The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law

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The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law

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This Article examines the development of a European framework for considering the law applicable to state private interventions in the market, both their own and those of other states through direct investment or through sovereign wealth funds. For this purpose, it closely analyzes the so-called golden share decisions of the European Court of Justice delivered between 2002 and 2007, through which the ECJ sought to apply the free movement of capital provisions of the European Treaties to vestigial issues of the construction of a postsocialist political economy in Europe. The Article then applies those insights in three distinct cases of sovereign participation in private market activity: the purchase of shares of a domestic company by a state, the purchase of shares of a foreign corporation by a state, and the purchase of shares by a multistate sovereign wealth fund. It suggests the importance of the state aids a jurisprudence of European competition law, a different result under American law, and the tensions inherent in the rising European jurisprudence with the parallel development of principles of foreign sovereign immunity.

The central point of the Article is this: Traditional choice-of-law analysis is grounded in a stubborn belief in the separability of public and private law, and positing issues of conflicts (and choice) of law as a central problem of private law for transactions among several jurisdictions. This grounding misses an important new development in conflicts (and choice) of law as well as the substantive consequences of those choices. That development, in turn, is founded on the growth of a new phenomenon, the increasing tendency of states to behave like private actors (participating in markets) rather than as sovereigns (regulating markets).

The general framework of the analysis has been choice-of-law related, but not in the traditional sense. Traditionally, the activities of sovereigns, either as regulators or participants did not raise issues of either choice or conflict of laws. But all that is changing. Modern globalization has effectively introduced a global advance toward free movement of capital and to greater protection of private activity from regulation. At the same time, states have sought to act more energetically as private as well as public actors. In a global legal order in which the value of state sovereignty has diminished and the cross-border element of transactions has increased, states can extend their authority as private actors to an extent difficult when they seek to regulate

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as sovereigns. States privatize their traditional activities or seek to regulate indirectly by acting in markets.

It is in this emerging jurisprudential milieu that issues of choice of law arise—when states seek to participate in markets, does private or public law apply and whose law applies in any case? The Article offers no answers to these questions. It suggests that the European Court of Justice's golden share cases provide an excellent window on a difficult issue of choice of law, and a revolutionary one. The transnationalization of corporate law norms provides an opportunity not only to examine the changing landscape of choice of law in private law, but also the creation of a new set of vertical choice-of-law questions and the substantive consequences of their adoption.

I. INTRODUCTION

At this conference, we have been asked to consider aspects of the European choice-of-law revolution.[1] That consideration is meant to be undertaken with a sensitivity to Mathias Reimann's recent plea for more comparison in choice of law.[2] We hope that this exercise will provide a basis for conversation across the Atlantic, at a minimum, and perhaps reinvigorate the field in the United States.[3] We engage in this exercise aware of the interdependency that is a consequence of the imperatives of contemporary economic globalization and its regulatory effects. "In a globalizing world of interdependent legal systems, determining which laws apply to international private transactions is of crucial importance."[4]

While the object of this activity is traditionally private law generally, and international private transactions in particular, I will "look beyond the traditional topics of private law (contract, tort, property) to those areas that present the most urgent and interesting problems today."[5] For that purpose, I examine a different aspect of this revolution in both private law and choice of law, an aspect that has

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1. The revolution is both vertical—shifting power over the field from member state to the institutions of the European Union—and horizontal—shifting the basis on which conflicts are resolved among competing systems. For a discussion, see generally Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173 (2008) (discussing the impetus for and the features of the European Union's new approach to tort conflicts in Rome II).

2. *See* Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 373-88 (2001). *But see* Bénédicte Fauvarque-Cosson, *Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple*, 49 AM. J. COMP. L. 407, 410-17 (2001) (arguing that comparative law and conflicts are both complementary and antagonistic). She notes:

> Twenty years later, the suggestion that the interdependence of comparative and conflicts law is one between potential antagonists deserves new attention. The unification process, one of the major *défi* of comparatists, directly threatens the conflict of laws methodology. If uniform rules expand—be they transnational or international rules, codified or uncodified—the whole conflicts system is trumped. If uniform rules develop to such a point that they become the major source of law, they torpedo conflict of laws.

Id. at 414.

3. *See, e.g.*, Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box?*, 18 ARIZ. J. INT'L & COMP. L. 867, 878 (2001) (examining and evaluating the British choice-of-law revolution and its similarities to American tort choice-of-law doctrine).

4. Duke Law Ctr. for Int'l & Comparative Law, The New European Choice-of-Law Revolution: Lessons for the United States? (2008), *available at* http://www.law.duke.edu/conference/2008/ChoiceOfLawPoster.pdf (conference announcement).

5. Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. L. 637, 645 (1998).

become apparent only in the last decade or so. My focus is corporate law and a species of vertical choice of law. The revolution is European and its consequences are global and of particular relevance to the United States.

The problem is deceptively simple: A person buys shares and seeks to exercise shareholder rights to pressure corporate managers to adopt policies permitted, but not mandated, by the law of the chartering state. What law applies if the purchaser is a natural person who is a citizen of the state in which the company is domiciled? Does a different law apply if the purchaser is a legal person, or if the purchaser is the government of the chartering state, or if the purchaser is a foreign state or a group of foreign states? In each case a party acting in a private capacity is seeking to engage in a discrete transaction and to exercise its rights as a shareholder to the extent permitted by law. Yet it is likely that these transactions will be treated differently—a different legal regime may apply.

I suggest that, in this respect at least, the revolution in private choice of law has become complicated. In a world in which corporations can assert power traditionally wielded by states,[6] in a world in which states seek to act, like corporations, within rather than on markets,[7] *private choice of law can no longer be considered exclusively private any more.* The focus, then, is on the complicating factor of public authorities seeking the protection and advantages of private law in their nonsovereign activities. In this respect there has been a European "revolution," to be sure, especially in the field of

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6. *See, e.g.*, ROBERT MANDEL, ARMIES WITHOUT STATES: THE PRIVATIZATION OF SECURITY 29 (2002).

> In a manner parallel to the controversy over the relationship of privatization to globalization and anarchy, there is reason to question the relationship between the spread of security privatization and the explosion in influence of nongovernmental organizations in international relations. Subnational and transnational groups of all kinds have emerged in the last few decades, with an impact on world affairs so significant that it is common to describe their authority relative to that of the nation-state as shared governance.

Id. at 40.

7. Noël O'Sullivan, *Concept and Reality in Globalization Theory*, *in* GLOBALIZATION, PRIVATIZATION AND FREE MARKET ECONOMY 11, 18-19 (C.P. Rao ed., 1998)

> In a leading article in which it subsequently explained what the new paradigm was about to its readers, *The Times* [of London] announced that the new model of government would be "pluralist, decentralised and entrepreneurial, rather than bureaucratic, centrally managed and highly regulated." In addition, the new paradigm would emphasize "intermediary institutions and subsidiarity as the basis of good government.

Id. at 19.

corporate regulation.[8] In the form of the golden share cases of the European Court of Justice (ECJ), however, this revolution has considerable conservative tendencies.[9] Those tendencies may seek to rigidly maintain the nice, safe, traditional barriers between public and private law, yet they ignore changes in the realities of the character of public and private institutions. Still, this revolution has significant ramifications well beyond the issues of postsocialist privatization of the heart of the cases. The new choice-of-law revolution requires incorporation of public authorities as private actors in a private law with public effects across borders. *This is choice of law as an instrument of corporate regulation.* From this regulatory stance there follows complications and substantive consequences. The regulatory function involves the use by public authorities of private law for public ends. Should public law apply? Should private law apply? Should the form of governmental action make a difference or does only the effect of the action determine the availability of private or public law as the standard for governing the actions contemplated by a state?

This Article provides a preliminary consideration of these complications for private choice of law. It is grounded on the assumption that the field of private choice of law is no longer a closed system positing a realm of private and another of public law, in which the state was a subject but not object of law at either the domestic or multilateral level.[10] Nor is private law founded necessarily on direct

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8. Much of contemporary scholarship has focused on the destruction of the traditional choice-of-law system for situs of the regulation of corporate "internal affairs" through the federalization of old horizontal choice-of-law regimes by a reinvigorated jurisprudence grounded in the fundamental freedoms promulgated by the Treaty Establishing the European Community—nondiscrimination and freedom of establishment within a framework that privileges the elaboration of an internal market. *See, e.g.*, Jens Dammann, *A New Approach to Corporate Choice of Law*, 38 VAND. J. TRANSNAT'L L. 51, 107 (2005) (arguing for a "statutory approach to free choice" that would allow corporations to freely determine the state law governing their internal affairs).

9. *See* Joined Cases C-463/04 & 464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007), *available at* http://europa.eu.int; Case C-112/05, Comm'n v. Germany, 2007 ECJ (Oct. 23, 2007), *available at* http://europa.eu.int; Joined Cases C-282/04 & 283/04, Comm'n v. Netherlands, 2006 E.C.R. I-9141; Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I-4641; Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581; Case C-367/98, Comm'n v. Portugal, 2002 E.C.R. I-4731; Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781; Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809.

10. *See* Ralf Michaels, *Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization* 10-21 (Duke Law Sch. Legal Studies Paper Series, Paper No. 74, 2005), *available at* http://ssrn.com/abstract=796228.

regulation by state actors upon receptive private actors; the meaning of regulation and jurisdiction are becoming increasingly fuzzy.[11]

Near the end of a recent review of one of the latest in the recent series of "golden share"[12] cases decided by the European Court of Justice, Peter Zumbansen and Daniel Saam suggested:

> [I]t is unlikely that we would even be able to see that deep into the conundrical internal life of the corporation, while applying our shareholder/stakeholder, public/private distinctions to make sense of it all. Can it be really all that difficult to heed the insightful warnings of the past not to take such categorizations as depictions of reality, but rather to understand them as the semantic representation of difficult but deliberate choices?[13]

As Zumbansen and Saam suggest, the corporation sits at the nexus of a number of legal regimes.[14] Issues of internal regulation of corporations that operate across borders implicate a horizontal choice of law and touch on the power of a state to regulate the economic entities operating within its borders.[15] To some extent, these issues might also implicate vertical choice of law at the supranational or federal level.[16]

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11. *See* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1760-62 (2007).

12. Golden shares can be defined as a power to veto certain changes in the corporate charter. More specifically, the term refers either to a particular class of stock or a regulatory system that gives the state a continuing power over certain fundamental corporate decisions especially with respect to formerly state owned enterprises that have been privatized. The Reuters Financial Glossary defines a *golden share* as "[a] share that confers sufficient voting rights in a company to maintain control and protect it from takeover. The golden share prevents potential predators from buying shares and then using them to outvote the company's existing owners." Reuters Fin. Glossary, Golden Share, http://glossary.reuters.com/index.php/Golden_Share (last visited May 29, 2008).

13. Peter Zumbansen & Daniel Saam, *The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism*, 8 GERMAN L.J. 1027, 1049 (2007) (citing the classics: Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976)).

14. *See id.* at 1037.

15. *See, e.g.*, Jens C. Dammann, Note, *The Future of Codetermination After* Centros*: Will German Corporate Law Move Closer to the U.S. Model?*, 8 FORDHAM J. CORP. & FIN. L. 607, 612-13 (2003) (discussing Germany's ability to retain its codetermination laws in the wake of recent legal developments in the European Community).

16. In the United States, federal securities laws may preempt, to some extent, the power of states to regulate certain matters of corporate governance. This is particularly true with respect to state antitakeover legislation. *Cf.* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 79-80, 86-87 (1987) (observing that state antitakeover legislation may be preempted

Issues of corporate personality implicate the scope and nature of corporate obligations in home and host states in the social and political spheres.[17] Corporate internal governance issues, once considered strictly economic and confined to internal corporate stakeholders, have been broadened to include social and political issues and the concerns of outside stakeholders beyond the regulatory authority of the chartering state.[18] The relationship between economic and political issues of corporate governance and accountability to internal and external stakeholders implicates horizontal and vertical choice-of-law issues in new and largely unexplored ways.[19] We are at a frontier between fields well worth exploring.

The recent golden share jurisprudence of the European Court of Justice has excited much commentary with respect to these nexus issues.[20] These cases have substantially supranationalized the rules of member state involvement in formerly state-owned enterprises—whether such involvement was in the form of a formal privileged stake in the enterprise,[21] the product of specifically targeted regulation,[22] or some hybrid arrangement.[23] They have been examined for their political effect.[24] It has been suggested that the cases represent an

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when it frustrates the purpose of federal securities law, but finding that the statute in question was consistent with the purposes of the Williams Act).

17. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 295 (2006).

18. In the European context, see, for example, Henry Hansmann & Reinier Kraakman, *Toward a Single Model of Corporate Law?*, *in* CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 56 (Joseph A. McCahery et al. eds., 2002).

19. *See, e.g.*, Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893, 893-94 (1994) (discussing the emergence of transnational corporations as the most powerful and influential force behind globalization and the failure of international law to recognize them as subjects).

20. *See* cases cited *supra* note 9.

21. *See* Joined Cases C-463/04 & 464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007), *available at* http://europa.eu.int; Comm'n v. United Kingdom, 2003 E.C.R. I-4641, I-4646; Comm'n v. France, 2002 E.C.R. I-4781, I-4781.

22. *See* Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581, I-4623; Case C-367/98, Comm'n v. Portugal, 2002 E.C.R. I-4731, I-4768 to 69; Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809, I-4809.

23. *See* Comm'n v. Germany, 2007 ECJ (Oct. 23, 2007), *available at* http://europa.eu.int.

24. *See, e.g.*, Leland Miller & Christian Beck, *Golden Shares and EU Accession: Bulgaria's Balancing Act*, (EU Policy Network), *available at* http://ssrn.com/abstract=600221 (last visited Mar. 29, 2008) (positing that Bulgaria, although not yet a member of the European Community, has an interest in assuring that its use of golden shares "remains quietly under the radar").

attack on the German system of corporate governance.[25] The European Court of Justice's judgments in these cases can be viewed as a simple elaboration of long-standing principles of European law grounded in basic provisions of the Treaties—principally the nondiscrimination and free movement of capital obligations—in the amplification of a harmonized company law.[26] From a choice-of-law perspective the Court's approach represents a greater effort to move choice-of-law issues up from the member state to the European level, thereby harmonizing and eliminating the horizontal choice-of-law issue. Yet, it represents far more than that.

These conceptual issues suggest the framework of the analysis of this Article, that is, the basis for determining the law applicable to member states as shareholders—as private actors holding interests in economic enterprises—and the substance of that law. As in the private law context, there are three foundational issues. The first is substantive law differences among competing legal regimes, that is, the extent to which substantive rules differ enough to affect behavior and the legal consequences of activity.[27] The second consideration involves rules for choosing among these competing state regulatory regimes, that is, the classic choice-of-law context. The third is the preemption of those methods for choosing between competing regulatory regimes by harmonization of either substantive or choice-of-law rules either up to a supranational or federal level,[28] or out to the private sector.[29]

The Article starts with a critical examination of the development of the jurisprudence of golden share regulation in the European Union. It examines this jurisprudence first in its narrowest doctrinal sense, building from the issue of the "rights that the State continues to hold

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25. *See* Zumbansen & Saam, *supra* note 13, at 1033, 1046-47.

26. For an early analysis before the start of the golden share cases, see generally Martin Rhodes & Bastiaan van Apeldoorn, *Capital Unbound? The Transformation of European Corporate Governance*, 5 J. EUR. PUB. POL'Y 406 (1998).

27. The reference is to the outcome-determinative effect of such choice. *Cf.* Guar. Trust Co. v. York, 326 U.S. 99, 109-12 (1945) (holding that where a federal court exercises jurisdiction on diversity grounds, the outcome-determinative legal rules should be the same as if the action had been brought in state court).

28. *See* Michael L. Rustad, *Circles of E-Consumer Trust: Old E-America v. New E-Europe*, 16 MICH. ST. J. INT'L L. 183, 198-99 (2007) (explaining the effect of the Brussels Convention on choice-of-law issues for Internet cases decided in European courts); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1732-38 (1992) (discussing the possibility of federal choice-of-law rules as boundaries on state choice of law).

29. *See* Catá Backer, *supra* note 11, at 1762 (describing "the operation of the system of law making, enforcement and sanctions within a network of multinational corporation, the NGO community and the media").

after privatising formerly state owned enterprises."[30] For that purpose it first examines the eight cases decided by the European Court of Justice between 2002 and 2007.[31] The Article reads these cases together for their elaboration of a constitutional jurisprudence under European law of state power when states seek to privatize previously public economic activity. This jurisprudence is explored for its substantive and choice-of-law dimensions. But substantive and choice-of-law dimensions of the cases have important consequences well beyond the narrow problem of postsocialist privatization that serves as the context for the cases. The cases imply more, particularly in their application in a new context—where a state actor seeks to enter the market as a private person, that is, where states seek to participate in economic activity on the same basis as private individuals.[32] That implication also suggests a point of convergence with the Court's application of the state aid provisions of European competition law.[33] Hints about the shape of this approach can be gleaned from the discussion in the opinions of the Advocates General in the golden share cases, which are considered in Part III of the Article.[34] An analysis of these opinions also reveals both a substantive and choice-of-law dimension. The analysis draws attention to emerging difficulties of regulating the private conduct of public entities. On one level the golden share cases are grounded in tradition, applying assumptions about state economic activity refined in the West's engagement with the realities of so-called socialist law and politico-economic organization.[35] In that context, state economic activity conflated regulatory and participatory roles,[36] and the economic

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30. Stefan Grundmann & Florian Möslein, Golden Shares—State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects 1 (Apr. 2003) (unpublished manuscript), *available at* http://ssrn.com/abstract=410580.

31. *See infra* Part II.A.

32. *See infra* Part II.B.

33. *See* Treaty Establishing the European Community art. 87, Nov. 10, 1997, 1997 O.J. (C 340) 13 [hereinafter EC Treaty]. Pursuant to article 87, except as otherwise provided in the Treaty, "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market." *Id.*

34. *See infra* Part III.

35. *See, e.g.*, A.H. HANSON, PARLIAMENT AND PUBLIC OWNERSHIP 175-207 (1961) (discussing the European experience with state ownership of enterprises).

36. In a planned economy the state has a double

> function. It is on the one hand the economic sovereign; it is the supreme banker, the supreme industrialist, the supreme landholder. On the other hand, the state is an economic citizen as well; its business enterprises, its collective farms, are entities

entities through which states acted could be understood as public/private bodies.[37] The critical focus under this framework was to find ways to bridge the private/public legal divide, though there was little doubt of the public character of state activity, even that which was commercial in character. Thus, analysis tended to be grounded principally in the development of the ancient law of sovereign immunity and what became its commercial activities exception.[38]

But postsocialist state participation in economic activities has a different dimension. The difference is founded in the nature of public participation—not as sovereigns seeking control, but as nonsovereign entities participating within regulatory frameworks like other nongovernmental entities.[39]

If one accepts this conceptual framework, then it might follow that states ought to be subject to the same constraints and enjoy the same privileges as private actors. Public choice of law is privatized to match the private character of state activity, with the attendant substantive consequences (principally freedom from the limitations of the free movement of capital restrictions of state activities). Yet, even when states act in their private capacity, their effects may be indirectly regulatory. As a consequence, rules applicable to private actors—including the protections of free movement of capital and a protection for a vigorous shareholder democracy regime—may not be available to

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subject to its laws. The state is both sovereign and subject; it both plans and operates the economy.

HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 157 (1966).

37. *See* Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 (2) J. TRANSNAT'L L. & CONTEMP. PROBS. 337 (2004).

38. *See, e.g.*, James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820, 820 (1981); Jere Geiger Thompson, Recent Development, *The Status of Legal Entities in Socialist Countries as Defendants Under the Foreign Sovereign Immunities Act of 1976*, 12 VAND. J. TRANSNAT'L L. 165, 165 (1979). For a discussion from an American judicial perspective, see Guevara v. Peru, 468 F.3d 1289, 1298-99 (11th Cir. 2006) (determining that a reward issued by Peru for the capture of one of its former ministers was a commercial activity not protected against actions for recovery).

39. This posits a participation in economic activities which is almost the inverse of that posited under socialist law assumptions—here states lose their political character and participate like other corporate bodies. Of course, such bodies retain something of their unique character as states, but the notion is that beyond their borders, at least, states acting in nonsovereign capacities have no more capacity than other corporate bodies. Put a different way, there is no magic about sovereign capacity beyond its borders. *See, e.g.*, Manuel Monteagudo, *Comments About the Experience of Peru in Sovereign Debt Litigation*, 23 BANKING & FIN. L. REV. 293, 298 (2008) (considering sovereign debt issues "in the era of globalization [to determine] how to conciliate all the interests implied when sovereigns do private business and fail").

states acting as private entities, within or outside of their home territories. To some extent, the approach of EU institutions to the problem of state aids under competition law also informs this discussion.

The golden share cases could be said to have determined the extent to which a member state, consistent with its obligations under the Treaty Establishing the European Community (EC Treaty) could continue either to retain a superior interest in a privatized firm or to limit the discretion of the owners of that firm by regulation. But the cases might stand for substantially more. Specifically, they might help define the extent of a member state's power to act in a private capacity,[40] the extent to which the EC Treaty applies to member states acting as private persons, the extent to which member states may enter into relationships with corporations that are not of a regulatory nature, and the consequences for the state in terms of its liability to third parties. In the long run, then, an elaboration of the emerging jurisprudence, the general principles of European Union law, and the policies of corporate governance underlying them may be substantially more important than the narrow context in which these cases arose.[41]

These possibilities for legal development, hinted at by a reading of the golden share cases through the lens of the opinions of the Advocates General, are then explored in their application to sovereign private economic activity.[42] The first of the three questions touches on the power of a member state to acquire shares in an undertaking incorporated under its laws but under a regulatory regime equally applicable to it and to all other investors.[43] Without the benefit of any special legislation applicable only to the state, can a member state buy a large stake in a corporation and use its power as an ordinary shareholder to its benefit? The second touches on the power of a member state to invest in undertakings not subject to its regulatory control.[44] Can France buy a large, perhaps even a controlling, stake in companies subject to the regulatory authority of Germany and vote its

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40. This point was clearly made in the December 2007 ruling of the ECJ in *Federconsumatori v. Comune di Milano*, Joined Cases C-463/04 & 464/04, 2007 ECJ (Dec. 6, 2007), *available at* http://europa.eu.net. The point was also stressed in the opinion of the Advocate General, Poiares Maduro, in that case, who was careful to build on and expand the theoretical discussion of Advocate General Ruiz-Jarabo Colomer from the earlier golden share cases. *See id.* (opinion of AG Poiares Maduro).

41. *See, e.g.*, R.J. BARRY JONES, GLOBALISATION AND INTERDEPENDENCE IN THE INTERNATIONAL POLITICAL ECONOMY: RHETORIC AND REALITY 199-216 (1995).

42. *See infra* Part IV.

43. *See infra* Part IV.A.

44. *See infra* Part IV.B.

shares for the benefit of the citizens of France, subject to ordinary company law rules? The third touches on the consequences of member states seeking to establish sovereign funds with the purpose of taking significant positions in undertakings for their collective benefit.[45] May France, Germany, and Spain fund an enterprise for the purpose of taking a large, and perhaps controlling, interest in certain undertakings for the mutual benefit of the members? For that purpose, the Article then considers the implications under public law—principally the law of sovereign immunity, which is another nexus in the point relationships between state and enterprise.[46] Inherent in the golden share cases is an understanding of the nature and character of the public and private role of states, as well as the legal effect of those roles for purposes of applying the most basic principles of European Union law. But that elaboration of the nature and scope of the public/private distinction in state activity may be different, and substantially different, from that developing under the law of sovereign immunity. If states never lose their public character, even when they act in a nonsovereign capacity abroad, but their actions abroad are treated as private within the host state, then the resulting tensions between the law of sovereign immunity and that of substantive state conduct might require resolution.

The Article also looks to insights American law might provide. American corporations are creatures of state law, but state law is a commodity that might be consumed by corporations that can freely seek reincorporation in a jurisdiction more to their liking. States may own shares in enterprises. But they may also regulate domestic corporations in a way that makes it much harder for them to engage in certain transactions—the sort of regulatory interference that would be unacceptable under the golden share rules of the European Court of Justice. The template with greatest affinity to the European golden share cases may be the state antitakeover legislation, initially disfavored and ultimately partially permitted under federal constitutional law principles.[47] In cases arising from such legislation, American courts spoke in terms that had significant potential to define the nature of corporate regulation and the extent of state regulatory

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45. *See infra* Part IV.C.

46. *See* ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS 1-28 (2005) (expanding on the origins and development of sovereign immunity in the United States).

47. *See, e.g.*, Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 113, 117-29 (2001) (tracing the development of state antitakeover law).

involvement in the governance parameters of domestic corporations.[48] At the same time, states may engage in the market as private actors with a flexibility that may be unavailable in Europe.[49] The foundational policies that animate these results may be useful for Europeans to consider as they determine the reach of the lessons of the golden share cases and the role of states as private economic actors—investors and consumers.

The European Court of Justice's golden share cases provide an excellent window on a difficult and revolutionary issue of choice of law. The transnationalization of corporate law norms provides an opportunity to examine not only the changing landscape of choice of law in private law, but also the creation of a new set of vertical choice-of-law issues involving a changing conception of the state in its relationships with what had been (perhaps overnarrowly considered) the exclusive objects of its regulation.[50] No longer a matter of which law must be applied, choice-of-law determinations must now increasingly consider the character of the actors involved in

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48. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (holding that Illinois law conflicted with the Williams Act and therefore the state law was unconstitutional). *But see* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 94 (1987) (upholding an Indiana antitakeover statute because it was only applicable to domestic corporations); WLR Foods, Inc. v. Tyson Foods, Inc., 65 F.3d 1172, 1180-81 (4th Cir. 1995) (holding that the Williams Act did not preempt Virginia statutes); Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1016 (E.D. Wis. 1989) (holding that the Wisconsin Business Combination Act was not preempted by the Williams Act).

49. *See, e.g.*, White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 214-15 (1983) (holding that the market participant exception applied where a city "expended only its own funds in entering into construction contracts for public projects"); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 796-97 (1976) (analogizing a state bounty program to the business of buying scrap autos). *But see* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277-78 (1988) (declining to extend the market participant exception to state tax subsidies). The market participant principle also bleeds into the issues of state privilege—including, but not limited to, state sovereign immunity. *See, e.g.*, Del Campo v. Kennedy, 517 F.3d 1070, 1072-73 (9th Cir. 2008) (holding that the Fair Debt Collection Practices Act exemption of officers and employees of state governments does not apply to a state-hired debt collector). For a similar analysis in antitrust actions, compare Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 948-49 (Fed. Cir. 1993), *overruling recognized by* Competitive Techs, Inc. v. Fujitsu Ltd., 374 F.3d 1098 (Fed. Cir. 2004) (refusing to apply the state-action exemption if the state's anticompetitive acts were made as a market participant rather than in the state's sovereign capacity), with City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379 (1991) ("We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is *ipso facto* . . . exempt from the operation of the antitrust laws." (internal quotation marks omitted)).

50. *See, e.g.*, Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, 1668-69 (2004) (describing the unwillingness of the Bolivian government to enforce water use laws against transnational corporations for fear of losing investment).

determining the legal regime applicable. States acting in their sovereign capacity, states acting as private stakeholders, corporations imbued with public purpose, all of these considerations will tend to change the face of choice of law in corporate law in the coming decades.

II. THE GOLDEN SHARE CASES: STATES AS PRIVATE ACTORS AND PUBLIC REGULATORS

The golden share cases are interesting in themselves for insights on the development of fundamental freedoms jurisprudence in connection with the privatization of European industry. But they might be even more important in the development of a jurisprudence that blends public and private law regimes in choosing the applicable law where public actors engage in private activity.

A. The Case Law

The ECJ delivered the first of its golden share decisions in 2002. The Commission had brought suit against Belgium, France, and Portugal asserting the failure to meet their obligations under articles 43 and 56 of the EC Treaty as a result of golden share arrangements in those countries' domestic industries.[51]

1. *Commission v. Portugal*[52]

In its privatization efforts, Portugal passed a number of laws. The Commission considered three of these to be in violation of the EC Treaty and of the Articles of Ascension and brought suit accordingly.[53] The first of these laws authorized legislation that would limit the number of shares and/or amount of requisite control of the privatized company by foreign persons or entities.[54] The second law, using the power granted by the first, stipulated that no more than twenty-five

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51. Article 56 provides in relevant part: "Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." EC Treaty art. 56. Article 43 provides, in relevant part, "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member State shall be prohibited." *Id.* art. 43. For a discussion of the cases, see *infra* Part II.A.1-3. For a discussion of European Court of Justice case law leading up to the golden share cases, see Leo Flynn, *Coming of Age: The Free Movement of Capital Caselaw 1993-2002*, 39 COMMON MKT. L. REV. 773 (2002).

52. Case C-367/98, Comm'n v. Portugal, 2002 E.C.R. I-4731.

53. *Id.* at I-4766.

54. *Id.* at I-4765.

percent of a newly privatized company shall be owned or controlled by foreign entities.[55] The third law required any natural or legal person wishing to obtain shares that exceeded ten percent of voting capital to receive prior authorization from the Minister of Financial Affairs.[56] The Commission claimed that the first two laws discriminated against citizens of other member states and were therefore violative of the Treaty.[57] Portugal conceded the infringement, claiming that the scheme established by the three laws was justified on grounds of the general interest.[58] Portugal claimed that this was a step in the privatization process, and that it was entitled to secure a strong, modern, and secure market during the transition.[59] Additionally, Portugal pointed to its policy of not engaging in discriminatory enforcement against Community nationals; the provisions in question were enforced only against those outside the Union.[60]

Noting that article 73b(1) (now article 56), which forbids restrictions on the free movement of capital, fails to define capital, the Court affirmed that the acquisition of securities on the capital market does constitute "capital" for purposes of interpreting that article.[61] As to the facially discriminatory laws, the Court rejected Portugal's argument that the provisions must be interpreted as only applicable to persons outside the Community, holding that administrative practices cannot serve to fulfill a member state's obligations under the Treaty.[62] The Court also struck down the facially neutral law.[63] Acknowledging that no unequal treatment would arise out of the provision, the Court nonetheless reasoned that article 73b was, like the other provisions enumerating the four fundamental freedoms, a general prohibition that was to be construed broadly.[64] The Court held that the provision in question was likely to deter investors from other member states and was therefore in violation of the Treaty.[65]

Citing the Commission's 1997 Communication, the Court noted that concerns for the general interest may exempt a member state from

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55. *Id.*
56. *Id.* at I-4766.
57. *Id.* at I-4768.
58. *Id.* at I-4770.
59. *Id.*
60. *Id.* at I-4769 to 70.
61. *Id.* at I-4971 to 72 (citing Case C-222/97, Trummer & Mayer, 1999 E.C.R. I-1661).
62. *Id.* at I-4772 to 73.
63. *Id.* at I-4773 to 74.
64. *Id.*
65. *Id.* at I-4774, I-4776.

its obligations as to the free movement of capital, provided that the challenged legislation is proportional.[66] The Court then noted that proportionality is defined as being suitable for securing its goals and not going beyond what is required to achieve those goals, as well as ensuring that there is no less restrictive means of accomplishing those goals.[67] Stating that general financial interests can never serve as an adequate justification "for obstacles prohibited by the Treaty," the Court held that the goals enumerated by the Portuguese legislation spoke to such interests rather than general interest concerns for which the exception was designed.[68]

The Court also quickly dismissed Advocate General Colomer's article 295 argument, subordinating the protections of member states' property systems within the Treaty system to the fundamental positive goals of the Treaty.[69] Reasoning that the freedom of movement of capital and the freedom of establishment are "inextricably linked," the Court declined to rule on the freedom of establishment issue (EC Treaty article 43), relying solely on its determination that the Portuguese laws violated the free movement of capital provision.[70]

2. *Commission v. France*[71]

France's privatization of its petroleum company included the creation of a special class of share, owned by the state, which was vested by legislation with two key powers with which the Commission took issue.[72] First, any natural or legal person acquiring shares in the company was required to get approval from the Minister for Economic Affairs when those shares exceeded a tenth, fifth, or third of the capital and voting rights of the company.[73] Second, the state retained the right to veto "a decision to transfer or use as security the assets listed in the annex" of the Decree, which constituted a majority of the capital of the company.[74] The law also required two state representatives to sit on the

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66. *Id.* at I-4774 to 75.
67. *Id.*
68. *Id.* at I-4775 to 76.
69. *Id.* at I-4774. See *infra* notes 225-230 for a discussion of Advocate General Ruiz-Jarabo Colomer's article 295 theory. This position is consistent with the ECJ's usual narrow interpretation of the scope of article 295. *See, e.g.*, Case 16/74, Centrafram BV v. Winthrop, 1974 E.C.R. 1183.
70. *Portugal*, 2002 E.C.R. at I-4777.
71. Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781.
72. *Id.*
73. *Id.*
74. *Id.*

board of directors, without voting rights.[75] The Commission claimed that these provisions would discourage investors from other member states, thus violating both the right of establishment and the free movement of capital.[76] While acknowledging that petroleum supplies might fall into the general interest exemption, the Commission nonetheless contended that the golden share arrangement was not proportional to the goal of maintaining petroleum supplies.[77]

France conceded that the laws might restrict the free movement of capital and on the right of establishment, but argued that they were nondiscriminatory as they applied to both nationals and nonnationals.[78] Though its rights were vested in a share and not directly through law, France accepted the applicability of article 56, arguing instead that the restrictions in its golden share were justified under both internal security and service in the general interest theories.[79] Arguing that the measures were proportional because of petroleum's critical role in the functioning of the country, France claimed that it was crucial that petroleum assets be under French control in the event of a crisis.[80]

The Court rejected France's argument that the measures did not restrict the movement of capital and the right of establishment.[81] Acknowledging that some restrictions can be justified, the Court noted that it had allowed a quantitative restriction on the movement of goods when petroleum supplies were at issue.[82] In ascertaining whether the measures were proportionate to their goals, the Court found that the provision requiring approval of the Minister of Economic Affairs could be discriminatorily enforced and also violated the principal of legal certainty, because there were no enumerated guidelines as the basis for the Minister's approval.[83]

The Court also found that the measures went beyond what was necessary to ensure petroleum supplies because of the broad discretion afforded to the state.[84] In examining the measure that enabled the state to veto the sale of assets, the Court held that this provision also failed the test for proportionality, in that it went beyond what is necessary to

75. *Id.*
76. *Id.* para. 21.
77. *Id.* paras. 24-26.
78. *Id.* para. 29.
79. *Id.* paras. 27-28.
80. *Id.* paras. 30-32.
81. *Id.* paras. 41-42.
82. *Id.* para. 47 (citing Case 72/83, Campus Oil Ltd. v. Minister for Ind. & Energy, 1984 E.C.R. 2727, paras. 34-35).
83. *Id.* paras. 50-51.
84. *Id.* paras. 51-53.

preserve the petroleum supply, and because the legislation failed to outline precise, objective criteria, on which a foreign investor could rely when considering purchasing shares in the company.[85] Consistent with its reasoning in the *Portugal* decision, the Court rejected Advocate General Colomer's article 295 theory regarding the supremacy of member state property rights, effectively determining that for choice-of-law purposes, the law of the European Union rather than that of the member state would apply.[86]

3. *Commission v. Belgium*[87]

The Commission asserted that, like the arrangements attacked in its actions in *Portugal* and *France*, Belgium's legal settlement for the privatization of two entities violated the Treaty.[88] Both companies were in the energy sector, and the golden share arrangements covering them were identical.[89] They provided that the appropriate Minister be notified in the event of a transfer of any assets that were being used or capable of being used as major infrastructures and that the Minister be given power to stop the transfer.[90] They also empowered the Minister to appoint two representatives to the board of directors who would have the power to propose the annulment of any action by the board that would be contrary to government objectives.[91]

The Commission argued that the broad veto powers that Belgium reserved for itself violated the right of establishment and the free movement of goods, were not justified by overriding concerns of general interest, and were not qualified by stable objective criteria.[92] In addition, the Commission argued that the Belgian arrangement permitted the state to exercise its power in a discriminatory fashion, contravening the principal of legal certainty.[93] The Commission also asserted that the measures were not proportionate to their stated objective because broadly defined veto power does not guarantee an adequate energy supply.[94] Lastly, noting that the Community had legislated in the area of the common market for natural gas, the

85. *Id.* paras. 52-53.
86. *Id.* para. 44.
87. Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809.
88. *Id.* para. 1.
89. *Id.*
90. *Id.* paras. 9-10.
91. *Id.*
92. *Id.* paras. 19-22.
93. *Id.* para. 22.

Commission questioned Belgium's authority to act, given the supremacy of Community law.[95]

In response, Belgium contended that, although the measures might restrict the free movement of capital or the right of establishment, they were justified by overriding requirements of the general interest because they function as safeguards for the country's energy supply.[96] Belgium asserted that the measures were proportionate because control of the physical infrastructure by which both electricity and gas were delivered could not be achieved by another means.[97] Belgium noted that the procedures set forth for annulment were specific and precise, requiring the Minister to act within twenty-one days.[98] Belgium contested the Commission's reference to the Council directive on natural gas on both procedural and substantive grounds.[99] First, it argued waiver because the Commission initially asserted the directive only in its application to the Court.[100] Second, Belgium asserted that the directive in question only harmonized the public service obligations of the member states, leaving them free to take certain measures that do not materially interfere with the harmonization.[101] Lastly, Belgium argued that any restriction was justified under a public security exception because the energy sector is critical to the survival of the citizens of the member state.[102]

The Court, accepting Belgium's concession that the measures in question constituted a restriction on the free movement of capital and the rights of establishment, first analyzed whether the objective of the legislation fell into one of the narrowly tailored exceptions.[103] The Court answered that question in the affirmative for restrictions on both the free movement of capital and the right of establishment, holding that safeguarding energy supplies "falls undeniably within the ambit of a legitimate public interest."[104] The Court found that this was justification under the public security exception as well.[105]

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95. *Id.* para. 25 (citing Council Directive 98/30, Concerning Common Rules for the Internal Market in Natural Gas, 1998 O.J. (L 204) 1 (EC)).
96. *Id.* paras. 26-27.
97. *Id.* para. 28.
98. *Id.* paras. 28-29.
99. *Id.* para 31.
100. *Id.*
101. *Id.*
102. *Id.* para. 32.
103. *Id.* paras. 40, 45.
104. *Id.* para. 46.
105. *Id.* para. 59.

Recognizing that maintaining energy supplies is within the scope of an article 56 derogation, the Court nonetheless explained that all such derogations must be applied narrowly when evaluating them in light of the requirements of proportionality.[106] The Court found that the two laws were sufficiently precise for purposes of legal certainty and limited in scope to only affect those assets that were crucial to the energy infrastructure, which was necessary in order to preserve energy supplies.[107] Placing the burden on the Commission to offer an alternative means to achieve the laws' goals, the Court found that the Commission had failed to do so.[108] The Court also rejected the Commission's "arguments concerning the gas directive" on procedural grounds; because they had not been brought up until the application, the Court declined to make a ruling on the substance of the claim.[109] The Court dismissed the application in favor of Belgium.[110]

4. *Commission v. Spain*[111]

Under Spanish law, transfers of capital amounting to greater than ten percent, mergers, and the disposal of certain assets required administrative approval.[112] The Commission challenged these regulations on the grounds that they violated the free movement of capital and the right of establishment.[113] Following the initial enactment of the measures, but before the application by the Commission, Spain amended the measures.[114] Spain claimed that the Commission's application was inadmissible on the basis that it referred to measures which were no longer in effect.[115] The Court rejected this argument, holding that procedural rules barred its consideration of the amended regulations.[116] Because the measure allowed a broad degree of control for the member state, the Commission claimed that it, like previous golden share arrangements, would work to discourage foreign investment, in violation of the Treaty.[117]

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106. *Id.* para. 47.
107. *Id.* para. 52.
108. *Id.* para. 53.
109. *Id.* para. 54.
110. *Id.* paras. 57, 60.
111. Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4606.
112. *Id.* at I-4606 to 18.
113. *Id.* at I-4622 to 23.
114. *Id.* at I-4620.
115. *Id.*
116. *Id.* at I-4621 to 22.
117. *Id.* at I-4623.

The Commission also asserted a failure of proportionality and the service of an overriding public interest, grounded on the regulation's broad scope and lack of transparency.[118] Spain refused to concede either point.[119] Spain also argued that the regulation's goal was clear and concisely stated and complied with the principle of legal certainty.[120] In addition, Spain put forth an article 295 argument, claiming that member states should have discretion in privatization.[121]

The Court first rejected the claim under article 295, reaffirming its interpretation that a member state's right to maintain its own forms of property ownership cannot override the fundamental rules of the Treaty.[122] The Court also held that the Spanish regulations were overbroad for purposes of the general interest exception, because they applied to commercial banks, whose function was not confined to the public service.[123] Employing similar reasoning, the Court also found that the particular restrictions were not confined to merely the energy sector as had been the restrictions in the Belgian case.[124] Lastly, the Court found that because the restrictions had no precise criteria for their operation, they failed the principal of legal certainty.[125] Because they provided the state with nearly unfettered discretion, they failed the principle of proportionality.[126] As it had done before, the Court linked regulatory action that impeded the free movement of goods with impediments to the freedom of establishment.[127]

5. *Commission v. United Kingdom*[128]

The British case posed a different problem for the Commission and the Court. On its face, the measures at issue appeared to be private and participatory rather than regulatory and sovereign. The British golden share provisions for the privatization of the British Airports Authority (BAA) stipulated that the transfer of any of the airports or a majority share in those airports required state approval, and that a person owning shares would not be entitled to voting rights

118. *Id.* at I-4624 to 25.
119. *Id.* at I-4627.
120. *Id.*
121. *Id.* at I-4626.
122. *Id.* at I-4633.
123. *Id.* at I-4634.
124. *Id.* at I-4636.
125. *Id.*
126. *Id.* at I-4636 to 37.
127. *Id.* at I-4638.
128. Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I-4641.

that exceeded fifteen percent of the votes cast at a general meeting.[129] The Commission asserted that this would have the effect of discouraging investment from persons from other member states and therefore constituted a violation of the free movement of capital and the right of establishment.[130] Britain did not rely on any claim that the measures fell into one of the exceptions allowed or that they conformed to the principles of legal certainty and proportionality.[131] Instead, Britain sought to rely on a free movement of goods argument, based on an exception to its application covering "modalités de vente" (selling arrangements) elaborated in *Keck*.[132] Britain asserted that measures which control the sale of shares do not violate the Treaty as they are not discriminatory against investors from other states and do not restrict access to a market.[133] Comparing the golden share measures to *Keck*-style selling arrangements, Britain urged the Court to modify its prior positions with respect to the application of article 56.[134] Importantly, for our purposes in this Article, Britain also claimed that the articles of association, which contained the contested measures, "do not constitute national legislation and cannot be equated to it."[135] Assuming that to be the case, Britain further argued that principles of private law would govern and the company would be free to act in the absence of harmonizing legislation.[136]

The Court first distinguished the free movement of goods from the free movement of capital, rejecting the adoption of a *Keck*-style rule for golden share cases.[137] While acknowledging that the measures at issue were facially nondiscriminatory, the Court reasoned that *Keck* was decided in light of preventing member states from impeding access to markets.[138] By contrast, restrictions found in golden share arrangements work to impede access to markets, and are therefore

129. *Id.* at I-4653 to 54.
130. *Id.* at I-4655 to 56.
131. *Id.* at I-4656.
132. *Id.* at I-4657 to 59 (citing Joined Cases C-267 & 268/91, Keck & Mithouard, 1993 E.C.R. I-6097). For the rule invoked, see *Keck*, 1993 E.C.R. paras. 12-18 ("National provisions restricting or prohibiting certain selling arrangements is not such as to hinder . . . trade between Member States . . . provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner . . . the marketing of domestic products and those from other Member States.").
133. *United Kingdom*, 2003 E.C.R. at I-4657.
134. *Id.* at I-4657 to 58.
135. *Id.* at I-4658 to 59.
136. *Id.*
137. *Id.* at I-4660 to 63.
138. *Id.* at I-4662 to 63.

incompatible with the Treaty.[139] The Court also rejected the argument that the measures in question were a matter of private, rather than public, law, finding that the articles of association that contained the contested provisions arose from Britain "act[ing] in . . . its capacity as a public authority."[140] In this sense, the private measure veiled an assertion of public regulatory power. The character of the action directed a choice of public rather than private law, and within public law, a choice of European over national law. The Court held the measures granting special share rights to the state discouraged foreign investors, which constituted a violation of article 56 as well as a violation of article 43 for the same reasons.[141]

6. *Commission v. Netherlands*[142]

In 1989, the Netherlands privatized both its telecommunications service and postal service.[143] In 1998, the two services were split into two entities, KPN (telecommunications) and TPG (postal service).[144] The Netherlands retained golden shares in both companies; these golden shares granted it broad discretionary powers to approve transfer of shares exceeding one percent of the total capital, the issuance of shares, and general rules for corporate governance.[145] The Commission brought an action against the Netherlands, claiming that the golden shares retained by the state would serve to discourage foreign investment in violation of the free movement of capital.[146]

The Netherlands claimed that the public law provisions of article 56 of the EC Treaty were not applicable because, with both KPN and TPG, the Netherlands was acting as a private rather than a sovereign entity within the bounds of private Dutch law. Under Dutch law, provisions of the type at issue were valid when agreements for their issuance were agreed among private corporate stakeholders.[147] Additionally, the Dutch asserted an overriding public interest in maintaining a postal service, which would allow it to maintain the golden share in TPG even were article 56 to apply.[148]

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139. *Id.*
140. *Id.* at I-4663.
141. *Id.* at I-4664.
142. Joined Case C-282/04 & 283/04, Comm'n v. Netherlands, 2006 E.C.R. I-9141.
143. *Id.* para. 4.
144. *Id.* para. 6.
145. *Id.* para. 9.
146. *Id.* para. 15.
147. *Id.* paras. 16-22.
148. *Id.* para. 17.

The Court rejected the assertion that the character of the Dutch actions had choice-of-law effect.[149] The Court held that a member state, even when acting as a private market participant, retained its public character.[150] As such, its obligations under the Treaty, including those of article 56, remained unimpeded.[151] Any action taken by the Dutch, whether of a public or private character, was public where likely to deter investment from other member states and implicated article 56 of the Treaty.[152] Applying its prior golden share jurisprudence, the Court agreed with the Commission that the golden shares at issue afforded broad discretionary powers to the state sufficient to deter foreign investment and consequently constituted a violation of the free movement of capital.[153] Such a restriction on the free movement of capital may be justified under certain circumstances, but the Netherlands offered no further justification for its share in KPN.[154] Examining the share in TPG, the Court acknowledged that the maintenance of a national postal service could be an overriding concern in the general interest, provided that the power retained by the state is proportionate to that goal and does not go beyond what was necessary to achieve it.[155] The Court found that the rights granted by the golden share in TPG went beyond what was necessary to ensure a working postal service, noting that the exercise of those rights was not based on precise criterion and did not require a statement of reasons.[156] Because both shares were found to be in violation of article 56 of the Treaty,[157] the Court found them to be in violation of article 43 for the same reasons.[158]

7. *Commission v. Germany*[159]

The saga of the privatization of Volkswagen has a long and ironic history. The latest chapter of that saga had its origins in 1960, when Germany privatized Volkswagen. As a consequence thereof, the

149. *Id.* para. 21.
150. *See id.* para. 19.
151. *See id.* para. 20.
152. *Id.* paras. 19-20.
153. *Id.* paras. 21-31.
154. *Id.* paras. 32-35.
155. *Id.* paras. 33, 38.
156. *Id.* paras. 39-40.
157. *Id.* paras. 41-43.
158. *Id.* para. 43. The Court's decision essentially mirrors the Opinion of Advocate General Poiares Maduro. *Id.* paras. 26-40 (opinion of AG Poiares Maduro).
159. Case C-112/05, Comm'n v. Germany, 2007 ECJ (Oct. 23, 2007), *available at* http://europa.eu.int.

federal government and the state of Lower Saxony each retained a twenty percent interest that carried with it certain rights, including that of appointing two members to the advisory board.[160] Additionally, under the company law, the voting rights of a single person could not exceed twenty percent of share capital, and resolutions had to be passed with at least eighty percent of the total votes.[161] The Commission characterized this as the equivalent of a requirement of government approval from both the federal and state level, and it brought an action against Germany on article 56 grounds.[162] The Commission did not assert claims under article 43 of the Treaty, and although the Court had regarded articles 56 and 43 as inextricably bound, the Court declined to reach article 43 and dismissed that portion of the action.[163]

With respect to the article 56 claim, Germany argued that the Volkswagen governance structure was not a national measure, but rather the result of an agreement between labor unions, workers, and the government, in which the unions and workers relinquished some control in exchange for guarantees from the government of protection against "any large shareholder which might gain control of the company."[164] The Commission, however, claimed that the capping of voting rights at twenty percent when combined with a requirement of eighty percent majority for company resolutions, served to benefit only the state, rather than shareholders generally.[165] Germany countered that the provision did not confer special rights on the state in its sovereign capacity because any other shareholder able to acquire twenty percent of the capital shares acquired the same voting rights. As such, Germany contended, the provision at issue can be distinguished from those provisions that had previously been struck down.[166] The Court agreed with the Commission, concluding that Germany's control of company law allowed the state to exercise considerable influence that exceeded the level of its ownership.[167]

The Commission also argued that the power to appoint members of the advisory board was tantamount to a special privilege bestowed upon the state, and would deter foreign investment in violation of the

160. *Id.* paras. 1-7.
161. *Id.* paras. 6-7.
162. *Id.* para. 9.
163. *Id.* paras. 10, 15-16.
164. *Id.* para. 22.
165. *Id.* para. 35.
166. *Id.* para. 32.
167. *Id.* paras. 50-51.

principal of the free movement of capital.[168] Stating that the supervisory board had no decision-making authority, Germany claimed that its number of representatives on the board, four, was proportional to its ownership in the company and had no bearing on investment decisions.[169] The Court agreed with the Commission that "[s]uch an entitlement constitute[ed] a derogation from general company law," which limited Germany to three representatives.[170] Additionally, the Court rejected the argument that the board had no decision-making authority, observing that board approval was required for a "number of transactions."[171] As a result, the Court found the provision that allowed the appointment of board members under these circumstances likely could deter investment and thus violated article 56.[172] This conclusion follows from the initial choice of public law determination. The rights acquired under the Volkswagen arrangement, whether held by a public or private entity, would have affected (deterred) investment. But article 56 was implicated only when the shareholder was a public rather than a private entity.

In addition, Germany argued that, even if the provisions violated the Treaty, they were "justified by overriding reasons in the general interest," which in the present case was worker protection.[173] The Court, however, held that Germany had failed to show that the level of control created by the company law was necessary to protect worker interests and therefore the measures failed the test of proportionality.[174]

8. *Federconsumatori v. Comune di Milano*[175]

The last of the current crop of golden share cases centered on a stakeholder dispute against AEM, a distributor of gas and energy in the Milan area, asserted by certain of its Italian shareholders and consumer groups.[176] The plaintiffs, citing the Court's golden share case law, challenged a measure that permitted the municipal council of Milan to effectively control AEM.[177] They claimed that Municipal Law Number

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168. *Id.* para. 57.
169. *Id.* para. 58.
170. *Id.* para. 60.
171. *Id.* para. 65.
172. *Id.* paras. 66, 68.
173. *Id.* para. 70.
174. *Id.* paras. 72-76.
175. Joined Cases C-463/04 & C-464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007), *available at* http://europa.eu.int.
176. *Id.* paras. 1-2, 6.
177. *See id.* para. 11.

474/1994 and article 2449 of the Italian Civil Code, when applied in concert, violated article 56 of the Treaty.[178] The law in question, passed in 1994 and then amended in 2003, allowed for the appointment of a director without voting rights to certain public service companies (energy, defense, transport, telecommunications) in which the state retained a stake.[179] It also stipulated a list system by which directors would be appointed.[180] The lists could be submitted by either outgoing directors or by members whose stake in the company exceeded one percent.[181] A minimum of one-fifth of the directors were required to have been appointed from minority lists.[182] Article 2449 allowed for the articles of association of one of these companies to confer upon the state one or more directors to the board.[183]

In April of 2004, the majority of AEM's shareholders voted to amend the articles of association, giving the Comune di Milano the exclusive right to appoint directors not exceeding one-quarter of the board's members and the right to participate in the election of directors not appointed by it.[184] The Regional Administrative Court for Lombardy referred the question of the validity of these provisions' to the European Court of Justice.[185]

The Court, acknowledging its broad reading of article 56, concluded that the Italian provisions implicated article 56 despite the fact that the specific provision at issue was the adoption of an articles of association, a creature of private law and of internal corporate governance.[186] While declining to specifically address the issue of whether a member state can ever be considered a purely private actor when investing in private undertakings, the Court appeared to concur with the Advocate General's opinion, stating that any public shareholding that would "enable [it] to participate effectively in the management of that company" would violate article 56.[187] Although the Comune di Milano was only able to appoint directors to the board in a number proportionate to its own shares, the Court noted that another provision allowed the municipality to participate in the list

178. *Id.* para. 15.
179. *Id.* paras. 4-5.
180. *Id.*
181. *Id.* para. 5.
182. *Id.*
183. *Id.* paras. 3, 5.
184. *Id.* para. 9.
185. *Id.* paras. 14-15.
186. *Id.* paras. 21, 29-32.
187. *Id.* para. 29.

system for appointing directors.[188] The arrangement gave Comune di Milano an undue silent majority, which could discourage foreign investment in violation of article 56 of the Treaty.[189] The Court reasoned that despite the fact that the rights conferred upon the Comune di Milano were not permanent and could be asserted by any private shareholder, the majority of voting power now vested in the state made it unlikely that any private shareholder could ever remove the state's voting rights or vest a private shareholder with equal voting rights.[190] Citing previous golden share cases, the Court noted that such restrictions might be permissible because gas and electricity services were among the previously recognized public interest services in which states could hold a golden share, provided the share survived the proportionality inquiry.[191] The Court found that, by failing to provide precise conditions that would justify the appointment of directors by the state, article 2449 of the Italian Civil Code did not place any limitations on state control of shares.[192] Thus, the Court determined that this arrangement failed the test of proportionality.[193]

B. Putting the Cases Together To Construct a Jurisprudence of Public/Private Shareholding

Is it possible to read these cases together to articulate a system of rules governing both the choice of law applicable when states seek to act as investors and the substance of that choice under European law? In both *Commission v. Germany* and *Federconsumatori v. Comune di Milano*, the Court of Justice held that the member state had violated article 56 of the Treaty, which guarantees the free movement of capital.[194] These cases differed from previous golden share cases in one significant respect. In the earlier cases, the member states had passed legislation that privatized a particular company or companies; the legislation also included special interest provisions for the state that were as varied as the states themselves and the industries that were being privatized.[195] In both *Germany* and *Comune di Milano*, the

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188. *Id.* paras. 26-29.
189. *Id.*
190. *Id.* paras. 36-37.
191. *Id.* paras. 40-41.
192. *Id.* para. 42.
193. *Id.* para. 43.
194. *Id.*; Case C-112/05 Comm'n v. Germany, 2007 ECJ (Oct. 23, 2007), para 82, *available at* http://europa.eu.int.
195. *See* Joined Cases C-282/04 & 283/04, Comm'n v. Netherlands, 2006 E.C.R. I-9141, paras. 9-10; Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I-4641, I-4646 to

contested provisions were not a creature of state legislation, but were enacted through the articles of association of the companies, enabled by member state corporate law provisions.[196] Both Germany and Italy argued that the shares (and rights emanating therefrom) retained by the state were alienable and that a similar arrangement could be enacted by the company for any other private shareholder.[197] Under this rationale, the state was not acting in a public capacity, and the Treaty provisions should not be implicated. Yet, Advocate General Maduro rejected this reasoning,[198] as did the Court.[199] In *Germany*, while agreeing with the Commission that the particular measures in question were still state action rather than private measures, Advocate General Colomer indicated that the member states could act as private investors without implicating the Treaty.[200] For them, all of the cases involved state power, the assertion of which could be limited by application of European law.

Advocate General Colomer perhaps best summarized the state of golden share jurisprudence and its general principles:

> (a) The Court examines the various national rules on intervention, essentially, in the light of the principles relating to free movement of capital: failure to observe those principles may, as an ancillary matter, give rise to an infringement of the principle of freedom of establishment.
> (b) In so far as such rules are capable of impeding the acquisition of shares in the companies concerned and of deterring investors from other Member States, they amount to restrictions on the free movement of capital.
> (c) Article 295 EC has no practical effect in this sphere.
> (d) The free movement of capital may lawfully be restricted only by measures which, without being discriminatory on grounds of nationality, are a response to overriding requirements relating to the general interest and are suitable and proportionate to the objective which they pursue. Such measures, which must be adopted *ex post facto*, must be based on objective criteria which

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54; Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581, I-4617 to 18; Case C-367/98 Comm'n v. Portugal, 2002 E.C.R. I-4731, I-4762 to 66, Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781, paras. 9-10; Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809, paras. 9-10.

196. *Comune di Milano*, 2007 ECJ para. 35; *Germany*, 2007 ECJ paras. 2-7, 12-16.

197. *Comune di Milano*, 2007 ECJ paras. 17-18 (opinion of AG Poiares Maduro); *Germany*, 2007 ECJ paras. 32, 36.

198. *Comune di Milano*, 2007 ECJ paras. 21-22 (opinion of AG Poiares Maduro).

199. *See id.* paras. 29-31; *Germany*, 2007 ECJ at paras. 50, 56.

200. *Germany*, 2007 ECJ paras. 29-31, 44-46 (opinion of AG Ruiz-Jarabo Colomer).

> are known in advance to those concerned, to whom a legal remedy must be available.[201]

The focus is on the special character of member states' interventions in their own economies. The object is to reduce all possible transaction costs to the free movement of capital that might be based on the "nationality" of that capital. Investors may be deterred by rules that discriminate on the basis of nationality, as well as other rules that make investment less attractive (for example, rules privileging state investment).[202] The form of that privileging is immaterial. All state intervention that is accompanied by regulation, the threat of regulation or indirectly supported by special regulation, constitutes an impediment to free movement.[203] Derogations in the public interest are narrowly construed.[204] In a general sense, then, a sovereign regulates even when it appears to be participating in the market—if it participates in the market that is the subject of its regulation. It is the regulatory character of the action that is key, along with the power to implement it within its territory. In that context, the private law offers no cover.

Left unanswered, however, are the extent to which the private law might cover state investment activity in other member states and the power of a member state to restrict private investment by other states. With respect to the first question, the golden share cases have suggested the possibility of a different choice of law. The protection of private law rights might cover the purely private financial activities of one member state in shares of companies subject to the regulation of other member states.[205] But the intentions of the member state must be financial and not regulatory, and the activities must be purely private. It is unclear whether such investment would fall within any exception to the golden share cases where, for example, the company whose shares were purchased also had operations (a subsidiary, branch, or agent) in the purchasing state. The sense is that in such a circumstance, the holdings would be conflated and deemed public.

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201. Joined Cases C-463/00, Comm'n v. Spain & Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I-4581, I-4593 (opinion of AG Ruiz-Jarabo Colomer) [hereinafter Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-463/00 & 98/01].

202. *See supra* Part II.A.

203. *See supra* Part II.A.

204. *See, e.g.*, Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809, paras. 46-47 (noting that "the Court has also held that the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly").

205. *See infra* Part IV.

Even so, European law might still serve to limit state participation, especially in the markets it regulates. The Court has long held that the purchase by a member state of equity interests in a company might be characterized as a "state aid"[206] under the competition provisions of the EC Treaty.[207] The Commission has applied a private investor test to gauge the validity of state aid,[208] which would be consistent with an application of private law standards to state participatory activity. The framework is parity between state and private investors.[209] The touchstone is some sort of idealized private investor. The distinction is between action that can be characterized as private and that which is sovereign and regulatory, albeit indirectly. As such, all motives other than an interest in profitability are suspect.

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206. *See* EC Treaty art. 87(1).

207. *See, e.g.*, Case 323/82, Intermills SA v. Comm'n, 1984 E.C.R. 3809. In *Case T-198/01 Technische Glaswerke Ilmenau GmbH v. Commission*, 2004 E.C.R. I-2717, the Court explained:

> In order to determine whether the reduction of some of the applicant's debts to the BvS constitutes State aid, it is appropriate, in the present case, to apply the test of a private creditor in a market economy, which was referred to in the contested decision and which, moreover, was not challenged by the applicant.... By granting the price reduction, the BvS did not act as a public investor acting in a manner comparable to that of a private investor pursuing a structural policy whether general or sectoral—and guided by the longer-term prospects of profitability of the capital invested. That public body had in fact to be compared to a private creditor seeking to obtain payment of sums owed to it by a debtor in financial difficulties.

Id. at paras. 98-99.

208. In a case involving the acquisition by Belgium of shares of a domestic company, and thereafter its efforts to increase the capital of that company, the Court agreed with the Commission that those actions were subject to review and the constraints of article 87 of the EC Treaty as state aids. "In order to determine whether such measures are in the nature of State aid, the relevant criteria is ... whether the undertaking could have obtained the amounts in question on the capital market." Case C-142/87 *In re* Tubemeuse (Belgium v. Commission), 1990 E.C.R. I-959.

209. In an early case, the Court explained:

> The Commission showed itself to be aware of the implications of the principle of equal treatment as between public and private undertakings in its communication to the Member States of 17 September 1984 on public authorities' holdings in company capital (published in the Bulletin of the European Communities, September 1984). In that statement it correctly observes that its action may neither penalize nor favour public authorities which provide companies with equity capital.

Case C-303/88 Italy v. Commission, 1991 E.C.R. I-1433, para. 19, *available at* http://europa.eu.int. From the principle of equal treatment, it fell to the Commission to determine whether the state's investment programs corresponded to normal market conditions. If so, such investments "cannot be regarded as State aid. In the present case it must therefore be determined whether, in similar circumstances, a private industrial group might also have made up the operating losses of the four subsidiaries between 1983 and 1987." *Id.* para. 20.

> [W]hen injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article [87] of the Treaty, and its compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision.[210]

However, the "dividing line between general measures of economic policy and state aids may . . . be a fine one."[211] Even if the state activity does not constitute state aid, investment activity of this sort would require preapproval under the rules implementing the state aid limits, at least in companies within their jurisdiction, to comply with the notice requirements of the state aid provisions. This distinguishes state investment from private investment, at least with respect to timing. This distinction made sense in the context in which many of the state aid cases arose, which were similar to those of the golden share cases—involving state owned or controlled enterprises.[212] The state aid jurisprudence might suggest congruence between standards of state interventions in economic activity when undertaken in a sovereign capacity under article 56, and where undertaken in a private capacity under article 87. Still, this congruence might extend only to activities within the territory of a member state. Both Court (in the golden share cases) and Commission (in its elaboration of state aid through shareholding)[213] were concerned with the effects of privatization and the creation of a European private market in place of the old controlled economies of the member states.

Conversely, it is likely that a member state might be able to legislate a prohibition on the private activities of public actors. Certainly that would be the case in those sectors of the economy

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210. *Id.* at para. 22.

211. PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 1088 (4th ed. 2008).

212. Indeed, privatization of the sort that gave rise to the golden share cases may have implications under the state aid rules as well. For a discussion of the Commission's position, see ANDREW EVANS, EC LAW OF STATE AID 70-76 (1997).

213. The Commission made its position clear in the 1980s. *See Application of Articles 92 and 93 of the EEC Treaty to Public Authorities' Holdings*, BULLETIN EC 91984 (1984), *available at* http://ec.europa.eu/comm/competition/state_aid/legislation/ec91984_en.html. The Commission noted, for example, four situations

> in which public authorities may have occasion to acquire a holding in the capital of companies: (a) the setting up of a company, (b) partial or total transfer of ownership from the private to the public sector, (c) in an existing public enterprise, injection of fresh capital or conversion of endowment funds into capital, (d) in an existing private sector company, participation in an increase in share capital.

Id. at para. 2. All of the situations suggest the privatization or internal economic management context in which the golden share cases arose.

identified in *Commission v. Belgium*.[214] But the derogation from article 56 might be applied more broadly to prohibit such private investment where the intent is to extend the regulatory power of the purchasing state outside of its borders or where the purchased interests also touch on operations which the purchasing sovereign can control in its regulatory capacity in its home territory.[215]

The golden share cases thus elaborate a theory that has not ventured very far from its origins in the activities of member states and their interventions in their domestic economies. On the one hand, the golden share cases suggest a tendency on the part of the Court and Commission to treat member states as public entities when they seek to participate in their domestic economies, even if that participation appears to be equivalent to that of a private individual (a "normal market economy conditions" standard).[216] Though they leave the door open, the cases suggest that there is very little room for a private law of public entities. On the other hand, the Court's state aid jurisprudence suggests a limit to the trajectory of golden share jurisprudence. Both Court and Commission have recognized the possibility of private investment activity, even within a member state's domestic economy. It also suggests the possibility of a space in which state economic activity might not fall within article 56, but instead fall within the private parity regimes of article 87. But in either case, the state is subject to regulatory constraints in the form of Commission supervision and Court review. And in neither case has there been substantial attention to such activities when conducted outside the territory of a member state.

III. THE CONSTRUCTION OF A JURISPRUDENCE OF PUBLIC/PRIVATE LAW?: THE IMPORTANCE OF THE ADVOCATE GENERAL OPINIONS IN THE GOLDEN SHARE CASES

In the most recent round of golden share cases, Advocate Generals Maduro and Colomer sought to elaborate variations on theories of European private public law—a law applicable to states

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214. *See* Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809, para. 28 (paraphrasing Belgium's concern with maintaining control over the country's energy supplies and energy transportation infrastructure).

215. *See, e.g.*, Case C-355/98, Comm'n v. Belgium, 2000 E.C.R. I-1221, I-1249 (regarding a successful challenge to a host of Belgian rules the effect of which would have been to extend Belgian regulatory authority to German companies seeking to provide services within Belgium).

216. This standard is articulated by the Commission in *Application of Articles 92 and 93 of the EEC Treaty to Public Authorities' Holdings*, *supra* note 213.

engaging in activities in the market as shareholders within the market constraints of the free movement of capital principles.[217] Though the ECJ has failed to embrace the finer points of the jurisprudence each has suggested, those efforts are worth considering, especially because they might be more relevant to the question of public shareholding outside the narrow context of privatization represented by the golden share cases.

Consider first the analytical framework proposed by Advocate General Colomer refined in the three golden share cases decided in 2002.[218] In his analysis, he argued that golden share arrangements, or "special powers," should be categorized according to whether they are facially discriminatory or not.[219] Only two of the Portuguese provisions fell within this first category, and Colomer recommended that they be struck down for violating articles 12, 43, and 56 of the Treaty.[220] He also rejected the Portuguese argument that political and financial considerations provided justification for the legislation.[221] Colomer went on to address those "special powers" that were not facially discriminatory, further dividing them into "access restrictions" and "management restrictions."[222] Access restrictions were defined as those restrictions "relating to the acquiring or increasing of a holding in the capital of a privatised company."[223] Management restrictions were those which empower a public entity to oversee or affect the administration of a privatized company.[224]

While making the distinction early in his opinion, Colomer did not distinguish among each type of restriction. Instead he attempted to construct an analysis based on a distinctive reading of article 295, which provides that Community law "shall in no way prejudice the rules in Member States governing the system of property owner-

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217. *See* Case C-112/05, Comm'n v. Germany, 2007 ECJ (Oct. 23, 2007) (opinion of AG Ruiz-Jarabo Colomer), *available at* http://europa.eu.int; Joined Cases C-463/04 & 464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007) (opinion of AG Poiares Maduro), *available at* http://europa.eu.int; Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-463/00 & 98/01, *supra* note 201; Joined Cases C-367/98, Comm'n v. Portugal, C-483/99, Comm'n v. France & C-503/99, Comm'n v. Belgium, 2002 E.C.R. (opinion of AG Ruiz-Jarabo Colomer) [hereinafter Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-367/98, 483/99 & 503/99].

218. Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-367/98, 483/99 & 503/99, *supra* note 217, at I-4733 to 35.

219. *Id.* at I-4733, 4737.

220. *Id.* at I-4737 to 39.

221. *Id.* at I-4739.

222. *Id.* at I-4733, 4737.

223. *Id.* at I-4737.

224. *Id.*

ship."[225] Colomer focused on the "in no way" language in the article, noting that such explicit and unconditional language is found nowhere else in the Treaty.[226] Colomer argued that restrictions on corporate control amounted to both tangible and intangible property rights, and that article 295 requires the adjudication of those rights be left to the member states.[227] Noting the concern about the discretion that such restrictions afford member states, Colomer contended that the Community would still be able to enforce Treaty violations for specific discriminatory acts using golden shares.[228] While acknowledging that the Court has generally subordinated the principle enshrined in article 295 to other Treaty provisions, Colomer nonetheless urged the Court to rule against the Commission and thus define the scope and proper application of article 295.[229] The Court, though, rejected Colomer's article 295 argument in all three cases.[230]

Colomer pressed on, however, in the May 2003 golden share cases involving measures passed by Spain and the United Kingdom, respectively. While agreeing with the Court's prior holdings on some counts, Colomer maintained that the Court had erred in finding member states' attempts at control of management and capital structure to be a violation of article 56.[231] Rather, he argued that such golden share arrangements affected the right of establishment, and that any effect on free movement of capital was "incidental."[232] He also argued that the Court, by refusing to analyze the issue under article 295, had effectively rendered that provision of the Treaty meaningless.[233] Stating that member state involvement in a private company was not per se prohibited, Colomer reasoned that if article 295 cannot mitigate the rigorous application of fundamental Treaty principles, then ostensibly any exertion of member state influence over a private company, for example, the exercise of voting rights, would trigger a violation of the Treaty.[234] Lastly, Colomer criticized the Court

225. *Id.* at I-4741.
226. *Id.* at I-4742.
227. *Id.* at I-4746.
228. *Id.* at I-4733, I-4737.
229. *Id.* at I-4750, I-4753 to 54.
230. Case C-367/98, Comm'n v. Portugal, 2002 E.C.R. I-4731, I-4774; Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781, para. 44; Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809, para. 44.
231. Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-463/00 & 98/01, *supra* note 201, at I-4595 to 96.
232. *Id.*
233. *Id.* at I-4596 to 97.
234. *Id.*

for not enacting a clearer standard in its proportionality analysis, arguing that it had failed to state sufficiently why the Belgian regulation was more precise than the Portuguese and French regulations that were struck down.[235] While acknowledging that the Belgian law required a statement of reasons, Colomer expressed disbelief that the French law did not contain similar provisions.[236]

Colomer then analyzed the Commission's claim against Spain, noting that the Spanish law was not markedly different from that of Belgium, except for the fact that the Spanish law appeared to be broader in scope and could be triggered by ownership of more than ten percent of the capital of the company.[237] Colomer, recognizing that the Spanish law contained a time limit, argued that such a limit should satisfy the principle of proportionality and that the measure should be upheld.[238]

In the case of the British law, which applied to airports, Colomer noted that, unlike the Belgian law, there were no limitations such as "objective criteria which are subject to review by the courts."[239] Rather, the law, by giving the state almost unfettered discretion to exercise veto power in the case of a person acquiring more than fifteen percent of share capital, more closely resembled the French measure that was found to be incompatible with the Treaty.[240] For that reason, Colomer recommended that the British law be found in violation of the Treaty.[241] Finally, Colomer once again urged the Court to recognize that article 295 protects member states' property regimes, including those involving the member state as a shareholder.[242] If the Court were to do so, Colomer argued that golden share arrangements would be presumed valid unless it could be proved that the measures were being applied in a discriminatory fashion.[243]

In his opinion regarding Volkswagen, Colomer reiterated and refined the argument voiced in his previous golden share opinions.[244]

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235. *Id.* at I-4597.
236. *Id.* at I-4597 to 98.
237. *Id.* at I-4599 to 4600.
238. *Id.* at I-4600 to 01.
239. *Id.* at I-4603.
240. *Id.* at I-4602 to 03.
241. *Id.* at I-4603.
242. *Id.*
243. *Id.* at I-4604.
244. Case C-112/05, Comm'n v. Germany, 2007 ECJ (Oct. 23, 2007), para. 47, *available at* http://europa.eu.int (opinion of AG Ruiz-Jarabo Colomer).

In 2002,[245] and again in 2003,[246] Colomer cited article 295, which purports to protect the member states' particular systems of property ownership.[247] Colomer reasoned that, unless article 295 is construed to mitigate a rigorous application of fundamental treaty principles, it ostensibly creates a de facto prohibition of member state involvement in private companies.[248] Thus, the golden share jurisprudence would effectively "mark the end of free State intervention in companies as it has hitherto been understood."[249] While acknowledging that Council Directive 88/361 classified acquisition of shares as capital movement,[250] Colomer restated his position in *Volkswagen*, again citing article 295.[251] Arguing that a member state should have the right to participate in the economic life of its country, including the ownership of shares in a corporation, Colomer noted that current golden share jurisprudence, based on the "identity of its various shareholders," did not allow for a distinction between private and public activity by a member state.[252] Lastly, Colomer suggested that the Court should clarify the scope and application of article 295 to member states' private undertakings beyond golden shares, which are mostly prevalent in formerly public companies that have been privatized.[253]

In a sense, Colomer's article 295 analysis suggests an analogue to the Court's own elaboration of a private behavior parity model in the state aid cases. The choice-of-law element emerges clearly. Private law applies to states when states act like private parties. But that is possible only when state conduct is measured against some sort of "reasonable" or "plausible" private actor standard. State investment activity that does not constitute state aid under article 87 could be understood as such to private law for purposes of article 87, and consequently the invocation of member state property law national regulation under article 295 would be possible without contravening

245. Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-367/98, 483/99 & 503/99, *supra* note 217, at I-4741 to 49.

246. Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-463/00 & 98/01, *supra* note 201, at I-4596 to 97.

247. EC Treaty art. 295 ("This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.").

248. Opinion of Advocate General Ruiz-Jarabo Colomer in Cases C-463/00 & 98/01, *supra* note 201, at I-4596 to 97.

249. *Id.*

250. Case C-112/05, Comm'n v. Germany, 2007 ECJ (Oct. 23, 2007), para. 62, *available at* http://europa.eu.int (opinion of AG Ruiz-Jarabo Colomer); *see* Council Directive 88/361, For the Implementation of Article 67 of the Treaty, 1998 O.J. (L 178) 5.

251. *Germany*, 2007 ECJ at paras. 47-56 (opinion of AG Ruiz-Jarabo Colomer).

252. *Id.* para. 48.

253. *Id.* paras. 50-51.

the policy underlying article 56. But to get to that result it would be necessary to embrace the assumption that state conduct considered private for state aid purposes does not deter investment for purposes of the application of article 56. Colomer thus suggests a choice-of-law regime with substantive consequences—grounded in the intersection of state economic activity and the public law constraints of European law. The law applicable to state economic activity ought to depend on the character of the state activity. Distinctions must be made between public and private—regulatory and participatory—actions. Where the state action is private in character then national law ought to apply and the public constraints applicable to member states as sovereign entities ought not to apply.

Advocate General Maduro has also sought to elaborate a more comprehensive jurisprudence of state investment and activities within private entities. In contrast to Advocate General Colomer, Maduro suggested a regime in which states hardly ever lose their character as public entities, even with respect to activity that assumes a private participatory form. In his opinion in *Comune di Milano*, Advocate General Maduro recommended that the national court rephrase the question as, "'Does Article 56 EC preclude national rules which enable a public body which retains a minority shareholding (33.4%) in a privatised company to retain the power to appoint an absolute majority of the members of the board of directors?'"[254] He addressed Italy's argument that article 56 EC is not applicable because the system of appointment of directors to the board is done through articles of association, "which were adopted pursuant to the normal application of [Member State] private company law."[255] Maduro, echoing previous opinions from both himself and Advocate General Colomer, opined that a member state acting through domestic company law does not relieve it of its obligations under the Treaty.[256] Additionally, Maduro addressed Italy's claim that through the articles of association, special appointment privileges could theoretically be given to a private party, and therefore the state and private actors were essentially on equal footing.[257] He rejected this argument, stating that whether acting in a private or public capacity, member states were bound by the

254. Joined Cases C-463/04 & 464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007), para. 15, *available at* http://europa.eu.int (opinion of AG Poiares Maduro).

255. *Id.* para. 16.

256. *Id.* para. 19.

257. *Id.* paras. 20-21.

obligations placed upon them by the Treaty.[258] Lastly, Maduro found that the state's control of a third of the capital shares while retaining an absolute majority of members of the board constituted a restriction on the free movement of capital.[259]

In *Comune di Milano*, Advocate General Maduro declined to directly address Advocate General Colomer's concerns regarding article 295 of the Treaty. He did, however, argue that the golden share jurisprudence was correct in terms of the restrictions that were now placed on member states engaging in private undertakings.[260] Posing the question of whether such undertakings implicate article 56 of the Treaty, Maduro answered in the affirmative, contending that member states, as signatories of the Treaty, were bound by its provisions regardless of the character of their actions.[261] Maduro also voiced concerns about member states restricting the free movement of capital by using private undertakings to derogate from their obligations under the Treaty.[262] However, Maduro was cautious to observe that any state ownership of capital in a private company should not necessarily trigger article 56.[263] He argued that a member state could hold shares in a company on the condition that it acted to maximize its investment and respected the normal rules of the market, thus not discouraging transnational investment.[264] Noting that member states are subject to political mechanisms and accountability to their citizens, he suggested that if a public body held shares in which it was in a "privileged position in relation to other shareholders," then there would be a restriction to the free movement of capital.[265] Consistent with this line of reasoning, Maduro rejected the argument that Milan, an entity that is part of the Italian state, was entitled to the powers given it by a vote of the shareholders through private company law mechanisms.[266]

Maduro's rationale in *Comune di Milano* is particularly important for its elaboration of an approach to the choice of public or private law for testing the legitimacy of member state activity. Maduro broke the analysis down in three parts: (1) whether it makes a difference that the

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258. *Id.* para. 22.
259. *Id.* paras. 31-32.
260. *See id.* paras. 25-26 ("In my opinion, this case-law imposes a requirement of consistency upon Member States.").
261. *Id.* paras. 21-22.
262. *Id.* para. 22.
263. *Id.* para. 25.
264. *Id.*
265. *Id.* paras. 25, 30.
266. *Id.* para. 32.

rights accorded to the public body were generally available under private law; (2) whether the fundamental freedoms in general, and the free movement of capital in particular, apply to public bodies even when they are not acting in their sovereign capacity; and (3) whether there is a sphere of private conduct that need not constitute a violation of a public authority's obligations under the free movement of capital.[267]

With respect to the first point, Maduro was of the opinion that regarding the source of a public authority's rights in an undertaking, "it is immaterial how those powers are granted or what legal form they take."[268] His rationale was to prevent abuse. "Otherwise, Member States would easily be able to avoid the application of Article 56 EC, by using their position as incumbent shareholders to achieve within the framework of their civil laws what they would otherwise have achieved by using their regulatory powers."[269] For Maduro, then, all actions of a public authority effectively have a regulatory effect. There is no private law for public authorities—private activity is regulation by other means. He supported his argument in curious fashion—arguing that Milan's bad faith was evidenced by the way in which it sought to turn to private law as a legal basis for its action after the ECJ had held that a direct legislative grant of a similar authority was prohibited by article 56.[270]

This conceptualization of the state as presumptively incapable of acting in a private capacity, because of the inherent regulatory nature of all of its actions, served as a basis for Maduro's conclusion on the second point.[271] Specifically, Maduro concluded that a member state is under a duty, *ratione personae*, to abide by EC Treaty provisions with respect to the fundamental freedoms even when they are not exercising their public authority.[272] It followed that, "[i]n principle, therefore, a public body such as the Comune di Milano cannot rely on the argument that its actions are essentially private in nature to avoid the application of the Treaty provisions on free movement."[273]

Maduro did suggest, however, a margin of appreciation of sorts for the way that the free movement provisions would be applied to a public authority when it seeks to act as a market participant and its

267. *Id.* para. 18.
268. *Id.* para. 19.
269. *Id.*
270. *Id.* para. 20 (citing Case C-58/99, Comm'n v. Italy, 2000 E.C.R. I-3811).
271. *Id.* para. 22.
272. *Id.* paras. 21-22.
273. *Id.* para. 22.

actions are essentially private in nature.[274] There is, of course, a tension between Maduro's attempt to suggest a *rationae materiae* limiting scope for the application of article 56 and his earlier declaration that public authorities invariably operate as a regulatory body, in whatever capacity they act. But the limitation Maduro suggests is narrow. Indeed, Maduro uses the *rationae materiae* basis for liability to sketch a very broad substance-over-form standard with respect to which the character of the state action is irrelevant:

> Member States are required to take into account the effects of their actions as regards investors established in other Member States who wish to exercise their right to the free movement of capital. In that context, Article 56 EC prohibits not only discrimination on grounds of nationality, but also discrimination which, in respect of the exercise of a transnational activity, imposes additional costs or hinders access to the national market for investors established in other Member States either because it has the effect of protecting the position of certain economic operators already established in the market or because it makes intra-Community trade more difficult than internal trade.[275]

In effect, the jurisprudence of quantitative restriction and of impediments to the provision of services[276] applies to the movement of capital within the European Union.

Maduro also suggests a narrow view of the private or market actor equivalence standard in the "state aid" cases, the jurisprudence of which Maduro tacitly acknowledges. Maduro well understands that the Court itself has acknowledged the possibility of states acting like private individuals and enjoying the consequences of that characterization. Maduro, however, suggests that it is better to assume that states will not be able to demonstrate that they acted strictly like a private person seeking profit (meeting even the private equivalence standard of the state aid cases). It is possible to rationalize this position: the officials of democratic states owe a paramount duty to the citizens of the state they serve. That duty must be discharged even in the face of countervailing considerations whenever the state is deemed to act. As such, even when a state purports to act like a private citizen, it can, at best, mimic the form of that action. But the state can never be a private entity precisely because it can never abandon its paramount duty to its citizens. State agents might well breach their duty to their citizens if they failed to act in all cases in the political best

274. *Id.* para. 24.
275. *Id.*
276. *Id.* paras. 28-30, 39-43.

interests of the polity. This overarching duty may be inconsistent with for-profit actions, except in rare cases. This makes sense in the context of a member state seeking an advantage or furthering a policy through its regulatory powers. Yet, Maduro's assumptions may be more problematic when the member state seeks to compete with private entities in its private capacity and participates in the market rather than regulates it, as a matter of policy.[277] And it makes even less sense where the state acts in a private capacity beyond the borders of its territory.

But Maduro appears to reject these distinctions. Even the mere ownership of shares in a company may trigger article 56, unless "investors in other Member States can be sure that the public body concerned will, with a view to maximising its return on investment, respect the normal rules of operation of the market."[278] But given Maduro's earlier assertion that public bodies regulate merely by acting, it is hard to imagine a situation where this is possible. Perhaps one example might be where the state abandons all control of funds used to invest in shares to another entity over which it has no influence and with respect to which no privileging legislation is passed.[279] Moreover, the limitations to action that are proven to maximize the return on investment under "the normal rules of operation of the market" might misunderstand even the basic nature of share ownership.[280] Investors, of course, always seek to maximize the return on their investment. Corporate investors gauge that return by the value of the investment to their shareholders in light of their long and short term plans. Maximizing value, thus, to some extent, must mean maximizing the utility of the investment to the satisfaction of the owners. Where the state is the owner, maximizing of return must, of necessity, be understood in the context of the desires of the state's ultimate shareholders—the people. As such, under Maduro's rationale, the state rarely, if ever, acts like a private investor because it must act to satisfy the maximization desires of its people. That is essentially regulatory

277. In the United States, this distinction is significant in the application of the American "free movement" rules under the Dormant Commerce Clause. *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (recognizing that the Commerce Clause does not prohibit a state from favoring its own citizens when it acts as a market participant); *see also* Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980) (same).

278. *Comune di Milano*, 2007 ECJ para. 25 (opinion of AG Ruiz-Jarabo Colomer).

279. *Cf. id.* (observing that the risk of discriminatory access to markets occurs where "a public body holds shares which give it a privileged position in relation to other shareholders as regards its powers of control in the company concerned").

280. *Id.*

rather than merely financial under "the normal rules of operation of the market." Choice of law—public or private—thus depends on the willingness of the state (as an entity) to act against the will of its owners, in order to conform to a set of outside expectations of the way in which private actors formulate and exercise their self interests, to use in the context of their investment decisions. That, of course, is something quite alien to the understanding of shareholder self interest in common law corporate law.[281]

At a fairly crude level, the European Court of Justice appeared to echo the conceptualization of the problem of state ownership expressed by Advocate General Maduro in his opinion.[282] Still, even *Comune di Milano* did not present the Court with the more timely issue—a case where a member state has invested in a private corporation outside of the privatization context. If it adopts the test suggested by Maduro, it will have to define what constitutes "privileged position in relation to other shareholders."[283] That language seems to suggest that, at the very least, a member state cannot own a raw majority of shares in a company, nor can it own an amount of shares greater than the largest foreign shareholder. It seems likely that any provisions passed through company law that would give decision-making authority or veto powers to the state without offering (and simultaneously granting) the same privilege to a private shareholder(s) would violate the Treaty. Additionally, Maduro's reasoning seems to presume that the member state, as it is subject to the political will of its populace, is incapable of acting in the interest of the company. In a sense, then, this reasoning supposes something like an inability of a state even to mimic the profit-maximizing private shareholder because the state is not subject to the same economic incentives and would be required, as a consequence of the character of those incentives, to act against economic interest. The key, though, for Maduro appears to be a combination of corporate control through shareholding and the use

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281. This, for example, Justice Dixon explained:

> The shareholders are not trustees for one another, and, unlike directors, they occupy no fiduciary position and are under no fiduciary duties. They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage.

Peters' Am. Delicacy Co. v. Heath (1939) 61 C.L.R. 457, 504 (Austl.).

282. *See, e.g.*, *Commune di Milano*, 2007 ECJ at paras. 28-32 (holding of the court) (noting that even though the challenged provision fell "within the scope of ordinary company law" it nevertheless amounted to a restriction of the free movement of capital).

283. *Id.* paras. 25, 30 (opinion of AG Poiares Maduro).

of that control for the benefit of the corporation rather than the state shareholder. Thus, the test for validity of private undertakings would hinge entirely on the amount of shares (and therefore control) it has acquired.

This view seems problematic, as noted by the following hypothetical. France owns ten percent of Company *X*. Institutional investors *A*, *B*, and *C* each own thirty percent of the shares. All three dump their shares on the open market, where they are purchased by a number of smaller investors, none of whom own a greater share than, say, five percent. Using Maduro's language, this would certainly appear be a "privileged position in relation to other shareholders."[284] The question arises: is France under an affirmative duty to reduce its interest in the company? Might the state increase its interest in the company? From the perspective of state aid rules, it might be possible for the state both to retain its interest and to increase its holdings—as long as the state could show that these actions would be reasonably undertaken by a private entity and are, in any case, undertaken for long-term profitability. But from Maduro's perspective, that showing would be difficult at best unless the state could evidence its actions by reference to those of private parties. Moreover, where France's stake is deemed controlling, it might be difficult to show, under any circumstance, that France's decisions as shareholder are not regulatory in form or effect and deter investment and as a consequence breach article 56.

Still, Maduro's approach does have the benefit of revealing, at the policy level, the sense of European regulators of the propriety of states presuming to act privately in the market. By proposing a system that effectively reduces incentives for states to invest in private companies, as any shareholding small enough to pass muster would not be of substantial economic benefit, it effectively reduces this sort of state activity without actually forbidding it. Nonetheless, it may make more sense to adopt a standard in which the burden is on the Commission to prove that a member state engaging in private undertakings has acted in such a way as to discourage transnational investment in violation of article 56 of the Treaty. That approach would certainly be more in accord with traditional notions of shareholder duty in common law countries applicable to controlling shareholders.[285]

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284. *Id.*

285. This, for example,

> must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling

In any case, Maduro's touchstone for a margin of appreciation *rationae materiae* suggests a basis for the development of a jurisprudence going forward—the choice of law applicable to the private acts of public bodies. That choice of law should come up at all is impressive evidence of the great change in the status and power of sovereigns in a global economic environment. Maduro reminds us that the development of both choice-of-law rules and private law cannot be considered complete without a consideration of the place of the private conduct of public bodies.[286] No longer do sovereigns simply occupy their territory and something else outside their national territory. Sovereigns have come to occupy something of a middle ground. The complexities of this changing paradigm will require the development of sets of choice-of-law rules applicable to particular clusters of state activity. It is to an examination of these issues in the contexts in which they are likely to arise that the Article now turns.

IV. THE PRIVATE ACTIONS OF PUBLIC ACTORS IN A NEW CONTEXT

This Article has suggested that the golden share cases are backward-looking, and that this perspective informs both the form and substance of choice-of-law approaches to the issue of state participation in economic activity in a nonsovereign capacity. The cases focus the European Court of Justice on the legitimacy of the details of an economic transformation of the last generation, one that moved most member states from a socialist to a more free market economic regulatory framework.[287] That transformation almost inevitably followed from the internal market objectives written into the EU governance framework since the Treaty of Maastricht.[288] Member

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> them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed.

Allen v. Gold Reefs of W. Afr., Ltd., [1900] 1 Ch. 656, 671. For an American version of this understanding, see, for example, Riebe v. Nat'l Loan Invs., L.P., 828 F. Supp. 453, 455-57 (N.D. Tex. 1993).

286. *See supra* notes 254-259, 261-269 and accompanying text.

287. For its governance implications, see, for example, Andrei A. Baev, *Is There a Niche for the State in Corporate Governance? Securitization of State-Owned Enterprises and New Forms of State Ownership*, 18 HOUS. J. INT'L L. 1, 32-39 (1995) (analyzing the governance implications of golden share arrangements). A similar argument is possible with respect to the application of the state aid doctrine of competition law to issues of state investment in private company shares. *See* discussion *supra* notes 215-219.

288. *See* WOLF SAUTER, COMPETITION LAW AND INDUSTRIAL POLICY IN THE EU 20 (1997).

states have been privatizing their state-owned enterprises for a long time.[289] They have been investing systematically in private corporations for a much shorter period. No longer the province solely of competition law and state aid doctrine, these activities now implicate free movement of capital as well. The cases have suggested the difficulties of the privatization project and the reluctance of states to let go of their direction of certain sectors of economic activity. Nonetheless, these public authorities are nearing the end of that project.

Yet the golden share cases also suggest an alternative methodology for confronting privatization in the context of the construction of the internal market in the European Union and in the context of contemporary economic globalization grounded in a privileging of capital and its movement across borders. The cases privilege a political framework that posited a strict divide between public and private law and firmly placed the state in the public law sphere. Where states refrain from a substantial amount of nonsovereign activity, this approach is useful. However, the model may be a problem in a world in which economic entities with public shareholders are no longer just a variant of the old Soviet "corporation."[290]

Still, though the institutions of the European Union appear to be focusing on the past, both public authorities and private actors have moved on. They have begun acting in ways that have muddled the once-clearer distinctions between public and private activity. States have begun to avoid legislation in favor of either soft law or influencing behavior in the manner of private entities.[291] In a world in which public authorities seek to act like private corporations and private corporations seek to act like public authorities, choice-of-law issues become more complex. In addition to the usual issues of choices among private legal regimes, the current realities of public and private entity behavior now suggest that the choice of law in international private transactions might involve consideration of the application of public law as well. In this context, the ramifications of the golden share rules are worth careful and critical analysis.

For purposes of analysis, three categories of private behavior by public authorities are considered in light of the golden share cases.

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289. *See* Baev, *supra* note 287, at 2.

290. For a discussion of the changes, and the problems such changes are causing for socialist states, see generally Catá Backer, *supra* note 37.

291. *See supra* Part II.A.

The first, and easiest, is the purchase of shares by a public authority in private markets where both the company and the shares traded are located within the territory of the purchasing public body.[292] In the simplest case, this involves the purchase by a public authority of shares of a company it has chartered and that is subject to its legislative control. The second involves the purchase of shares in a company located outside the territory controlled by the public authority; such a purchase may be made either on the market or through a private transaction and may be made either directly or through a state-controlled fund.[293] In the simplest case, it involves the purchase by State *Z* of shares of Company *X* located (and chartered) in State *Y*. The third involves share purchases of companies outside the national territory by a fund created through contributions from a number of public authorities and controlled either directly or indirectly by them.[294] This scenario touches on the activities of sovereign wealth funds—now increasingly powerful global equity market actors. What emerges are regimes in which the choice of law depends on the identity of the sovereign in context—where the shares are being purchased, the nature of the purchase transactions, and the sort of shares purchased.

A. Purchase of Shares in the Market of a Domestic Company

In some jurisdictions, there may be little impediment for a state to enter the market to purchase shares on an equal footing with private purchasers. For example, there is no current statutory scheme in the United Kingdom that would prevent or limit the government from acquiring shares in a private sale or on the open market.[295] Yet this is the type of private transaction closest to the golden share model. A straightforward application of the golden share jurisprudence might suggest a presumption that private investment by state entities in domestic companies, even if acquired in public markets in the same manner as such shares might be acquired by a private individual, would still trigger article 56 EC prohibitions. The difficulty in this case is the applicability of *Comune di Milano*.[296] On the one hand, one can argue that a member state's purchase of shares in a domestic

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292. *See infra* Part IV.A.

293. *See infra* part IV.B.

294. *See infra* Part IV.C.

295. *See* Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I-4641, I-4658 to 59.

296. Joined Cases C-463/04 & 464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007), *available at* http://europa.eu.int.

company is a different case. Here the state is not tilting the field. Rather, the state has entered the market in the same way as private individuals and has bought shares without seeking a controlling interest. And it is true that this would, at first blush, suggest an exception to application of the *Comune di Milano* result.[297]

However, one could argue that the state is always free to legislate around its ownership interest. The threat of potential regulatory control (for example if the state did not get its way on a matter of internal governance) might produce the same result for purposes of impeding free movement as actual legislation. On this basis, even the most innocuous market transaction of domestic corporations could trigger a free movement of capital analysis. If that is the case, then it is likely that a state's private purchase transactions, transactions of controlling interests, and vigorous efforts to assert shareholder power in domestic corporations would be met with much suspicion.

Certainly, applying Advocate General Maduro's framework, all of these cases would be suspect precisely because the private law of investment could not be realistically applied.[298] As such, a new public law of private investment would have to be crafted. For Maduro, that would require the construction of a set of guidelines that would substantially limit the methods of investment and the objectives under which states seek to invest in their own domestic corporations. States would be required, effectively, to forswear any action that might have the least regulatory connotation—even if the identical action undertaken by a private individual would be seen as the vindication of good corporate governance and the effective exercise of shareholder rights. This might serve to amplify the construction of the private equivalence standards under state aid doctrine as well. Where states are presumptively understood as incapable of private conduct, where all state action is directly or indirectly regulatory, then private law may be unavailable to state actors—even when they act in their nonsovereign capacity. Conversely, the presumption of a regulatory nature of state action might be overcome only by application of a standard of private actor equivalence under state aid jurisprudence.[299] However, the Commission has long taken as narrow a view of the availability of this exception as Maduro takes with respect to the

297. *See id.* paras. 41-43.

298. *See supra* notes 268-270 and accompanying text.

299. In its discussion, the Commission explained the essence of this standard as the "normal market economy conditions" standard. *See Application of Articles 92 and 93 of the EEC Treaty to Public Authorities' Holdings*, *supra* note 213.

inapplicability of article 56 to state investment in economic activity. "The Commission has already had occasion in the past to consider the question of public holdings in company capital from the angle of policy on State aid; in most cases, in view of the particular circumstances, it has regarded them as constituting State aid."[300]

In the United States, the opposite result is likely. States are not precluded from owning interests in private entities and may engage in private market transactions.[301] Where a state acts in the market, rather than as a regulator, the constitutional provisions relating to the regulation of the American internal market do not apply.[302] The issue then is the character of the investment rather than its source.

In the United States, the more interesting question is not the private participation of public entities, but the extent of their sovereign immunity.[303] By reason of state sovereignty individuals may not sue a state without its consent, either in a federal or state court.[304] While the sovereign immunity of the states neither derives from nor is limited by

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300. *See id.*

301. 15 U.S.C. § 77r-1(a)(1) (2000) expressly states that a "State shall be authorized to purchase, hold, and invest in securities." As defined in § 77b, "[t]he term 'security' means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement." *Id.* § 77b(a)(1). In *Louisville, Cincinnati & Charleston Rail-Road Co. v. Letson*, the United States Supreme Court seemed to imply that a citizen of a state would be allowed to bring suit against a corporation created by, and transacting business in, another state, although the foreign state itself may be a member of the corporation. 43 U.S. (2 How.) 497, 555 (1844). Similarly, in *Bank of the United States v. Planters' Bank of Georgia*, the Supreme Court authorized the Bank of the United States to bring suit in circuit courts against a bank incorporated under Georgia state law, and of which Georgia itself was a stockholder, despite the fact that an original endorser or payee would *not* be able to sue in the same courts. 22 U.S. (9 Wheat.) 904, 906-10 (1824). Both of these decisions predate the passage of the Securities Act of 1933, 15 U.S.C. §§ 77A-77aa (2000), and the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78a-78mm (West 2006), though their substance is still likely applicable. *See, e.g.*, Sonoma Falls Developers, L.L.C. v. Nev. Gold & Casinos, Inc., 272 F. Supp. 2d 919, 922 (N.D. Cal. 2003) (citing Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558).

302. *See supra* note 277 and accompanying text.

303. The Eleventh Amendment precludes, and section 10(b) of the Exchange Act does not authorize, a securities fraud suit against a state, Green v. Utah, 539 F.2d 1266, 1273-74 (10th Cir. 1976); Brown v. Kentucky, 513 F.2d 333, 336 (6th Cir. 1975); MacKethan v. Virginia, 370 F. Supp. 1, 2-5 (E.D. Va. 1974), a state agency, Levy v. First Nat'l City Bank, 507 F. Supp. 189, 190-91 (S.D.N.Y. 1980); *In re* Equity Funding Corp. of Am. Sec. Litig., 416 F. Supp 161, 198-99 (C.D. Cal. 1976), or a municipality, *In re* New York City Mun. Sec. Litig., 507 F. Supp. 169, 181 (S.D.N.Y. 1980). Although these cases deal with suits arising out of securities fraud, it is conceivable that a court would be unwilling to strip a state of its sovereign immunity for lesser offenses in light of the precedent for refusing to do so in cases involving alleged fraud. A state's Eleventh Amendment immunity is also not waived by its regulatory activities in a federally regulated area. *Green*, 539 F.2d at 1273-74.

304. U.S. CONST. amend. XI.

the terms of the Eleventh Amendment, the Amendment provides that a nonconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.[305] Citizens may not bring suit against a state or any instrumentality thereof without the state's consent.[306] On the other hand, an individual is not obligated to engage in a private transaction with a state in the absence of the negotiation of such a waiver, and states, by statute, may waive their immunity to suit and liability.[307] The argument is made stronger where there is no issue of control, a strong subtextual issue in golden share cases.

B. Purchase of Shares in the Market (or Privately) of a Foreign Corporation (or in a Foreign Market)

The question becomes far more interesting when one considers the law applicable to market transactions involving the purchase by one state of the shares of a company over which it does not directly regulate. The usual case might involve the purchase of shares in a company whose charter is issued through another state.[308] On the surface, this might suggest the best case for the equal treatment of states with private entities. In this case, unlike that in which the state always has the potential to legislate changes to its corporate law, the state stands in the same shoes as a private investor. On the other hand, the state, even as a private investor, has the power to reach deeply into the economic affairs of other states by implementing its legislative program through shareholder activism.[309]

It may be most useful to consider the problem by way of an example from contemporary practice. Consider for this purpose the current role of Norway as an increasingly important private shareholder within the European Union, and worldwide.[310] Norway has twice rejected the opportunity to join the European Union, once in 1972 and the last time in 1994.[311] Norway, however, is heavily

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305. *See Green*, 539 F.2d at 1269-70.

306. *Id.*

307. *See id.*

308. *See, e.g., Russian Reassurance over Airbus*, BBC NEWS, Sept. 25, 2006, http://news.bbc.co.uk/2/hi/business/5377300.stm (reporting on Russia's purchase of a five-percent stake in Airbus).

309. *See infra* notes 316-318 and accompanying text.

310. *See, e.g., infra* Part IV.C (describing Norway's activist approach in the management of its pension fund).

311. *See* Eur. Comm'n, External Relations, Norway, http://ec.europa.eu/external_relations/norway/index_en.htm (last visited May 29, 2008).

integrated with the European Union through its participation in the European Economic Area, the terms of which are governed by the Agreement on the European Economic Area (EEA).[312] The EEA has been in force since January 1, 1994 "and extends the Single Market legislation, with the exception of Agriculture and Fisheries, from the EU Member States to Norway, Iceland, and Liechtenstein."[313] The EEA permits Norway to participate in many of the programs of the European Union, but membership in the EEA carries no voting rights in shaping European Union policy.[314] Norway thus is burdened with policy over which it has no direct control. "Norway also, along with its EEA/EFTA partners, contributes financially to social and economic cohesion in the EU/EEA. Norway is as integrated in European policy and economy as any non-member State can be, and the close EU-Norway relations generally run smoothly."[315]

But control can come in a variety of forms in an age in which the state can assert sovereign power using the mechanics of private action. The Norwegian Government Pension Fund (*Folketrygdfondet*) is the second-largest sovereign wealth fund (SWF) in the world, and the largest in Europe.[316] "Folketrygdfondet has been investing in the stock market since 1991, and its role as a financial investor is well entrenched."[317] It is currently estimated to be valued at 380 billion U.S. dollars.[318] The name "pension fund" is something of a misnomer, as *Folketrygdfondet* is funded from Norway's considerable petroleum revenues.[319] In 2006, the Government Pension Fund Global was merged with Norway's National Insurance Scheme to form *Folketrygdfondet* by an act of the Legislative Assembly.[320] The new entity has the long-term goals of management of petroleum revenues

312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. Pension Funds Online, Top 100 Global Funds, http://www.pensionfundsonline.co.uk/pdfs/Top-100-Global-Pension-Funds.pdf (last visited May 29, 2008).
317. *See* FOLKETRYGDFONDET, OWNERSHIP REPORT 2007 2 (2007), *available at* http://www.ftf.no/r/fil/2007123_1.pdf.
318. *Foreign Government Investment in the U.S. Economy and Financial Sector: Hearing Before the H. Subcomm. on Domestic and International Monetary Policy and the Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Servs.*, 110th Cong. 24 (Mar. 5, 2008) (statement of Martin Skancke, Director General, Asset Management Department, Ministry of Finance, Norway).
319. *See id.*
320. *See id.*

and the financing of Norway's pension scheme, and it has become a model for transparency and ethical management among SWFs.[321]

Folketrygdfondet is administered by Norges Bank Investment Management (NBIM), a division of the Norwegian Central Bank.[322] Norges Bank is also responsible for the publication of quarterly and annual reports on the fund, which are made public.[323] These reports include lists of all companies and commodities in which the fund is invested, rates of return, absolute and relative risk, and a strategic plan for the future.[324] The *Folketrygdfondet* board of directors consists of nine members, who are appointed by the King to four-year terms.[325] Investment regulations are set by the government.[326] Up to fifty percent of the fund's assets may be invested in shares, primary capital certificates, bonds, commercial paper, and deposits in commercial and savings banks.[327] The fund is also subject to regional investment restrictions, with the majority of both fixed-income and equity investments confined to Europe.[328] Additionally, the fund is not permitted to own more than five percent of the equity shares, or exercise voting rights in excess of five percent of total voting rights in a single company.[329]

Investments are made by the *Folketrygdfondet* in accordance with a set of "Fundamental Ownership Guidelines."[330] Among them is an obligation to "attend to its ownership interests on the basis of a set of qualitative investment criteria within the areas of ethics and corporate governance. Evaluation against such criteria shall form an integral part of the investment methodology of Folketrygdfondet, and of its ongoing asset management effort."[331] The *Folketrygdfondet* is also required to assume a shareholder activist role:

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321. NORWEGIAN MINISTRY OF FIN., REPORT NO. 24 (2006-2007) TO THE STORTING: ON THE MANAGEMENT OF THE GOVERNMENT PENSION FUND IN 2006 at 6-7 (2007), *available at* http://www.regjeringen.no/pages/1966215/PDFS/STM200620070024000EN_PDFS.pdf [hereinafter PENSION FUND MANAGEMENT REPORT NO. 24].

322. *Id.*

323. *Id.* at 21 fig. 2.5.

324. *Id.* at 107.

325. *Id.* at 103.

326. *Id.* at 103-04.

327. *Id.* at 103.

328. *See id.* at 101-02.

329. *Id.* at 102.

330. FOLKETRYGDFONDET, *supra* note 317, at 3 (reproducing the "Fundamental Ownership Guidelines for Folketrygdfondet").

331. *Id.*

> The financial interests of Folketrygdfondet shall be attended to by way of management monitoring, on an ongoing basis, financial developments on the part of the companies in which Folketrygdfondet is invested, hereunder by attending investor presentations held by the companies and by meeting with management representatives of the companies when deemed desirable.[332]

The Norwegian finance minister has publicly acknowledged her intention to incorporate a social agenda into Norway's investment strategies by, for instance, paying careful attention to companies that emit greenhouse gases. As she has explained, "In a global economy, ownership of companies is the most important way to have influence."[333]

The *Folketrygdfondet* is not subject to the usual rules applicable to private or state pension funds. "Folketrygdfondet is not subject to restrictions in the form of ongoing return or capital adequacy requirements. This means that Folketrygdfondet enjoys a special position as far as asset management is concerned, and is well placed to adopt a long investment horizon."[334] Fund ownership must be geared to fostering "good corporate governance."[335] The Norwegian fund explains this approach:

> The corporate governance principles adopted by Folketrygdfondet are premised on the Norwegian Code of Practise for Corporate Governance and the OECD Principles of Corporate Governance. Good corporate governance shall attend to the rights of the owners and other stakeholders in relation to the companies, and ensure that the management mechanisms of the companies work appropriately.[336]

For its 2007 report, the *Folketrygdfondet* targeted remuneration models,[337] activities to issue shares,[338] and on the creation of elections committees on boards of directors.[339]

On November 19, 2004, an Ethics Council was established by Royal Decree.[340] The Council's primary function is to evaluate

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332. *Id.*

333. Mark Landler, *Norway Backs Its Ethics with Its Cash*, N.Y. TIMES, May 4, 2007, at C1 (internal quotation marks omitted).

334. *See* FOLKETRYGDFONDET, *supra* note 317, at 2.

335. *Id.*

336. *Id.*

337. *Id.* at 6-7.

338. *Id.* at 5 ("We are of the view that a general authority to issue shares should normally not exceed ten percent of the share capital.").

339. *Id.* ("The role of the Election Committees is to ensure a good process for the appointment of Directors, with the proposed candidates enjoying the support of the main shareholders, and to ensure that the interests of the shareholders as a whole are attended to.").

companies in which the fund might invest to determine whether those companies meet certain ethical standards.[341] The Council makes recommendations to the Ministry of Finance, which then has the power to exclude companies from the fund's portfolio.[342] Subsequently, the Council is obligated to periodically evaluate excluded companies in the event that a company has ceased to engage in actions which are contrary to the ethical guidelines.[343] In December 2005, the Council released ethical guidelines by which companies are to be evaluated.[344] The guidelines state two principal aims. First, because the fund is concerned with long-term stability and solvency, it should seek to invest in companies who promote sustainability in the "economic, environmental and social sense."[345] Second, the fund should abstain from investments that might contribute to violations of "fundamental humanitarian principles, serious violations of human rights, gross corruption or severe environmental damages."[346]

The Council has recommended the exclusion of companies who manufacture or aid in the manufacture of nuclear weapons or cluster munitions.[347] Such companies include Northrop Grumman Corp., Lockheed Martin, and GenCorp, Inc..[348] The Council has also excluded Freeport McMoRan Copper and Gold, Inc., and DRD Gold Ltd. for environmental abuses, as well as Wal-Mart Stores, Inc., for labor rights violations.[349] The Council has even shown its willingness

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340. Council on Ethics, Norwegian Government Pension Fund-Global, http://www.rejeringen.no/en/sub/Styrer-rad-utvalg/ethics_council.html?id=434879 (last visited May 29, 2008).

341. *See* FOLKETRYGDFONDET, *supra* note 317, at 8. The fund justifies this focus on ethics in both conventional and behavior modification terms:

> The reason why we want ethics to form a key aspect of our company assessments is that we believe that a conscious and responsible attitude to ethical issues will over time contribute to enhanced value creation. This will again contribute to safeguarding our shareholder value, as entrusted to companies. Folketrygdfondet has therefore defined a set of investment principles for ethical investment assessments, and these are incorporated into our investment methodology and ongoing asset management efforts.

Id.

342. Ethical Guidelines, Norwegian Government Pension Fund Global, http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/Ethical-Guidelines.html?id=425277 (last visited May 29, 2008).

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. PENSION FUND MANAGEMENT REPORT NO. 24, *supra* note 321, at 75-77.

348. *Id.* at 77 tbl. 4.1.

349. *Id.* at tbl. 4.2.

to exclude companies that deal with governments that have poor human rights records, as evinced in its exclusion of Total SA for doing business with the ruling military junta in Burma.[350]

Some of these decisions have had political consequences, especially, and ironically, including responses from American public officials. When the *Folketrygdfondet* put Wal-Mart on its "no-invest" list of companies because of its alleged difficulties in keeping its supply chain relationships within ethical bounds,[351] the American ambassador to Norway objected.[352] American officials publicly criticized the Norwegians both for their conclusions and for their actions, which in their opinion had a flavor of indirect regulation.[353]

Were the *Folketrygdfondet* merely a private actor, there is little question that it would pose no particular problem in private law regimes. It would be clear that the rules applicable to all private investors would apply (as would whatever rules generally govern investment funds of the type created). The fund purchases stock on the market, does not take a majority position, has negotiated no special regulatory regime within the host states, and seeks ultimately to maximize the value of its investments in a way that is precisely articulated and approved by its holders.

But the result might be different under the emerging European jurisprudence. First, it is not clear that the investments are made like ordinary investments. The Norwegian legislature has conferred special rights on the fund to act more flexibly than equivalent private funds.[354] Moreover, a significant objective of the investment might be deemed regulatory—the *Folketrygdfondet* means to be an active shareholder, both in its purchase decisions and its relationship with entities in which

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350. Ministry of Fin., Recommendation of 14 November 2005, http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-of-14-November-2005.html?id=419590 (last visited May 30, 2008).

351. *See, e.g.*, John Acher, *Norway Dumps Wal-Mart from $240 Billion Investment Fund*, USATODAY.COM, June 6, 2006, http://www.usatoday.com/money/industries/retail/2006-06-06-norway-walmart_x.htm ("The ministry said the council had found 'an extensive body of material' that indicated Wal-Mart had broken norms, including employing minors against international rules, allowing hazardous working conditions at many of its suppliers and blocking workers' efforts to form unions.").

352. *See* Landler, *supra* note 333 ("[T]he American ambassador to Norway, Benson K. Whitney, . . . accused the government of a sloppy screening process that unfairly singled out American companies. 'An accusation of bad ethics is not an abstract thing,' Mr. Whitney said. 'They're alleging serious misconduct. It is essentially a national judgment of the ethics of these companies.'").

353. *Id.*

354. *See supra* notes 330-350 and accompanying text.

it has taken a position. To the extent that such entities also have operations in Norway, the result would be little different than under *Comune di Milano*; Norway has a privileged position with respect to its private investment. On that basis its very investment is public rather than private in character and could impede the free movement of capital. That is to say, because of the regulatory effect, the fund would be treated as a state actor operating in its sovereign capacity (though indirectly so) rather than in a private capacity.

This result is plausible under the ECJ's golden share jurisprudence, and it is much more likely by applying Advocate General Maduro's conceptualization of the problem. The *Folketrygdfondet*, like Milan in *Comune di Milano*, is the recipient of special legislative favor.[355] *Folketrygdfondet* may invest under more flexible rules. This privileging alone might be sufficient to bring it within the public law rules of that case. But by its own admission, the fund is seeking not merely to maximize its financial position, but also to advance a specific regulatory program.[356] While that program is not specifically Norwegian, that does not change the regulatory, though indirect, character of the investment project. From this perspective, Norway appears to be engaging in a bit of extraterritorial regulation through its control of key economic actors.

Yet, this is an odd result. Norway is seeking to do little more than any other private investor could do. Its activism is limited by the regulatory framework within which it operates. It has not sought to change the rules of corporate governance. Rather it means to use them the way any other investor with a large stake might. That its motivations spring from the public policy of Norway should not distinguish it from, say, a corporation whose investment strategy is grounded in a founder's deeply held religious beliefs.[357] In either case, as long as the ultimate goal is stakeholder wealth maximization—however plausibly defined—then that should be the end of the story. The difference can only be supported by a presumption that states are different and that the fiction of private action by public entities is just that.

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355. Joined Cases 463/04 & 464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007), para. 29 (opinion of AG Poiares Maduro), *available at* http://europa.eu.int (noting that the special powers enjoyed by the Comune di Milano were conferred by national law that was passed for the benefit of public entities).

356. *See supra* notes 340-350 and accompanying text.

357. *See, e.g.*, Cynthia L. Cooper, *Religious Right Discovers Investment Activism*, CORPWATCH, Aug. 3, 2005, http://www.corpwatch.org/article.php?id=12527 (discussing the growing popularity of Christian investment funds).

In the American context, the answer is less complicated. It is fairly clear that such a state investment actor is free to pursue its private investment strategy.[358] That pursuit can even include as a stated objective the desire to regulate the corporate behavior of the entities in which the fund takes a stake. Public funds, like the California[359] and New York[360] pension funds, have risen to some prominence on just such a basis. In the United States, the more interesting question is not the private participation of public entities, but their sovereign immunity.

C. *Purchase of Shares by Multisovereign Wealth Funds*

The question, perhaps, becomes more interesting when the public entity entering the market is a sovereign wealth fund. Sovereign wealth funds are not new devices.[361] However, as wealth has moved from the traditionally dominant developed states to well-managed developing states,[362] or resource rich states,[363] the size of these funds

358. *See supra* notes 277, 301 and accompanying text.

359. *See* CalPERS, About CalPERS, http://www.calpers.ca.gov/index.jsp?bc=/about/home.xml (last visited May 30, 2008). CalPERS, which stands for California Public Employees' Retirement System, is required to meet certain financial performance objectives. CALPERS, TOTAL FUND STATEMENT OF INVESTMENT POLICY 3 (2007), *available at* http://www.calpers.ca.gov/eip-docs/investments/policies/invo-policy-statement/total-fund-statement.pdf. CalPERS is actively involved in shareholder activities to promote certain behaviors among the companies whose stick it holds. *See* CalPERS, Shareowner Activities Policies, http://www.calpers.ca.gov/index.jsp?bc=/investments/policies/shareowner/home.xml (last visited May 30, 2008). Among CalPERS activities is the production of a list of underperforming companies, which it publishes to its Web site and for each of which it describes those activities that led them to be listed. *See* CalPERS, 2007 Corporate Governance Focus List, http://www.calpers.ca.gov/index.jsp?bc=/about/press/news/invest-corp/focuslist.xml (last visited May 30, 2008) ("CalPERS named eleven underperforming companies in our annual Focus List in March 2007.").

360. Press Release, Office of the New York State Comptroller, Governor and Comptroller Propose Pension Fund Reforms (Dec. 12, 2007), *available at* http://www.osc.state.ny.us/press/releases/dec07/121207.htm.

361. Simon Johnson, *The Rise of Sovereign Wealth Funds*, FIN. & DEV., Sept. 2007, at 56, 56.

362. The Arab Gulf states, principally Dubai, are usually considered the best examples of this source of sovereign wealth fund. *See, e.g.*, Anders Åslund, *The Truth About Sovereign Wealth Funds*, FOREIGN POL'Y, Dec. 2007, http://www.foreignpolicy.com/story/cms.php?story_id=4056 (noting that compared to its neighbors, "Dubai has done a far better job of putting sustainable wealth in the hands of [its] citizens"). But other developing states have begun to join in for a variety of reasons, not all of them the same as those that motivate private investors. "Brazil will create a sovereign wealth fund with the primary aim of intervening in foreign exchange markets to counter the appreciation of Brazil's currency, according to finance minister, Guido Mantega." Jonathan Wheatley, *Brazil Creates SWF To Curb Real*, FIN. TIMES, Dec. 9, 2007, http://www.ft.com/cms/s/0/a0a3dcc8-a687-11dc-b1f5-0000779fd2ac.html?nclick_check=1.

have grown.[364] More significant for the application of current legal principles, though, is that the investment strategy of the funds has changed as well. Once principally consumers of developed state debt (for example United States Treasury issues), these funds have increasingly sought to take positions in companies and to use their shareholder power more aggressively.[365] This has brought the funds to the attention of the developed (and increasingly indebted) states:

> [T]he combination of government control and the funds' growing footprint—estimated at around $2.5 trillion and getting bigger—has created a sense of unease in some quarters, prompting calls last fall from the Group of Seven industrial nations, for instance, for a code of best practices that would bar the funds from a range of politically motivated investment activities.[366]

The rise of these funds is causing some unease and great suspicion among investment target nations.[367] The character of that suspicion is similar to that expressed so well by Advocate General Maduro in his *Comune di Milano* opinion with respect to golden share provisions—that the form of private activity masks regulatory intent. Translated to the context of sovereign wealth funds, the fear would be that the directors of these funds will not be acting in the market like private individuals. Underlying that fear is the idea that states cannot act like private individuals no matter how hard they try, because states have a different maximization objective than private individuals. There is also a growing sense of the importance of soft regulation of

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363. Johnson, *supra* note 361, at 56 ("Still, the holdings remain quite concentrated, with the top five funds accounting for about 70 percent of total assets. Over half of these assets are in the hands of countries that export significant amounts of oil and gas.").

364. *Id.* (noting that sovereign wealth funds' "total size worldwide has increased dramatically over the past 10-15 years").

365. *The World's Most Expensive Club*, THE ECONOMIST, May 24, 2007, http://www.economist.com/finance/displaystory.cfm?story_id=9230598 (reporting on China's recent announcement to invest $3 billion in a U.S. private equity firm and describing the move as evidence of China's preparedness "to barge into murky private markets as well as liquid public ones").

366. William L. Watts, *'World a Better Place' Thanks to Sovereign Funds*, MARKETWATCH, Jan. 24, 2008, http://www.marketwatch.com/news/story/sovereign-wealth-funds-inspire-fear/story.aspx?guid=%7B1DC5E52D-807E-4950-9056-FD73CB8F2D17%7D.

367. An article from *The Economist* recently put it as follows: "Sovereign-wealth funds are a way to help recycle emerging-market surpluses. And yet suspicion about their motives could make their money much less welcome. . . . You can see why a call from Canada's Alberta Heritage Savings Trust Fund may strike you differently from an offer by Venezuela's Investment Fund for Macroeconomic Stabilisation." *Asset Backed Insecurity*, THE ECONOMIST, Jan. 17, 2008, http://www.economist.com/finance/displaystory.cfm?story_id=10533428.

corporate behavior, especially in the form of shareholder activism.[368] Meeting these fears are what ground the assurances of fund owners and managers. "For their part, the fund managers say they don't understand what the fuss is about. There are no examples, they say, of a fund using market positions to manipulate a foreign nation's currency or to sway policymakers in a foreign capital."[369] Fund managers also suggest the manipulative aspects of these arguments. They note, quite rightly, that when the developed world pushed a global regime of free movement of capital and took strong positions in the economic structures of developing states, there was little objection of the sovereign character of the investment, or the need to treat such investment differently from other financial investment.[370]

For all that, the question of the character of such investments, and the choice of law under which they will be regulated, is a live one. On the one hand, the activities of multistate investment funds would seem to make the clearest case for the application of purely private law. No single state controls the fund. The fund is geared to taking positions in companies for the "usual" purposes of maximizing wealth. This may provide the limited case the existence of which was intimated by the ECJ in *Comune di Milano*.[371] On the other hand, the fundamental difficulty remains—the owner of the fund is a sovereign. Mere ownership by a cluster of sovereigns changes the complexion but not the nature of the ownership. In this case, the comparison is with the agenda of a supranational organization, say the European Union, rather than with that of an individual state, say Norway. Yet this magnifies rather than diminishes the sovereign action issue. State investment policy is still formed to maximize its value to its own populace. That involves the maximization of political concerns, rather than purely economic concerns (again assuming it possible to separate the two). As such, public investors, even in their private investment decisions, will shape their decisions differently than private investors, even private investors whose shares are in turn publicly traded. As a consequence, state intervention in markets might constitute the sort of impediment to free movement which article 56 of the Treaty was

368. *See supra* notes 352-353 and accompanying text.

369. Watts, *supra* note 366.

370. *Id.* ("When funds from developed economies 'moved into markets and bought industries, we did not speak of restricting capital,' Kudrin said. Now that funds from emerging economies are on the scene 'we are having discussions about the aim of investment.'").

371. *See* Joined Cases C-463/04 & 464/04, Federconsumatori v. Comune di Milano, 2007 ECJ (Dec. 6, 2007), paras. 40-41, *available at* http://europa.eu.int.

meant to avoid. Or it might constitute specially targeted state aid. "Some funds, such as Norway's, behave as capitalists bent on making as much money as they can. Others may have 'strategic' goals—to nurture national champions, say, or to galvanise regional development."[372] If, on the other hand, public investors were able to demonstrate something like passivity in investment decisions (perhaps through the appointment of independent fund managers and the like), it might be possible that these funds would pass muster, even under the jurisprudence that might be intimated from the golden share cases.

The response of the international community appears to be developing in the direction of the golden share cases. This is no surprise given the prominence of the European Union in its construction.[373] That new approach echoes Advocate General Maduro's insight that states cannot avoid the sovereign character of their actions even in their private activity.[374] The consequence is the necessity of constructing a private law of public bodies. This was the thrust in late 2007 of the Group of Seven industrialized nations who sought to compel a code of ethics for such funds grounded in forcing investment to mimic the short-term profit maximization model that is purportedly used by private funds.[375]

Former U.S. Treasury Secretary Lawrence Summers explained the concern that arises when governments participate in capitalist markets with mixed motivations:

> The logic of the capitalist system depends on shareholders causing companies to act so as to maximize the value of their shares . . . . It is far from obvious that this will, over time, be the only motivation of governments as shareholders. They may want to see their national

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372. *Asset Backed Insecurity*, *supra* note 367.

373. William L. Watts, *Sovereign-Wealth Funds Too Big To Ignore*, MARKETWATCH, Oct. 20, 2007, http://www.marketwatch.com/News/Story/sovereign-wealth-funds-too-big-ignore/story.aspx?guid=%7B306F9A57%2D55FD%2D4B8C%2DAA44%2DF1F9514ECF37%7D.

> European Union officials had raised warning flags ahead of the G7 meeting, saying they fear some funds may aim to pursue political objectives rather than profits.
>
> Such concerns were further underlined by former U.S. Treasury Secretary Larry Summers in a Financial Times op-ed earlier this year that questioned whether some funds would act in the same interests of traditional shareholders.

Id.

374. *See supra* notes 268-270 and accompanying text.

375. Watts, *supra* note 373 ("The concerns were pushed into the headlines Friday when finance ministers from the Group of Seven industrialized nations sat down with representatives of some of the biggest funds to urge them to increase transparency and adopt a set of 'best practices.'").

> companies compete effectively, or to extract technology or to achieve influence.[376]

As a consequence, states would be subject to an investment maximization regime far more inflexible than that available to purely private actors.

Yet this is an odd consequence, in a sense. Nothing prevents private individuals from creating funds for the principal purpose of asserting indirect governance power on economic entities.[377] Short or even medium-term profit maximization can be sacrificed for long-term goals deemed welfare-maximizing (in the opinion of the fund managers), and the objective of the fund might be to take controlling positions in key industries for the purpose of indirectly regulating their behavior.[378] This is regulatory fund management. The fund intends to remake the rules under which these companies operate in a way similar to that undertaken by states through law.[379] But these funds use shareholder rather than state power to effect their legislative agendas. Much of this work is lauded by the very states that find similar conduct by state owned enterprises so threatening.[380] It is hard to see why sovereign funds "should be 'driven by commercial motives' rather than political or strategic ones"[381] when such strategic and political motives seem to excite little interest when exercised by nonsovereign funds.

And indeed, the American approach has been quite different from that of the golden share cases.[382] Traditionally (at least in its

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376. *Id.* (internal quotation marks omitted).

377. *See* Cooper, *supra* note 357.

378. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 783-96 (2005).

379. *See, e.g.*, Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1289-90 (2004) ("A new category of 'ethical investment' has also gained momentum, leading stockbrokers and shareholding funds to scrutinize the business practices of companies in their portfolios.").

380. Steven R. Weisman, *Overseas Funds Resist Calls for a Code of Conduct*, N.Y. TIMES, Feb. 9, 2008, at C3 (reporting on "the Bush administration['s] call[] for an international code of conduct by sovereign wealth funds" and asserting that such action was based on a fear that "without a code, the funds may use their investments to try to exercise political leverage").

381. Robert Schroeder, *Policy Needed for Sovereign Funds, Paulson Says*, MARKETWATCH, Oct. 20, 2007, http://www.marketwatch.com/news/story/paulson-urges-sovereign-fund-policy-imf/story.aspx?guid=%7b0607A4AB-A2D8-4F68-9AF1-F7C23DCE1060%7d&print=true&dist=printTop (quoting U.S. Treasury Secretary Henry Paulson in a speech to the IMF-World Bank annual meeting).

382. *See, e.g.*, Mark E. Rosen, *Restrictions on Foreign Direct Investment in U.S. Defense and High Technology Firms: Who's Minding the Store?*, 4 U.S. A.F. ACAD. J. LEGAL

contemporary form), Americans have been indifferent to the ownership of investment or control.[383] Americans have relied on their ability to regulate the corporate entities whose ownership may be in foreign hands.[384] That this ownership is under the control of a foreign sovereign makes no difference under American law.[385] The rule works, in part, because sovereigns are treated like private individuals for purposes of liability and the imposition of obligations with respect to their commercial activities under the American Foreign Sovereign Immunities Act regime.[386] American courts have been quite aggressive in stripping sovereigns of any immunity in the United States for their activities there.[387] But lately, the Americans have been intimating a greater willingness to treat foreign sovereign private investment under a different regime, embracing the idea that sovereigns do not act like ordinary individuals, even powerful multinational corporate individuals, in their investment decisions.[388] It is one thing, for example, for British Petroleum to purchase Amoco Oil Company and

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STUD. 75, 77 (1993) (pointing to a long-standing American tradition of welcoming foreign investment and arguing that federal statutory restrictions on foreign direct investment in industries related to national security "negates" this policy).

383. *Id.*

384. *See* Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907 (1824) ("[W]hen a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates . . . ."). The State Department first adopted a "restrictive theory of immunity" regarding actions taken by foreign sovereigns in 1952; under this doctrine, foreign sovereigns enjoy immunity with respect to public acts, but are subject to the jurisdiction of American courts with respect to private or commercial acts. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Attorney General (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, app. 2 at 711-15 (1976).

385. *Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) at 907.

386. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (2000).

387. *See* Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352, 2354 (2007); Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992); Guevara v. Peru, 468 F.3d 1289, 1305-06 (11th Cir. 2006); Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1300 (11th Cir. 1999); United States v. Noriega, 117 F.3d 1206, 1211-12 (11th Cir. 1997). *But see* Saudi Arabia v. Nelson, 507 U.S. 349, 362-63 (1993). *See generally* Law at the End of the Day, Permanent Mission of India to the U.N. v. City of New York: The State as Private Actor in a World of Private Actors, http://lcbackerblog.blogspot.com/2007/06/permanent-mission-of-india-to-un-v-city.html (June 30, 2007, 10:19 CDT) (discussing the implications of the Supreme Court's decision in *Permanent Mission of India to the United Nations*).

388. *See, e.g.*, National Security Foreign Investment Reform and Strengthened Transparency Act of 2006, H.R. 5337, 109th Cong. (2006) (proposing legislation that would implement increased scrutiny and review of foreign investment that might affect national security).

promptly shut down its operations in the United States; it is quite another if the Venezuelan State acquired enough shares in British Petroleum to induce it to make the same decision.[389]

V. CONCLUSION

This Article has sought to cover a lot of ground. The general framework of the analysis has been choice-of-law related, but not in the traditional sense. The central point has been that traditional choice-of-law analysis—grounded in a stubborn belief in the separability of public and private law, and positing issues of conflicts (and choice) of law as a central problem of private law for transactions among several jurisdictions—misses an important new development in conflicts (and choice) of law. That development centers on the growth of a new phenomenon, the increasing tendency of states to substitute actions in the private law realm for regulatory (or sovereign) activity.

States as shareholders represent an old activity with a potentially significant effect going forward that is different in both quantity and quality from the past. State shareholders are no longer limited to the old Marxist-Leninist state enterprises of Eastern Europe, Maoist China, and Castroist Cuba. States no longer invest solely in the shares of domestic corporations. Nor are state holdings of private corporate shares limited strictly to passive holdings. Instead, states appear ready to invest in private companies and to exercise the rights of shareholders to the full extent permitted under law.

Traditionally, these activities did not raise issues of either choice or conflict of laws. State enterprises were creatures of public law, and a large body of jurisprudence emerged to determine the extent of the liability of those enterprises.[390] Until recently, most states sought to invest solely in the shares of their own domestic corporations.[391] The purpose of that investment was to retain control of important sectors of

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389. Yet Americans cultivated a higher tolerance for this sort of thing when the issues involved American investment in Central American banana plantations. *See, e.g.*, PETER CHAPMAN, BANANAS: HOW THE UNITED FRUIT COMPANY SHAPED THE WORLD 53-58 (2007).

390. *See, e.g.*, Vladimir v. Laptev, *Socialist Enterprises*, *in* 17 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 16, at 3 (Borislav T. Blagojevic & Kenneth W. Dam eds., 1978) (discussing the legal doctrines and statutory framework governing the state enterprises of socialist countries in the Soviet era).

391. The golden share cases exemplify this pattern of state investment and ownership in domestic corporations comprising key sectors of the national economy, such as energy, transportation, and infrastructure. *See supra* Part II.A.

the economy.[392] Thus, the object of investment was regulatory (in a socialist sense, that is as an integral expression of a control economy) rather than participatory, that is, investment for the traditional private actor motivation of wealth maximization or investment policy. Even in those contexts where states sought to invest in the economic enterprises of other states, restrictions on the free movement of capital for that purpose effectively reduced such activity to negligible levels.[393] But all that has changed now. Modern globalization has effectively introduced a global advance toward free movement of capital. States have sought to act more energetically as private as well as public actors. In a global legal order in which the value of state sovereignty has diminished as the cross-border element of transactions has increased, states can extend their authority as private actors to an extent difficult when they seek to regulate as sovereigns.[394] It is in this emerging jurisprudential milieu that issues of choice of law arise. Does private or public law apply? And whose law applies in any case?

The Europeans have been at the forefront of the development of an approach to these issues—though the emergence of this jurisprudence is incidental to vestigial issues of the construction of a postsocialist political economy in Europe. That jurisprudence would not have emerged but for the development of the great superstructure of law represented by the treaties establishing the European Union (in general) and the European Economic Community (in particular). That superstructure has established a hard law of free movement of capital to which all member states are bound.[395] It has also produced a consensus on a privileged form of economic activity—market based—through an elaboration of a European competition law applicable to both the public and private (regulatory and participatory) activity of states. And it provided an economic framework within which that superstructure could be developed—the common market. It is in that international federal context that the issue of the relationship of states to the entities they charter was developed as the European Community

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392. *See, e.g.*, Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809, para. 46 (recognizing that Belgium's objective of regulating and maintaining control over the country's natural gas supplies falls squarely within the public interest exception under the EC Treaty).

393. *See* NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 357 (6th ed. 2006) (describing the "limited progress" in the free movement of capital before the 1980s and the view at the time by many states that "control of capital movements was an important economic and monetary instrument" which they preferred to keep "largely in their own hands").

394. *See supra* Part IV.C (discussing states' use of sovereign wealth funds to exert a regulatory influence on foreign corporations).

395. EC Treaty art. 56.

worked through a variety of efforts of the member states to retain an interest in the corporations they once controlled but then sought to privatize, or in which they otherwise invested. All of those methods were opposed by the European Commission in the motley series of challenges to the golden share regimes of France, Portugal, Belgium, Spain, the United Kingdom, the Netherlands, Germany, and Milan.[396] Only the Belgian legislation survived.[397]

From these cases, the form of a relevant jurisprudence has emerged. States are free to engage in market activities for their own account with respect to which the private law of such transactions would apply.[398] However, because states never lose their public character, market transactions involving state actors and corporations chartered domestically appear to be presumptively regulatory in nature.[399] Because states can or might regulate their position as shareholders, any state activity involving domestic corporations appears to be treated as direct or indirect regulation, or regulation in effect. As a consequence, such activity, to the extent it might affect the willingness or ease of transactions in those shares by nationals of other member states, would violate the fundamental right to free movement of capital enshrined in the EC Treaty.[400] What survived was the regulatory framework that appeared to treat all individuals equally and that touched on the regulation of a sector of the economy deemed vital to the governance of the state.[401] Completing this analysis was the framework of public/private equal treatment written into European competition law in the form of the state aids provisions of the EC Treaty.[402] These suggested the same result as the golden share cases—a presumption that states did not act to maximize profit (and thus their private activity was public in character). The presumption could be overcome only where a state could convince the Commission that its actions were private in form and fact. Using the language of the state aid cases, this would require a showing that the state was investing "under normal market economy conditions."

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396. *See supra* Part II.A.

397. *See supra* Part II.A.

398. *See, e.g.*, Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I-4641 (acknowledging the validity of the United Kingdom's argument that "Member States are entitled to engage in economic activities on the same basis as private market operators, within the framework of contracts governed by private law" but determining that in the instant case "[t]he restrictions at issue do not arise as the result of the normal operation of company law").

399. *See supra* notes 267-268 and accompanying text.

400. *See supra* text accompanying note 201.

401. *See supra* Part II.B.

402. *See supra* notes 225-230 and accompanying text.

Left unanswered, however, was whether these ideas could apply when the state acted purely as a private party or engaged in private economic (investment) activity in another member state. To that end, the opinions of the Advocates General in those golden share cases might prove useful. In particular, Advocate General Colomer's suggestion of the relevance of article 295[403] and Advocate General Maduro's sophisticated construction of a theory of the public character of state private transactions[404] suggested a framework for analyzing choice of law. The implication of these approaches is that the private law of corporate investment must be divided into a private and public component. The ordinary rules of private transactions in shares might not apply when a state purchases stock and seeks to assert the rights of a shareholder. When a state engages in that activity, it is presumptively engaging in regulatory activity indirectly and public law must apply (in the case of member states, the overriding law of the EC Treaty). The reason advanced is both deceptively simple and troubling—because a state can never duplicate the internal construction of a private entity, it can never act to maximize its welfare. Instead, as a political body, it must necessarily act to maximize its political capital. As a consequence, it cannot participate in the market in the same way as a private individual.

The Article then sought to apply those insights in three distinct cases: the purchase of shares of a domestic company by a state, the purchase of shares of a foreign corporation by a state, and the purchase of shares by a multistate sovereign wealth fund. In the first case, it was clear that the developing jurisprudence would severely constrain a member state.[405] The very purchase of an equity interest in a domestic corporation conflates the regulatory and private investment function in a way that, under developing European jurisprudence, favors the public element. In the second case, on the other hand, purchase of the shares of a foreign corporation might go either way. However, applying the rationale of Advocate General Maduro, it is likely that even these arguably private transactions would be characterized as public in character. Such a purchase could be deemed an effort at indirect and extraterritorial regulation that would either be prohibited, or might even permit the host state a power to prevent the investment. This sort of characterization might also inform the view that the state aid provisions of article 87 apply even were the free movement of capital

403. *See supra* notes 225-230 and accompanying text.
404. *See supra* notes 259-271 and accompanying text.
405. *See supra* Part IV.A.

principles inapplicable. These considerations continue to distinguish public/private activity from the same activity conducted by a purely private actor. And it poses an interesting choice-of-law nexus: private law will always apply to the private investor but may apply to the public investor only after a threshold consideration of the nature of the public actor's investment. In the third case, while there is a greater likelihood that the fund itself might be treated as a private individual—and might claim the protection of all laws that protect private investment within the EU regulatory scheme—the result could easily be different. For example, where the governments that make up the members of the SWF actively direct investment, where such investment is meant to further the political rather than a strictly financial agenda, or otherwise where a person might be able to suggest the indirect regulatory (and extraterritorial) effect of such investment, then it might be likely that even these investments would be treated as public—and limited. Consequently, there is a movement within European jurisprudence to permit state private activity, but to construct a public law of such private (nonsovereign) conduct.

Yet this approach might present some tension with the developing law of foreign sovereign immunity. Under that legal regime, states retain certain immunity from either suit or liability for their conduct abroad, but usually only to the extent of their sovereign activities.[406] Commercial activities—like the private purchase of shares are not considered sovereign, and thus can expose a state to liability from which others may seek recovery for losses.[407] Nonetheless, the developing jurisprudence of state transactions in shares suggests that such activity retains its sovereign (regulatory) character. On that basis, a new class of activity might be created—sovereign activity with respect to which foreign sovereign immunity does not apply. But this may be a stretch too far, and at some point the Europeans will have to confront this tension.

American law might provide substantially different results. There is no impediment to share ownership by American public entities, including states. States may even purchase shares of domestically chartered companies, subject only to political accountability at the hands of the electorate.[408] Likewise, states might become active shareholders of such entities, and might even seek to impose on those

406. *See* BANKAS, *supra* note 46, at 69-77.
407. *Id.* at 74-75.
408. *See supra* note 301 and accompanying text.

entities their own conceptions of appropriate behavior.[409] This result would not change even if those behavior norms represent the policy of the legislature of the foreign jurisdiction engaging in the investment activity.[410] When states are deemed to be engaging in activity in the market, rather than regulation of the market, then the limitations of the American Constitution's Dormant Commerce Clause would not apply.[411] States would be free to further their own interest to the extent such interests might be furthered within the law.[412] Private law would thus apply to determine the applicable law and states would be treated as regulators only when acting through statute. This represents a different conception of the state, and of applicable law, from that developing in Europe. The private activities of states are not subject to special limitation and private law applies to such activities.

The Article offers no answers to these questions. It suggests that the European Court of Justice's golden share cases provide an excellent window on a difficult issue of choice of law, and a revolutionary one. The transnationalization of corporate law norms provides an opportunity not only to examine the changing landscape of choice of law in private law, but also to examine the creation of a new set of vertical choice-of-law questions. No longer a matter of which law must be applied, choice-of-law determinations must now increasingly consider the character of the actors involved in determining the legal regime applicable. States acting in their sovereign capacity or states acting as private stakeholders are considerations that will tend to change the face of choice of law in corporate law in the coming decades.

409. *See supra* note 302 and accompanying text.
410. *See supra* note 302 and accompanying text.
411. *See supra* note 302 and accompanying text.
412. *See supra* note 302 and accompanying text.