companies Act, and SOEs' founding legislation would no longer be applicable to the appointment and removal of boards of directors and executive officers of both privatised and non-privatised SOEs.

The new legislation should include a provision for negotiating the delisting of all to-be-privatised SOEs from the PFMA. In other words, the new legislation would govern all SOEs listed in schedules 2 and 3 of the PFMA that are to be privatised. The implication of this provision is that all SOEs that are to be privatised would not be governed by the PFMA, but rather by the new Act, the Companies Act, and the SOEs' founding legalisations, as long as they do not conflict. In the event that the new legislation, the Companies Act, and the SOEs' founding legislation are in conflict with one another, the new Act would only take precedence when it comes to the procedure for appointing and removing directors and executive officers. However, the Companies Act will have precedence over all other matters. This provision will also be helpful in the event of a potential conflict between this Act and the PFMA, as the PFMA currently enjoys pre-eminence over conflicting SOE-related legislation. Consequently, delisting these privatised SOEs from the PFMA will make the Companies Act the governing law in all matters pertaining to SOEs, excluding the authority to appoint and remove board members and executive officers.

In preparation for privatisation through SIP, the new legislation should consolidate all key SOEs that are to be, and would be strictly for commercial activities. The remaining SOEs that

would not be required to be privatised by the Act should be decentralised to the provincial level.

The new legislation should include a provision stating that all shareholders have the right to vote for their preferred candidates for the board of directors, which would only be done through an annual general meeting. Subsequently, the new legislation should specify that all line ministers are shareholders by virtue of their position as line ministers, but that their voting rights will be delegated to the SASAC supervisory, as explained in recommendation 3.

The new legislation must contain a provision that specifically addresses the requirements, set of skills, and industry knowledge required of prospective boards of directors and executive managers who are to lead SOEs for a 5-year term, with the option of renewal for another non-renewable 5-year tenure.

To safeguard the rights of minority shareholders, it is proposed that the legislation should include a clause granting all shareholders, including minority shareholders, the right to vote on all matters pertaining to the corporate governance and development of these privatised SOEs.

To resolve the current confusion and conflict regarding the authority's responsibility to appoint the executive managers of SOEs, the Act should grant these powers directly to the boards of directors as the entrusted entities responsible for the corporate governance of SOEs. In addition, executive managers should report directly to the boards of directors as opposed to line ministers.

To ensure that these privatised SOEs are founded on sound principles of corporate governance, the Act should include a provision that regulates the performance of boards of directors and executive managers, in order to promote accountability, transparency, and performance of SOEs. The same provision should also cover corporate crimes committed by shareholders, the boards of directors, and the executive managers. This would also address the malfeasances currently plaguing these SOEs.

- **Recommendation 2: Privatisation of South African SOEs through SIP**
- The second step that South African policy-makers should implement is the privatisation of all the major SOEs through SIP.
- The state must be willing to surrender 49% of all the shareholding rights to foreign and domestic investors. This 49% must be listed on JSE and other foreign stock exchange institutions.
- The target investors should be investors, either in their individual capacity, or groups of companies with solid record and the required skills in the field of these parastatals.
- The capital raised must allow the SOEs to clear their debts in order for the entities to start with clean financials.
- **Recommendation 3: Adoption of the Chines SASAC supervisory structure style**

- It is recommended that policy-makers adopt the Chinese SASAC supervisory structure once the South African government has consolidated and privatised large SOEs through SIP.
- The new legislation will include a provision governing the establishment and appointment of SASAC. The new legislation should empower the minister to appoint SASAC in consultation with the NA. This supervisory body should be composed of individuals with extensive industry experience in the respective SOEs to be privatised, as well as academics and researchers in the corporate governance of SOEs.
- This institution's main responsibility would be to represent the interests of all line ministers with SOEs in their ministries. In other words, SASAC would consolidate all the line ministers with SOEs under their control and should be handed all the shareholdings in these privatised and non-privatised SOEs, so that they can act as shareholders on behalf of the line ministers.
- This supervisory style would dilute the triple role that ministers play in SOEs, while also strengthening the legal structure that oversees them. Line ministers would not actively participate in nor interfere with corporate governance duties that are typically the domain of the board of directors.
- The new legislation should grant all shareholders the right to appoint and remove board members, while empowering SASAC to exercise the voting rights of the line ministers as the shareholders. This means that both minority and majority shareholders would have the opportunity to vote and appoint their preferred candidates to serve on a board of directors at an AGM. However, the purpose of delegating the voting rights of line ministers to the supervisory body is based on recommendation 1, that line ministers should not directly vote for the board of directors. This would serve to abolish section 1 of the PFMA, which gives the line ministers the power to appoint them.
- Additionally, this would serve to curb the current issue of political interference, where line ministers appoint people close to them and remove those who do not serve their interests. However, line ministers should be consulted regarding the candidates for which SASAC should vote in the shareholders meeting. The responsibility of the line ministers would be to present the list of candidates to the NA for consultation and background checks. Then, once the line ministers have consulted and vetted these candidates in consultation with the NA, they should inform SASAC of the adopted resolution regarding the candidates, so that SASAC could make informed decisions about the candidates they are to vote for in a shareholder meeting.
- In the legislation establishing this institution, it should be made clear that SASAC represents the interests of the South African government as the shareholder of these SOEs.
- Lastly, line ministers ought to establish an annual ministry conference during which SASAC will report on their duties, responsibilities, and the decisions they have made on behalf of the line ministers, in order to protect the government's interests. One of

the purposes of this annual ministry conference would be to promote a culture of accountability and transparency. In addition, it would be essential for SASAC to provide quarterly reports to line ministers, so that they can make presentations to parliamentary portfolio committees.

5.6 Areas of further research

The study proposes that an interdisciplinary study could potentially be conducted on the impact of privatisation, on loss of employment, and on corporate governance from a political-science perspective.

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