
How Should States Own? Heinisch v. Germany and the Emergence of Human Rights- Sensitive State Ownership Function

Mikko Rajavuori*

Abstract

State ownership is thriving. Emerging economies are extending their growing economic power outward through sovereign wealth funds. State-owned multinationals have become top sources of foreign direct investment. Bailouts have recreated powerful state ownership structures in regions where private ownership has traditionally prevailed. The state is back – in shareholder capacity. Approaching the rise of state ownership from a human rights perspective, this article submits that a new conceptualization of state ownership function is emerging. State ownership provides a strong link connecting corporate actions with the international human rights system. Yet the conventional methods used to integrate state ownership in human rights treaty bodies' discretion seem unable to grasp the changing economic role of governments in the global economy. The article suggests that the notion of the 'public shareholder', introduced by the European Court of Human Rights in Heinisch v. Germany (2011), provides a useful lens for interrogating how states should govern the human rights performance of corporations through ownership. When exposed to the recent practice of a range of United Nations treaty bodies, internationalizing state ownership activity becomes framed in human rights terms. In this vision, the whole ownership function becomes a site for turning companies in the state's portfolio into responsible corporate citizens who take the impact of human rights seriously. Specifically, treaty bodies should advise states to seek human rights governance through private mechanisms in the capacity of the shareholder. In the process, human rights' checks and balances should constitute a counterweight for market-based initiatives that regulate state activity in the capacity of the shareholder.

* PhD candidate, University of Turku, Finland. Email: mijora@utu.fi. The author would like to thank Daniel Augenstein for commenting on an earlier version of the manuscript.

1 Introduction

The question of ‘how states should own corporations in the global economy?’ is more pertinent now than at any other time in the past 30 years. During the past decades, the new rise of state ownership has seen state-owned multinational corporations (MNCs) become the top sources of foreign direct investment (FDI). In addition, emerging economies have extended their growing economic power outward through sovereign wealth funds (SWFs). Simultaneously, bailouts have recreated powerful state ownership structures in regions where private ownership has traditionally prevailed. In short, the state is back – in a shareholder capacity. The answer is also more elusive than ever. To be sure, an array of policy and regulatory interventions has sought to capture and control proliferating state ownership. Ranging from international soft law standards to enhanced corporate governance and from competition law scrutiny to national security-influenced FDI review, these interventions have attempted to mitigate the perceived economic risks posed by surging ‘state capitalism’.

At the same time, alternative visions on how states should use their shareholder power have emerged. Take the case of the Norwegian Government Pension Fund Global (Norwegian Pension Fund), a SWF managing a large portion of Norway’s petroleum wealth. The Norwegian Pension Fund has a long history of activist divestments, as witnessed by a recent decision to exclude a subsidiary of a United Kingdom-based resource developer, Vedanta Resources, from its investment universe due to a perceived risk of severe environmental damage and systematic human rights violations.¹ By relying on shareholder activism, the Norwegian Pension Fund frames state ownership in three important ways. First, its international portfolio highlights that state ownership has gone global. Second, it indicates that exit and voice strategies are viable options complementing, or even replacing, traditional top-down regulatory policies aiming to change corporate behaviour, and, third, it suggests that state ownership can also be framed in the language of human rights.

The Norwegian Pension Fund’s activities reveal the relationship between state ownership and the realization of human rights, signalling that state shareholder power can bring about better lives and outcomes for individuals around the world. Its investment policies are, however, unilateral choices of a single state. Inspired by emerging linkages between business and human rights, this article is interested in making a more generalizable claim about the new roles of state shareholders brought about by changing economic realities. To this end, the article focuses on a human rights conceptualization of state ownership as it appears in the recent practice of a range of human rights treaty bodies. Departing from traditional treatment of state-owned entities, human rights treaty bodies are increasingly reflecting the three developments exposed by the Norwegian Pension Fund’s exclusion policy – that is, the international scope of state ownership activity, the related proliferation of market-based techniques of governance and the framing of state ownership in human rights terms. This insight

¹ Government Pension Fund Global Council of Ethics, *Recommendation to Exclude Sesa Sterlite from the Investment Universe of the Government Pension Fund Global* (13 September 2013), available at www.regjeringen.no/pages/2024882/Recommendation_Sesa_Sterlite_2013.pdf (last visited 3 September 2014).

provides ground for a more general understanding of the human rights potential and constraints brought about by surging state ownership activity.

Using the case law of the European Court of Human Rights (ECtHR) as its entry point, the article will first discuss how modern human rights law understands state ownership. The article concentrates on the case of *Heinisch v. Germany*, suggesting that it contains both archetypes and a new understanding for human rights-based conceptualization of state ownership.² This new conception, where the state is identified as a public shareholder, is then contextualized both with developments in the global economy and in the recent practice of United Nations (UN) human rights treaty bodies. The article concludes by submitting that, while still nascent, the emerging human rights-based conceptualization of state ownership makes analytical and strategic sense when exposed to the immense power that state shareholders currently command.

2 *Heinisch* and the Notion of Public Shareholder

This section discusses the case of *Heinisch v. Germany*, which is used to establish the basic tenets of human rights-based understandings of state ownership. It is then suggested that in *Heinisch* the ECtHR offers a new understanding of state ownership and its relation to human rights. This conceptualization, centred on the notion of the public shareholder, sees the ECtHR crafting a new mode of human rights governance.

A *Heinisch* and the Three Understandings of State Ownership

In *Heinisch*, which was decided on 21 July 2011, the ECtHR delivered a judgment in a major whistle-blowing case.³ Understaffed and overburdened, employees of a geriatric nursing home had repeatedly voiced their concerns about the deteriorating quality of care. After a series of attempts to evoke a response from management, an employee lodged a criminal complaint against the company. While the investigations were ultimately discontinued, the employee remained active in criticizing the employer's procedures. Eventually, the employee was dismissed without notice. German courts upheld the dismissal, leading the employee to allege a violation of the right to freedom of expression under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The judgment delivered by the ECtHR was simple: the domestic courts had failed to strike a fair balance between the need to protect the employer's reputation and rights and the need to protect the applicant's right to freedom of expression.

Heinisch is generally discussed in the context of Article 10 of the ECHR, where the ECtHR's jurisprudence involving freedom of expression of civil servants and private sector employees is well established. In this article, however, the case is approached from the perspective of state ownership. The reason for this shift is that the nursing

² ECtHR, *Heinisch v. Germany*, Appl. no. 28274/08, Judgment of 21 July 2011. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/> (last visited 3 September 2014).

³ *Ibid.*

home in question was operated by Vivantes Netzwerk für Gesundheit GmbH, a limited liability company majority-owned by the *Land* of Berlin. While the relationship between state and company was not considered in detail, state ownership was still discussed perceptively.⁴ In the ECtHR's view, the dismissal of the employee because of her disclosures and the subsequent upholding of the dismissal in domestic courts constituted a clear interference with her right to freedom of expression.⁵ To discern whether the action amounted to a breach of the ECHR, however, the Court had to analyse if interference was prescribed by law, if it pursued a legitimate aim and if it was necessary in a democratic society to assess if the interference amounted to a breach of the ECHR. In the latter analysis, the ECtHR pursued a balancing exercise weighing various interests present in the case.⁶

State ownership appeared potently in the balancing exercise. First, it was discussed in relation to establishing a public interest motivation in disclosing the problems in the operator's procedures. In the ECtHR's assessment, the dissemination of information about the quality or deficiencies of institutional care was 'undeniably of public interest ... [i]n societies with an ever growing part of their elderly population ... who often may not be in a position to draw attention to shortcomings in the provision of care on their own initiative'.⁷ The motivation of public interest is even more evident when a state-owned company provides the institutional care, where the confidence of the public in a provision of vital care services by the state is at stake.⁸

Second, state ownership was discussed when the ECtHR considered the detriment caused to the employer by the employee's disclosure. Clearly, the ECtHR recognized that whistle-blowing had economic consequences for the employer and that there was an interest in 'protecting the commercial success and viability of companies for the benefit of shareholders and employees, but also for the wider economic good'.⁹ In the case, the ECtHR drew special attention to the fact that the employer was a 'State-owned company providing, inter alia, services in the sector of institutional care for the elderly'.¹⁰ While the ECtHR noted that state-owned entities also have an interest in commercial viability, the main finding was that 'the protection of public confidence in the quality of the provision of vital public service by state-owned or administered companies is decisive for the functioning and economic good of the entire sector'.¹¹ Importantly, the ECtHR also contended that 'the public shareholder itself has an interest in investigating and clarifying alleged deficiencies in this respect within the scope of an open public debate'.¹² For this reason, it ultimately found 'that the public interest in receiving information about shortcomings in the provision of institutional care for

⁴ *Ibid.*, at 51.

⁵ *Ibid.*, at 43–45.

⁶ *Ibid.*, at 66–70.

⁷ *Ibid.*, at 71.

⁸ *Ibid.*

⁹ *Ibid.*, at 89.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

the elderly by a State-owned company is so important in a democratic society that it outweighs the interest in protecting the latter's business reputation and interests'.¹³

Reading *Heinisch* closely, state ownership appears in three different understandings. The first understanding revolves around the status of the company as an independent corporate entity where a municipality happens to own shares. The second understanding involves the ECtHR's construction of a more comprehensive public interest motivation that is a result of the company's ownership structures. The third understanding of state ownership can be found in the ECtHR's passing reference to a public shareholder.

In the first understanding, the ECtHR refers to state ownership when it defines the company being majority-owned by the *Land* of Berlin¹⁴ and later when it discusses the applicability of its own case law to the case. According to the ECtHR, in *Heinisch*, the issue was whether Article 10 of the ECHR:

applies when the relations between employer and employee are governed, *as in the case at hand*, by private law and that the State has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals.¹⁵

Here, the company is clearly understood as a private entity whose ownership structure includes a municipal shareholder. However, municipal ownership does not change the relationship between the employee and the employer. Accordingly, the employer is understood as a wholly private party. In this confined understanding, the effect of state ownership in the ECtHR's reasoning is negligible.

In the second understanding, the scales in the balancing exercise are altered when state ownership steps into play. In the ECtHR's view, the presence of a 'state-owned company' that provides 'vital' institutional care was a clear factor in pushing the issue of disclosures from the realm of protecting the reputation of a business and commercial interests to the domain of protecting the freedom of expression and the whistle-blower.¹⁶ Here, additional elements and dimensions brought about by state ownership structures tilt the ECtHR's reasoning towards an understanding of the company as a functional part of the state. The first understanding in which the company was construed as a private operator is replaced by analytics in which state ownership legitimizes the lower threshold for establishing a public interest in the whistle-blower's disclosures. Further, when assessing the detriment to the employer, the state ownership seems to assign a higher threshold for the company to tolerate criticism directed towards its key operations. However, it is unclear whether the conclusion was informed by its being a 'vital public service' or by its provision as a 'State-owned company'.¹⁷

The third understanding given to state ownership is centred on the concept of the public shareholder. In the ECtHR's view, 'the provision of vital public service by State-owned or administered companies is decisive for the functioning and economic good

¹³ *Ibid.*, at 90.

¹⁴ *Ibid.*, at 6.

¹⁵ *Ibid.*, at 44 (emphasis added).

¹⁶ *Ibid.*, at 71.

¹⁷ *Ibid.*, at 89.

of the entire sector'¹⁸ because the 'public shareholder itself has an interest in investigating and clarifying alleged deficiencies in this respect within the scope of an open public debate'.¹⁹ While, in the previous understanding of state ownership, the company operating in the field of geriatric care was supposed to have a higher tolerance towards criticism, in this view, the ECtHR extends the same rationale to the public shareholder. In the ECtHR's analysis, the municipal shareholder has to be prepared to discuss the shortcomings of the company's operations in greater detail because of its strong ownership position in the company. This position raises questions. What does it matter what the shareholder should do when discussing the operations of the company? If the company is considered separate from the municipal shareholder, is the ECtHR expecting the public shareholder to use its influence to make an intervention into the day-to-day management of the company? Is it expected to wield its shareholder power to influence the company not to use all of the possible legal remedies when an employee is tampering with the company's reputation and its bottom line?

B *Heinisch Situated*

How can the three different understandings of state ownership in *Heinisch* be rationalized? One possibility is to look at the evolution of the ECtHR's case law with regard to state ownership. Since the issue cuts through a range of core questions revolving around the ECHR, the ECtHR's case law provides a fairly nuanced view on a human rights conceptualization of state ownership. There are two doctrinal areas where state ownership comes particularly close to the functioning of the ECHR's human rights protection. In the first area, the focus is on the nature of human rights obligations. The second focus area involves the admissibility of applications from state-owned entities seeking protection under the ECHR.²⁰ Yet another factor to consider is the relationship between state ownership and the public functions of the entity, especially in the context of privatizations. This dimension, however, is not discussed in detail.

In general, the ECHR distinguishes between negative obligations that require the state to refrain from violating human rights and positive obligations where the state must ensure the effective realization of human rights by, for example, protecting the rights of individuals against violations by third parties. Over time, the ECtHR has developed a set of criteria determining whether corporate actions are directly attributable to the state under negative obligations or whether the state should be held responsible because of its failure to take all reasonable measures to protect human rights under positive obligations. State-owned entities have featured prominently in this exercise.

A good example of the criteria that has been developed can be found in *Yershova v. Russia*, where the ECtHR delineated whether the state was directly responsible for a municipal corporation's failure to pay the applicant or whether it had only failed

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ For a similar classification, see Daniel Augenstein, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights*, Submission to the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (2011), at 6–12.

to enforce a judgment against the company as a third party. The ECtHR's deliberation on the issue was based on 'such factors as the company's legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities'.²¹ Ownership, in particular, was considered to be a part of the assessment of 'sufficient institutional and operational independence from the State'.²² In the case, the ECtHR noted that 'the city ... was the company's owner in accordance with domestic law and retained ownership of the property conferred to the company', effectively ensuring that the 'company's institutional links with the public administration were particularly strengthened'.²³ Ultimately, the ECtHR held that 'notwithstanding the company's status as a separate legal entity, the municipal authority, and hence the State, is to be held responsible under the Convention for its acts and omissions'.²⁴ Naturally, the decision was informed by a complex analysis of the company's operational context.

Similar reasoning was deployed in the case of *Mykhaylenky and others v. Ukraine*, where the applicants sought to recover salary arrears from a state-owned company.²⁵ In the ECtHR's view, the government had not demonstrated that the company 'enjoyed sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention for its acts and omissions'.²⁶ Accordingly, the public nature of the company's operations was emphasized regardless of its formal classification under domestic law.²⁷ A different outcome was reached in the case of *Fadeyeva v. Russia*, where the applicant suffered from health issues brought about by pollution from a formerly state-owned steel plant. In this case, it was noted that 'at the material time ... steel plant was not owned, controlled, or operated by the State'. Consequently, the ECtHR considered that the state party had not directly interfered with the applicant's rights. Instead, the state's responsibility arose 'from a failure to regulate private industry' under a positive duty.²⁸

Similar delineation processes have also surfaced at the admissibility stage. In these cases, the issue has been whether the entities are able to have standing before the ECtHR. Cases have usually involved a state-linked entity claiming a violation on the government's part. Subsequently, the government has contended that due to their proximity to the state the companies belong to the public sector and cannot apply to the ECtHR.²⁹ Consequently, a complex case law expanding the meaning of 'nongovernmental organization' defined in the Article 34 of the ECHR has developed.

²¹ ECtHR, *Yershova v. Russia*, Appl. no. 1387/04, Judgment of 8 April 2010, at 55.

²² *Ibid.*

²³ *Ibid.*, at 57–58.

²⁴ *Ibid.*, at 62.

²⁵ ECtHR, *Mykhaylenky and others v. Ukraine*, Appl. nos 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, and 42814/02, Judgment of 30 November 2004, at 5, 17.

²⁶ *Ibid.*, at 44.

²⁷ *Ibid.*, at 45.

²⁸ ECtHR, *Fadeyeva v. Russia*, Appl. no. 55723/00, Judgment of 9 June 2005, at 89.

²⁹ ECtHR, *Radio France and Others v. France*, Appl. no. 53984/00, Judgment of 23 September 2003 (dec.), at 24.

In *State Holding Company Luganskvugillya v. Ukraine*, the ECtHR ruled that an application of a state-owned entity contesting a fine was inadmissible. The decision was informed by the facts that the applicant corporation was owned and managed by the state; had participated in the exercise of governmental powers in the management of the coal industry; had a public service role in the activity of the state and had no independent function.³⁰ Alternatively, in *Ukraine-Tyumen v. Ukraine*, the ECtHR considered the applicant company to enjoy sufficient institutional independence despite the strong ownership position that the state held in the company.³¹ In later case law, the ECtHR clearly stated that the case illustrated that the ‘State’s minority shareholding did not give to the State a greater role in the management of the company than other shareholders’.³² In *Islamic Republic of Iran Shipping Lines v. Turkey*, a case concerning a seizure of a vessel by Turkish authorities, the ECtHR considered that even though the ‘applicant company was wholly owned by the State and currently an important part of its shares still belong to the State and a majority of the members of the board of directors are appointed by the State’, it was run as a commercial business independent from state structures and could apply to the ECtHR.³³ Similar tests have been employed in a number of cases with varying outcomes, suggesting that the ECtHR wavers on the nature of state-owned entities on a functional case-by-case basis. This is especially pronounced in *Transpetrol v. Slovakia*, where the ECtHR assessed ‘the overall procedural and substantive context of the application and ... its underlying facts’,³⁴ concluding that the applicant company displayed features of both a governmental and non-governmental organization. In this case, the application was ruled inadmissible because of the perceived unity of interest between the state shareholder and the company.³⁵

In sum, a range of issues in which state ownership is implicated have surfaced from the ECtHR’s case law. Naturally, a case taking place in a former Socialist state, involving a privatized state agency and concerning the failure of the government to enforce a domestic judgment about unpaid salaries³⁶ is qualitatively very different from a case where a state-owned entity itself is looking for protection against the state in a liberal democracy.³⁷ Yet an entirely different scenario emerges when state ownership is used as an additional argument establishing jurisdiction³⁸ or when a (former) state-owned entity contributes to a human rights harm imposed on protected individuals.³⁹

³⁰ ECtHR, *State Holding Company Luganskvugillya v. Ukraine*, Appl. no. 23938/05, Judgment of 27 January 2009.

³¹ ECtHR, *Ukraine-Tyumen v. Ukraine*, Appl. no. 22603/02, Judgment of 22 November 2007, at 27.

³² *State Holding Company Luganskvugillya*, *supra* note 30.

³³ ECtHR, *Islamic Republic of Iran Shipping Lines v. Turkey*, Appl. no. 40998/98, Judgment of 13 December, at 78–82.

³⁴ ECtHR, *Transpetrol v. Slovakia*, Appl. no. 28502/08, Judgment of 15 November 2011, at 67.

³⁵ *Ibid.*, at 76.

³⁶ *Mykhaylenky and Others*, *supra* note 25.

³⁷ *Radio France and Others*, *supra* note 29.

³⁸ ECtHR, *Catan and other v. Moldova and Russia*, Appl. nos 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012, at 120.

³⁹ *Fadeyeva*, *supra* note 28.

While the contexts differ, the actors differ, the issues differ and the solutions differ, it is important to note the binary character of the ECtHR's conceptualization of state ownership. When addressing the categorization of an action under negative or positive obligation or when contemplating the admissibility of an application on the basis of the entity's governmental or non-governmental characteristics, the ECtHR produces a rather crude 'either/or' systematization. Even though the ECtHR's discretion is informed by a functional analysis, the result is a division between state-owned entities understood as being either immersed in state structures or as private operators who can apply to the ECtHR and whose conduct governments are required to regulate and control in order to meet their positive obligations. Either way, state ownership matters. In a negative-obligations reading, state ownership, alongside public function tests, is best understood as a form of attribution. In a positive-obligations reading, state ownership influences the content of state obligations. Accordingly, the basic models for understanding the human rights dimensions of state ownership are framed by these antipodes.

Compared to the case law discussed earlier, *Heinisch* is not a traditional state ownership case. The case focuses on freedom of expression – the nature of the entity is not involved in the discussion – and state ownership appears mainly as an additional, although powerful, argument in the balancing exercise. Yet the first two understandings of state ownership identified in *Heinisch* contain the archetypes distinguished in the ECtHR's case law. In the first understanding, the company falls into the private operator category, where 'the State has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals'.⁴⁰ The position of the state is not conceptualized through ownership but, rather, through its positive obligation to ensure the effective realization of human rights. In the second understanding, the company is referred to as fleshing out the 'vital public service ... decisive for the functioning and economic good of the entire sector'.⁴¹ Here, the strong ownership position that the municipality has in the corporation is used to tilt it towards a publically oriented entity.

C *Public Shareholder: A Third Way?*

Unlike the rest of the ECtHR's case law, however, *Heinisch* contains a third understanding of state ownership. In this understanding, state ownership is framed neither in terms of the positive obligation towards protecting individual human rights nor in terms of attributing the actions to the state. Instead, the ECtHR subjects the conduct of a municipality in a shareholder capacity to scrutiny and assigns the municipality a responsibility of facilitating a public investigation and clarification of the alleged deficiencies in the conduct of the company.⁴² This requirement is extended to the service the company provides and the way it treats its employees in times when the individual's interest, corporate interest and public interest collide. The ECtHR's vision

⁴⁰ *Heinisch*, *supra* note 2, at 44.

⁴¹ *Ibid.*, at 89.

⁴² *Ibid.*

of the public shareholder is curious, and it sits uneasily with the ideal conceptualization of state ownership identified earlier. In general, the public shareholder appears as something more than a regular, private law-influenced shareholder involved in a company that carries out commercial activities and has ‘neither a public-service role nor a monopoly in a competitive sector’.⁴³ The public shareholder is also something less than a shorthand expression for seeing the company as a state agent and attributing its actions to the state under negative obligations. In *Heinisch*, the ECtHR crafts a middle position between these antipodes. In the process, it offers a third way of understanding why and how state ownership matters from a human rights perspective.

The novelty of the ECtHR’s approach in *Heinisch* relates to its treatment of the municipal shareholder. In practice, the ECtHR extends human rights-influenced restrictions on a state, while it acts in the private capacity of a shareholder. On the one hand, the role of a public shareholder is that of a restricted shareholder. When a company in the state’s portfolio is involved in human rights-sensitive activity, a public shareholder should allow for a thorough examination, investigating and clarifying the alleged deficiencies on the issue. On the other hand, it is clear that this type of a hands-off approach does not necessarily alleviate the intricacies and sensitivities to human rights abuses in the company’s operations. Therefore, the ECtHR’s analysis seems also to suggest a general positive obligation to wield shareholder power to bring about better human rights outcomes in the conduct of the company. By assigning public shareholder responsibilities that flow from general state functions, the ECtHR frames state ownership in terms of these roles.

Further, the ECtHR’s suggestion that a public shareholder can tolerate public discussion surrounding the company’s operations is directed towards the majority owner of the company, *Land* of Berlin. While the ownership structure of the company is not discussed in detail, the public shareholder is the only shareholder that is singled out. The interest the other shareholders might have in the company is not enunciated. This suggests that, in the ECtHR’s rationale, the responsibility to restrict or civilize the company’s behaviour towards whistle-blowers falls on the public shareholder. Finally, the state is required to act only in the capacity of the public shareholder. In *Heinisch*, the *Land* of Berlin is only a shareholder, not a public regulator. For this reason, the modes of advancing the realization of human rights are shaped by its capacity to influence the company and to promote human rights governance as a private shareholder. In short, the whole state shareholder function becomes a site of advancing ECHR rights and freedoms. The necessity for human rights-motivated shareholder activity flows from the ECHR, but the venues and modes of its realization focus on the realm of private market transactions. Instead of governing through public regulation, the public shareholder is expected to assume its position as a single, but powerful, shareholder who steers corporate behaviour to coincide with the requirements stemming from the ECHR.

In sum, *Heinisch* provides a curious and unique window into the potential of employing state ownership in securing the realization of human rights within the

⁴³ *Transpetrol*, *supra* note 34, at 62.

ECHR system. In *Heinisch*, the public shareholder itself appears as a subject to human rights obligations. This notion disturbs the traditional distinction between negative and positive obligations in relation to corporations as non-state actors and communicates a powerful idea interrogating how states should govern corporations' human rights performance through ownership. At the same time, it must be emphasized that *Heinisch* is an isolated judgment and that state ownership was not instrumental in deciding the case. Further, the notion of a public shareholder has not been featured in the ECtHR's case law since that case. Therefore, the implications of the ECtHR's new conceptualization must be approached with caution. Regardless, as an intervention shaping and rearranging the parameters of state obligations and corporate activities with regard to human rights, *Heinisch* is informative in three ways. First, it reminds us that state ownership matters when discussing the extent of state obligations. Second, it points out that state ownership can be construed as an instrument of private governance through which public ends are sought. Third, it informs us of the ways state ownership activity should be controlled. All of these observations suggest that understanding state ownership through the lens of a human rights-sensitive public shareholder makes analytical sense and has significance beyond the ECtHR's jurisprudence.

3 Taking *Heinisch* Global

This section exposes the notion of a public shareholder to the growing significance of state ownership in the global economy. Scholarship underlining the relationship between state ownership and the realization of human rights is then discussed. It is then argued that the ECtHR's reasoning finds counterparts in the recent practice of the UN human rights treaty bodies. Based on these findings, the section concludes by suggesting that a human rights-sensitive state ownership function has emerged.

A *The Rise and Regulation of State Ownership*

Over the last century, a strong state presence in markets through corporate ownership has been created through development, industrial and employment policies, the provision of public goods, the existence of natural monopolies and strategic national interests. In general, state ownership and state-owned enterprises (SOEs)⁴⁴ have been employed as integral economic policy instruments across the globe. Since the late 1970s, however, state ownership policies have primarily been characterized by privatization. States all over the world have sold major blocks of their ownership positions to the private sector in the process, which has been described as the greatest transfer of ownership in the history of the corporation.⁴⁵

⁴⁴ In the following sections, state-owned enterprises (SOEs) are defined through state ownership. Basically, SOE is used as a shorthand expression for those corporations in which the state holds equity stakes, no matter for what purpose or of what size.

⁴⁵ Bortolotti and Faccio, 'Government Control of Privatized Firms', 22 *Review of Financial Studies* (2008) 2907, at 2907–2908.

While the number of SOEs declined considerably between the 1970s and 2000s, several recent developments have challenged the prevailing narrative of the demise of state ownership. Most importantly, recent projections suggest an increasing significance of SOEs and states in corporate ownership roles, especially with regard to ownership in foreign corporations. Currently, nearly 20 per cent of the world's top 100 corporations and over 10 per cent of the top 2,000 publicly traded MNCs are SOEs.⁴⁶ Their market value corresponds to 11 per cent of the market capitalization of all listed companies worldwide, and their overseas investments account for roughly 11 per cent of global foreign direct investment flows.⁴⁷

Alongside the internalization of SOEs, another major development is the heterogeneity that state ownership has assumed. While direct government equity holdings are still a key mode of ownership, it is increasingly augmented by a variety of state-owned holdings companies, SWFs and development banks.⁴⁸ Further, the composition of the SOE economy has changed. The ubiquitous presence of SOEs in all segments of national economies has given room to fewer and more specialized entities congregated in public utilities, energy development, service and financial sectors.⁴⁹ Additionally, the magnitude of state ownership has changed as states often find themselves as minority shareholders in former SOEs or as equity investors in completely new enterprises.⁵⁰ Contemporary state ownership structures have moved towards minority ownership with objectives of foreign investment or expansion into world markets for goods and services.

Surging state ownership is often explained by the activation of emerging economies seeking to acquire technology, intellectual property, brand names and natural resources through ownership stakes in foreign corporations.⁵¹ However, the increased significance of state ownership cannot be explained only by the strategic interests of emerging economies. Two additional developments have revitalized attention to the policies and trade effects of state ownership globally. First, the rise of SWFs has continued to accelerate as a number of states have sought to target revenues from commodity exports as well as from foreign exchange reserves and financial assets.⁵² Second,

⁴⁶ Przemyslaw Kowalski *et al.*, *State-Owned Enterprises: Trade Effects and Policy Implications*, OECD Trade Policy Papers No. 147 (2013), available at http://www.oecd-ilibrary.org/trade/state-owned-enterprises_5k4869ckqk7l-en (last visited 3 September 2014), at 31.

⁴⁷ UN Conference of Trade and Development (UNCTAD), *World Investment Report* (2012), available at www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf (last visited 3 September 2014), at 99.

⁴⁸ Aldo Musacchio and Sergio Lazzarini, *Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond* (2014), at 53.

⁴⁹ Organisation for Economic Co-operation and Development (OECD), *SOEs Operating Abroad: An Application of the OECD Guidelines on Corporate Governance of State-Owned Enterprises to the Cross-border Operations of SOEs* (2010), available at www.oecd.org/dataoecd/46/20/44215438.pdf (last visited 3 September 2014), at 3.

⁵⁰ Boubakri *et al.*, 'The Political Economy of Residual State Ownership in Privatized Firms: Evidence from Emerging Markets', 17 *Journal of Corporate Finance* (2011) 244.

⁵¹ UNCTAD, *World Investment Report* (2011), available at www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf (last visited 3 September 2014), at xiv.

⁵² UNCTAD, *World Investment Report* (2013), available at unctad.org/en/PublicationsLibrary/wir2013_en.pdf (last visited 3 September 2014).

the magnitude of government interventions in addressing the global financial crisis since 2008 has re-opened the debate over state involvement in private enterprise.⁵³ Together, these developments suggest that state ownership has assumed a strengthened position in the global economy.

So far, the new rise of state ownership has primarily been met with policy and regulatory interventions designed to control potential market distortions. The normative foundations and preferred policy measures of this approach are well rehearsed. In brief, state-owned entities are considered to be less efficient than private corporations because of their perceived governance problems: the double role of the state as a market participant and regulator is alarming; soft budget constraints have undermined competition; and political interventions have encouraged rent seeking.⁵⁴ In an international setting, state ownership has been described either as a potential market irritant jeopardizing competitive markets and level playing field or as a threat to national security.⁵⁵ Since the late 1970s, the rationales for state ownership have driven a number of regulatory initiatives aimed at reducing and controlling the scale of direct state involvement in corporations. While privatization efforts have contributed significantly towards this goal, they are only one aspect of the employed policy bundle.⁵⁶

A newer breed of regulatory interventions have usually adopted traditional policy prescriptions. Some instruments emphasize a level playing field and transparency.⁵⁷ In national and international practice, the prescriptions have taken a variety of forms. In Canada, for example, the Investment Canada Regulations have been augmented with guidelines directed specifically towards investment by foreign SOEs.⁵⁸ Similarly, the activation of overseas acquisitions by Chinese SOEs has prompted the European Commission's interest in the relationship between the Chinese state and its corporate nationals in the light of merger control.⁵⁹ Under the regime of World Trade Organization (WTO), state ownership has emerged as a subsidy question.⁶⁰ Finally, the 2008–2009 bailouts in the automotive industry sector forced the US policy-makers to assess their stance on the potential influence that state shareholders were able to

⁵³ Templin, 'The Government Shareholder: Regulating Public Ownership of Private Enterprise', 62 *Administrative Law Review* (2010) 1127.

⁵⁴ Shapiro and Globerman, 'The International Activities and Impacts of State-Owned Enterprises', in Karl P. Sauvart et al. (eds), *Sovereign Investment: Concerns and Policy Reactions* (2012) 98, at 114–124.

⁵⁵ OECD, *supra* note 49, at 9.

⁵⁶ Erika Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (2007), at 255–260.

⁵⁷ See, e.g., OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2005), available at www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf (last visited 3 September 2014), at preamble; International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices*, available at www.iwg-swf.org/pubs/gapplist.htm (last visited 3 September 2014).

⁵⁸ Industry Canada, *Investment Canada Act Guidelines: Statement Regarding Investment by Foreign State-Owned Enterprise*, available at www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#state-owned (last visited 3 September 2014).

⁵⁹ Commission Decision on Case COMP/ M.6082: China National Bluestar/Elkem (31 March 2011), at 10, 17.

⁶⁰ WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body*, 11 March 2011, WT/DS379/AB/R. See also Ming Du, 'China's State Capitalism and World Trade Law', 63 *International and Comparative Law Quarterly* (2014) 409.

exercise over corporations. In the case of General Motors, for example, the government was determined to be ‘extremely disciplined’ in using its rights as a shareholder.⁶¹

While it is impossible to discuss regulation of state ownership in various regulatory regimes in detail in this article, the commonality between approaches has emphasized the importance of countering the negative effects of state influence in international markets. The key observation is that a number of regulatory regimes have already sought to control the influence that states have over corporations precisely in shareholder capacity. Consequently, the limits of state ownership in the global economy are shaped by market-based regulatory interventions and policy prescriptions. So far, human rights-sensitive restrictions imposed on state shareholders, as displayed in *Heinisch*, have not been featured in this vision.

B State Ownership, Corporate Social Responsibility and Human Rights

Even though state ownership has usually been approached from a competitive neutrality perspective, alternative regulatory narratives are also available. *Heinisch* provides for an illuminating starting point. At its core, *Heinisch* arises from two strained relationships. The first is the relationship between an employer and an employee. Here, the tension emerges from conflict between working conditions and employee loyalty. The second relationship involves the company seeking to operate as profitably as possible and society, writ large, imposing restrictions on its operations in order to minimize potential economic and social externalities. Understood this way, *Heinisch* can be framed as belonging to a longer continuum attempting to address and mitigate adverse societal impacts caused by corporations.

Over the years, a wide spectrum of approaches has been deployed to achieve balance in the corporation/society equation. These attempts have ranged from voluntary corporate social responsibility (CSR) schemes to the recalibration of the purposes of corporate law. Since the early 1990s, international law, and human rights law in particular, has become an important site for discussing the parameters of corporate activities in relation to individuals, communities and society at large. In recent years, this process has culminated in the endorsement of the UN Protect, Respect and Remedy Framework (UN Framework)⁶² and the Guiding Principles on Business and Human Rights (Guiding Principles).⁶³

Traditionally, the business and human rights discussion has focused on private MNCs, leaving state-owned entities in the margins. Recent studies have, however, explored both human rights and CSR dimensions of state ownership from a variety of angles. It has, for example, been argued that SOEs’ CSR strategies are not always

⁶¹ White House, *Press Release: Obama Administration Auto Restructuring Initiative for General Motors* (30 March 2009), available at www.whitehouse.gov/the_press_office/Fact-Sheet-on-Obama-Administration-Auto-Restructuring-Initiative-for-General-Motors (last visited 3 September 2014).

⁶² Human Rights Committee (HRC), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008.

⁶³ HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy Framework*, UN Doc. A/HRC/17/31, 21 March 2011.

on par with MNCs' commitments⁶⁴ and that SOEs may operate beyond normal regulatory mechanisms.⁶⁵ Alternatively, it has been suggested that state ownership is usually associated with a higher degree of CSR disclosures⁶⁶ and that responsible investment pursued by states ripples throughout national firms.⁶⁷ The emerging business and human rights literature emphasizes the special nature of state ownership. In some conceptualizations, state-owned companies are considered to be parts of the state, making them bearers of human rights obligations under international law like any other governmental entity.⁶⁸ In other typologies, SOEs are subjected to higher expectations of human rights observance than privately owned corporations because of the aggregate effect of special soft law and policy instruments, the possibility of attribution and the heightened duty to protect against third-party abuses. Here, the significance of 'SOEs is that their nature enables some initial steps to be taken towards meeting the wider need for regulation' of corporate human rights impacts.⁶⁹ In sum, while scholarship on the impact of state ownership is mixed and the ways of conceptualizing state ownership in human rights terms is still developing, it is clear that state ownership is increasingly viewed as a possible and potentially effective site for altering corporate behaviour to coincide with the requirements arising from international human rights law.⁷⁰

C State Ownership in the Practice of UN Treaty Bodies

Extending human rights claims to SOEs, partially privatized entities and their state shareholders is not novel. On the contrary, these connections have been addressed in domestic and international settings for decades.⁷¹ From the perspective of the International Covenant on Civil and Political Rights (ICCPR), for example, the starting

⁶⁴ Lindsay *et al.*, 'Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles', 6 *Journal of World Energy Law and Business* (2013) 2.

⁶⁵ Kelly, 'Ending Corporate Impunity for Genocide: The Case against China's State-Owned Petroleum Company in Sudan', 90 *Oregon Law Review* (2011) 414.

⁶⁶ Mohd Ghazali, 'Ownership Structure and Corporate Social Responsibility Disclosure: Some Malaysian Evidence', 7 *Corporate Governance* (2007) 251.

⁶⁷ Vasudeva, 'Weaving Together the Normative and Regulative Roles of Government: How the Norwegian Sovereign Wealth Fund's Responsible Conduct Is Shaping Firms' Cross-Border Investments', 24 *Organization Science* (2013) 1662.

⁶⁸ Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) 78, at 96.

⁶⁹ Camilla Wee, *Regulating the Human Rights Impact of State-Owned Enterprises: Tendencies of Corporate Accountability and State Responsibility*, International Commission of Jurists, Danish Section (2008), available at www.icj.dk/Publications/Reports/SOEHumanRightsResponsibilities_ICJ_DK.pdf (last visited 3 September 2014).

⁷⁰ Van Der Zee, 'Sovereign Wealth Funds and Socially Responsible Investment: Dos and Don'ts', 9 *European Company Law* (2012) 141. For a critical position, see Demeyre, 'Sovereign Wealth Funds and (un)Ethical Investment: Using "Due Diligence" to Avoid Contributing to Human Rights Violations Committed by Companies in the Investment Portfolio', in Gro Nystuen *et al.* (eds), *Human Rights, Corporate Complicity and Disinvestment* (2011) 183.

⁷¹ For a thorough discussion from a privatization perspective, see Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (2011).

point is the requirement for states to ‘respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized’ in the convention.⁷² In practice, the rights of individuals are protected only when states both refrain from violating the rights themselves through state agents and when they protect individuals against acts committed by private persons or entities.⁷³ Similarly with the ECHR system, the discourse on state ownership and human rights is particularly influenced by tensions between negative and positive state obligations.

Under the ICCPR system, state ownership has traditionally surfaced as a question of negative obligations. Here, the issue boils down to how the responsibility of ‘the State Party as a whole’ is construed and how state ownership affects the delineation between ‘public or governmental’ institutions and other entities.⁷⁴ The Human Rights Committee (HRC) approached the question of state ownership in a straightforward way in its early practice. In a case involving the Finnish Broadcasting Company, the premise was that holding a stake of 90 per cent of the shares created a strong indication for the state party to be responsible for the actions of the corporation.⁷⁵ The negative obligations reading is emphasized by recent general comments by the Committee on Economic, Social and Cultural Rights (CESCR), which discuss SOEs under the obligation to respect the right to health⁷⁶ and the right to water.⁷⁷

From a positive obligations reading, in which corporations are usually situated, the issue is whether states are able to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by private entities.⁷⁸ SOEs, too, have been addressed under this reading as indicated by *Love et al. v. Australia*, where the HRC discussed whether an action by a state-owned airline ‘was directly imputable to the State party, or whether the State party’s responsibility would be engaged by a failure to prevent third party discrimination’.⁷⁹ The positive obligations reading is more pronounced, however, in the practice of the Committee on the Rights of the Child (CRC), which has noted gaps in states’ ‘legislative frameworks regulating ... the

⁷² International Covenant on Civil and Political Rights 1966, 999 UNTS 171, Art. 2.

⁷³ HRC, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, at 8.

⁷⁴ *Ibid.*, at 4. In this connection, it should be noted that both the UN and the ECHR system can be seen to operate in a wider context of state responsibility. Accordingly, the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, reprinted in *Yearbook of the International Law Commission*, vol. 2, pt. 2 (2001) contain authoritative guidance as to when actions of a state-owned entity, e.g., can be attributed to state. Recently, the issue has often emerged in investment treaty arbitration, see Feit, ‘Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity’, 28 *Berkeley Journal of International Law* (2010) 142. For purposes of the present contribution, state ownership will only be approached from the perspective of the specialized human rights regimes.

⁷⁵ HRC, *Leo Hertzberg et al. v. Finland*, Communication No. 61/1979, UN Doc. CCPR/C/OP/1 (1985), at 124, at 9.1.

⁷⁶ Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to Highest Attainable Health, UN Doc. E/C.12/2000/4, 11 August 2000, at 34.

⁷⁷ CESCR, General Comment 15: The Right to Water, UN Doc. E/C.12/2002/11, 20 January 2003, at 21.

⁷⁸ General Comment 31, *supra* note 73, at 8.

⁷⁹ HRC, *Love et al. v. Australia*, Communication No. 983/2001, UN Doc. CCPR/C/77/983/2001, 2003, at 8.4.

adverse impacts of activities by private and state-owned companies'.⁸⁰ The CESCR has also drawn attention to the protection of indigenous communities from 'the economic exploitation of the lands and territories traditionally occupied or used by them to state-owned companies or third parties'.⁸¹ Often the delineation between obligations is left unexplicated. In an illustrative case, *Hopu and Bessert v. France*, indigenous applicants argued that the construction of a hotel on their ancestral burial grounds amounted to interference with their right to family and privacy.⁸² The hotel was being constructed on the land owned by a corporation in which the Territory of Polynesia was the sole shareholder, and the land was subsequently leased to a private developer. A rights violation was discerned, but it is not clear whether it was because the conduct of the company leasing the site to a private developer was attributable to the state or whether the state failed to fulfil its due diligence obligations in regulating the conduct of the company as a third party.

Accordingly, the human rights reading of state ownership fluctuates between negative and positive obligations. In the negative obligations reading, the ownership function seems to be embedded in the overall human rights function of the state. In the positive obligations reading, the existence of a state shareholder position still makes the state more susceptible to human rights claims. However, the categorization produced by the treaty bodies is both crude and opaque. Often, as in *Hopu*, the distinction collapses altogether.⁸³ Despite the conceptual opaqueness, treaty bodies have increasingly drawn attention to the influence that the shareholder's position allows for states. This tendency is best understood in terms of the potential to influence, and it may be seen to take place in the framework set out by the CESCR in General Comment 14, which indicates that in order to comply with their international obligations states 'have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right ... if they are able to influence these third parties by way of legal or political means'.⁸⁴

Corporations have been featured in this exercise, although often in relatively non-committal language. States are, for example, 'encouraged to set out clearly the expectation that all business enterprises ... respect human rights standards ... throughout their operations'.⁸⁵ Alternatively, states have been 'remind[ed] to sensitize corporations ... to their social responsibilities'.⁸⁶ More concrete initiatives have included 'establishing the obligation to conduct social and environmental impact assessments prior to new economic agreements with' corporations,⁸⁷ systematic human rights

⁸⁰ Committee on the Rights of the Child (CRC), Concluding Observations: Myanmar, UN Doc. CRC/C/MMR/CO/3-4, 14 March 2012, at 21; see also CRC, Concluding Observations: Angola, UN Doc. CRC/C/AGO/CO/2-4, 11 October 2010.

⁸¹ CESCR, Concluding Observations: Argentina, UN Doc. E/C.12/ARG/CO/3, 16 December 2011.

⁸² HRC, *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1, 1997.

⁸³ See also Hakimi, 'State Bystander Responsibility', 21 *European Journal of International Law* (2010) 341.

⁸⁴ General Comment 14, *supra* note 76, at 39. See also General Comment 15, *supra* note 77, at 33.

⁸⁵ HRC, Concluding Observations: Germany, UN Doc. CCPR/C/DEU/CO/6, 12 November 2012, at 16.

⁸⁶ Committee on the Elimination of Racial Discrimination, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN Doc. CERD/C/GBR/CO/18-20, 14 September 2011, at 29.

⁸⁷ CRC, Concluding Observations: Seychelles, UN Doc. CRC/C/SYC/CO/2-4, 23 January 2012, at 21.

impact assessments⁸⁸ and better integration of the Guiding Principles.⁸⁹ In the broadest version of this argument, states are advised to treat ‘all business-related policy, legislation or administrative acts and decision-making’ as important sites for the realization of human rights.⁹⁰

When discussing state ownership, treaty bodies have articulated the required actions more clearly. SOEs, for example, have been discussed as actors whose conduct should pay close attention to national actions plans to implement equality. Therefore, state parties have been advised to actively promote female candidates to boards of directors.⁹¹ Treaty bodies have also drawn attention to the relationship between states and certain special SOEs. Australia, for example, has been advised to establish ‘mechanisms for the Export Credit Agency ... to deal with the risk of abuses to human rights before it ... guarantees to facilitate investments abroad’.⁹² Similarly, Sweden has been recommended to make certain that ‘State corporations, including the State pension funds, that invest abroad ... comply with due diligence requirements to prevent and protect children in those countries from offences’.⁹³ Finally, the CRC advises states to have stringent requirements in place for the availability of public financial support for corporations. SOEs, in particular, are required ‘to undertake child-rights due diligence and to publicly communicate their reports on their impact on children’s rights’.⁹⁴ These positions are consistent with the policy rationales extended in the UN Framework and the Guiding Principles, where it was emphasized that states have the greatest means within their powers to ensure that human rights are implemented when they have significant holdings in corporations.⁹⁵

In sum, the UN bodies have been pushing for more exhaustive processes that will make the availability of public financial support conditional on improved human rights considerations in corporate procedures. In the process, state ownership is also being framed in human rights terms. While much of the earlier practice has revolved around the conceptual division between negative and positive state obligations, state ownership is increasingly discussed with reference to the influence that potential states have over corporations. In this vision, shareholding becomes a site of state power that also is restricted by human rights obligations. Accordingly, states are advised to use their shareholder power to facilitate human rights-sensitive policies in corporations and business-supporting state functions so as to prevent and alleviate adverse human rights impacts.

Here, the developments within the UN system come close to issues reflected in *Heinisch*. While there are differences between the ECtHR’s notion of the public

⁸⁸ CESCR, Concluding Observations: Belgium, UN Doc. E/C.12/BEL/CO/4, 23 December 2013, at 22.

⁸⁹ CRC, Concluding Observations: Namibia, UN Doc. CRC/C/NAM/CO/2–3, 16 October 2012, at 27.

⁹⁰ CRC, General Comment 16: State Obligations Regarding the Impact of the Business Sector on Children’s Rights, UN Doc. CRC/C/GC/16, 17 April 2013, at 26, 28.

⁹¹ Committee on the Elimination of Discrimination against Women, Concluding Observations: Portugal, UN Doc. CEDAW/C/PRT/CO/7, 1 April 2009, at 40–41; CEDAW, Concluding Observations: Finland, UN Doc. CEDAW/C/FIN/CO/6, 15 July 2008, at 179.

⁹² CRC, Concluding Observations: Australia, UN Doc. CRC/C/AUS/CO/4, 28 August 2012, at 28.

⁹³ CRC, Concluding Observations: Sweden, UN Doc. CRC/C/OPSC/SWE/CO/1, 23 January 2012, at 20–21.

⁹⁴ General Comment 16, *supra* note 90, at 45, 64.

⁹⁵ HRC, *supra* note 63, at 4.

shareholder and the treaty bodies' conception of additional oversight over state-owned entities and investment, both visions signal that state shareholders matter in governing corporate actors' human rights performance. In essence, state ownership is construed according to a state's human rights obligations, and states are advised to seek human rights governance through private mechanisms across the market in a shareholder capacity. The use of shareholder power is embedded in states' human rights function, and its use is restricted by human rights treaties. What emerges is a human rights-sensitive state ownership function – a new way for understanding the potential and limits of proliferating state shareholder power.

4 Conclusion: Emerging Human Rights-Sensitive State Ownership Function

This article has argued for the emergence of a human rights-sensitive state ownership function. As witnessed in *Heinisch* and in the practice of UN human rights treaty bodies, state ownership provides a strong link connecting corporate actions with the international human rights regime. Yet the conventional human rights conceptualizations used to integrate state ownership in treaty bodies' discretion seem unable to grasp the changing economic role of governments in the global economy. New modes of state-orchestrated economic governance blend both public and private and national and international in ways that are elusive to the traditional conceptualizations of state ownership that has developed in the context of wholly owned SOEs. Yet the new forms of state ownership command immense power, restricted so far mainly through market-based regulatory interventions.

It is in this connection that *Heinisch*, with the notion of the public shareholder and the UN treaty bodies' attempts to frame state ownership in human rights terms, finds new meaning and global significance. In a progressive reading of *Heinisch*, the ECtHR suggests that states arrange their private shareholder function to be consistent with their public human rights obligations. The whole ownership function becomes a site for turning companies in the state's portfolio into responsible corporate citizens taking their human rights impacts seriously. Yet the power to influence corporations to consider human rights does not take the form of traditional public regulation. Instead, the ECtHR and the UN treaty bodies advise states to seek human rights governance through private mechanisms across the market in shareholder capacity.⁹⁶ While the vocabulary of 'restricted state shareholder' put forward by the nascent human rights reading of state ownership resonates with more established regulatory regimes, its rationales and strategies build on a very different set of premises and goals than those opted for by the likes of the European Union, the WTO and the Organisation for Economic Co-operation and Development.

⁹⁶ Similarly, see Catá Backer, 'Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets', 29 *American University International Law Review* (2013) 1.

As a result of the increasing significance of state ownership in the global economy, these new ways of contextualizing capabilities, forms and limitations of state shareholders matter. They matter as doctrinal exercises articulating more nuanced human rights conceptions of state capitalism and they matter as strategies to enhance the legitimacy of the human rights-based regulation of state ownership before the market-based regulatory instruments. While still nascent, the human rights reading extended by *Heinisch* and the UN treaty bodies signals that human rights obligations have become a legitimate concern for states to consider when devising their ownership policies.