To: Participants in the NYU Legal History Workshop  
From: Jenny Martinez  
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The excerpts that follow are part of a larger, book-length project I am working on that reexamines the public-private distinction in relation to large transnational corporations and international law. It begins with history, for the purpose of unsettling our attitudes towards frameworks of public/private, state/non-state, and intraterritorial/extraterritorial that we now take for granted in contemporary international law doctrine. By examining the historical contingencies that led to the crystallization of the categorical distinctions that we have inherited, we can better understand the ways in which they are not natural or inevitable, and thus open intellectual space to imagine better, more functional ways of framing contemporary legal problems. The final portion of the project – yet to be written – will address this normative challenge.

As you will see, this is a very incomplete draft. I have attempted to include a sketch of the arc of the whole project, but you will see that many parts (parts that are likely to be whole chapters) have yet to be filled in. I look forward to your comments and our discussion as I further develop the project.
Corporations, International Law and the Public/Private Distinction

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This excerpt is part of a larger project that reexamines the public-private distinction in relation to large multinational corporations and international law. It begins with history, for the purpose of unsettling our attitudes towards frameworks of public/private, state/non-state, and intraterritorial/extraterritorial that we now take for granted in contemporary international law doctrine. By examining the historical contingencies that led to the crystallization of the categorical distinctions that we have inherited, we can better understand the ways in which they are not natural or inevitable, and thus open intellectual space to imagine better, more functional ways of framing contemporary legal problems. The final portion of the project – yet to be written – will address this normative challenge.

In the first part of the project (parts of which are included below), I examine the role of the large trading companies that spanned the public/private divide in the early modern period. While many other scholars have discussed various aspects of these companies including their peculiar mix of public and private characteristics,¹ I focus on the effect of these companies on the development of the law of nations, and the effect of the law of nations on the companies. I suggest that, far from being

¹ See generally Philip J. Stern, The English East India Company and the Modern Corporation: Legacies, Lessons and Limitations, 39 Seattle U. L. Rev. 423 (2016) (“[T]his Article . . . seeks to outline the various ways in which the East India Company’s legacy has been drawn upon in a range of fields, but especially legal and business scholarship.”)
invisible to international law (as suggested by some contemporary international law sources),

1 corporate entities played a central role in the development of the law of nations in the early modern period, and that the very conception of a modern business corporation was in turn shaped by developments in the law of nations. In line with current historiography that emphasizes the central importance of empire to the legal structure of the early modern world, the project also examines the ways that these corporations were central to the construction of empire and the ramifications of that role in international law.

The project further continues (in a part sketched here) by examining the doctrinal and theoretical division of international law into public and private spheres in the nineteenth century (and the placement of corporations in the private sphere), which must be understood in the context of evolving understandings of the nation-state and the economy as well as the evolving contours of empire. In this time period, the large trading companies of the early modern period gave way to more state-centric forms of empire, though as recent work has shown, chartered-

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2 See, e.g., Kiobel v. Royal Dutch Shell, _ F.3d _ (2nd Cir. 2011) (“[O]ffenses against the law of nations (i.e., customary international law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations.”).

3 See, e.g., Lauren Benton and Richard J. Ross, Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World, in Empires and Legal Pluralism (forthcoming) (“An old narrative of a transition from empires to nation-states has now given way to an emphasis on the centrality and persistence of empires in world history.”).
company governments persisted in ways that have been poorly understood. While this story falls apart at the edges on close examination even in the late 19th and early 20th centuries, at its core there is an essential truth to the conventional story; at least in formal terms international law became firmly state-centric in the late 19th and early 20th century.

Turning to the twentieth century, the project examines the divergent path of empire in different regions of the world. While the late 19th and early 20th centuries are sometimes described as a new wave of imperialism and colonial expansion in the acquisition of territories in the scramble for Africa, in fact this co-existed alongside a very different structure of relationships between states in the Americas. This portion of the project will examine (in a section not included here) the role of the Monroe Doctrine in international law, as well as (in the section you have preliminary parts of here) the role of large transnational companies like United Fruit Company in Latin America in the 20th century. As the term “banana republic” evocatively captures, the weak nation-states of Latin America in the early and mid 20th century were susceptible to control by strong transnational business entities, which translated their monopoly power in the economic sphere into governmental and even military power. The United Fruit Company – commonly called “El Pulpo” or “the octopus” in Latin America because of the perception that its tentacles

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reached into every aspect of society -- was the quintessential example of this type of enterprise, though other transnational companies in different industries exercised significant influence. At times, these companies de facto controlled territory, commanded armies, toppled governments, collected taxes, and administered justice all without having formal sovereignty. Aided by “gunboat diplomacy” and covert military action from the United States, transnational business enterprises shaped the development of the region. While much studied by historians and political scientists in and of Latin America, the effect of this period on the development of international law has been too little examined by international legal scholars. And yet this history has left distinctive footprints in contemporary public and private international law.\(^6\)

I suggest that we need to think in a new way about the structures of power that have resulted from the waning of formal empire with decolonization in the twentieth century and the growth of the modern multinational corporation. Just as corporate entities that bridged the public/private divide were potent engines of empire in the early modern period, and just as transnational companies influenced the shape of Latin American history in the 20\(^{th}\) century, I suggest that corporations of today constitute global power networks that must be accounted for in the structure of international law. This form of network resembles not so much the late

\(^6\) Article 36 of the OAS Charter, for example, now provides that “[t]ransnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.”
nineteenth and early twentieth century empires with nation-states at the hub –
empires which aspired to a kind of formal territorial sovereignty, and which were
pulled apart in decolonization of Africa and Asia in the mid-twentieth century – as
much as the much looser, legally and structurally plural forms of empire in the early
modern period and the economic imperialism of 20th century Latin America.

I should be clear at the outset what I am not arguing. I am not arguing that the
history I recount dictates any particular legal results today. For example, I am not
arguing that resolution of the doctrinal question of corporate liability in ATS cases
like Kiobel should somehow be determined by the relationship of large trading
companies and the law of nations in the early modern period, or by the history of
United Fruit in Latin America.

Rather, I suggest that both current problems and history suggest the possibility
of a conceptual or theoretical shift in the way we think about large, multinational
corporations. The point of the history is this: to show that the public/private
distinction in respect of corporations and international law more generally is a
historically contingent one. The way we currently think about corporations and
territorially bounded nation-states grew out of a particular set of social, economic,
and political developments in the late nineteenth and early twentieth century. 7 I

7 That way of thinking has not gone unquestioned, of course. The Marxist-inspired
social movements and states of the twentieth century were a challenge to this way
of thinking, with the nationalization of corporate enterprises a central part of their
economic and political programs. But that whole project turned out to be a
suggest that we need a new way of thinking about companies that are, in many ways, bigger and more influential than states -- a way of thinking that is rooted not in the past, but in our own time and place.

A. The Public-Private Distinction

The public-private distinction is one of the most often-discussed aspects of legal theory. The origins of the distinction, its analytic flaws, political ramifications, and future have been discussed in virtually every substantive field of law. Critics from Karl Marx, to the legal realists, to Duncan Kennedy, to feminist scholars, have reportedly killed the distinction, yet it persists as a central organizing feature not only of American law, but also of international law.

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The standard account of the emergence of the public/private distinction in American law was summarized by Morton Horwitz some thirty years ago when he wrote:

“The distinction between public and private realms arose out of a double movement in modern political and legal thought. On the one hand, with the emergence of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries, ideas of a distinctly public realm began to crystallize. On the other hand, in reaction to the claims of monarchs and, later, parliaments to the unrestrained power to make law, there developed a countervailing effort to stake out distinctively private spheres free from the encroaching power of the state.”

Horwitz suggested that “only in the nineteenth century was the public/private distinction brought to the center of the stage in American legal and political theory,” and that “[b]efore this could occur, it was necessary to undermine an earlier tradition of republican thought that had closely identified private virtue and public interest.” He further notes that “[t]he emergence of the market as a central legitimating institution brought the public/private distinction into the core of legal discourse during the nineteenth century” and that “[o]ne of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law.”

He observes that the entrenchment of the distinction was due to the efforts of “judges and jurists to create a legal science that would sharply separate law from politics. By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what

14 Id.
was thought to be the dangerous and unstable redistributive tendencies of
democratic politics, legal thinkers hoped to temper the problem of "tyranny of the
majority." Moreover, "[j]ust as nineteenth-century political economy elevated the
market to the status of the paramount institution for distributing rewards on a
supposedly neutral and apolitical basis, so too private law came to be understood as
a neutral system for facilitating voluntary market transactions and vindicating
injuries to private rights."\textsuperscript{15}

But, in Horwitz's account, "[p]rivate power began to become increasingly
indistinguishable from public power precisely at the moment, late in the nineteenth
century, when large-scale corporate concentration became the norm. The attack on
the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been
reserved to governments."\textsuperscript{16} While the judiciary in the \textit{Lochner} era resisted
government attempts to regulate behavior in the marketplace, progressives
"devoted their energies to exposing the conservative ideological foundations of the
public/private distinction. Culminating in the Legal Realist Movement of the 1920's
and 1930's, judges such as Holmes, Brandeis, and Cardozo and legal theorists such
as Roscoe Pound, Walter Wheeler Cook, Wesley Hohfeld, Robert Lee Hale, Arthur
Corbin, Warren Seavey, Morris Cohen, and Karl Llewelyn devoted themselves to

\textsuperscript{15} Id. at 1425-26.
\textsuperscript{16} Id. at 1428.
attacking the premises behind the public/private distinction.” 17 The Lochner approach to freedom of contract, of course, died during the Court’s shifts during the New Deal. But the public/private distinction remained alive as an organizing principle of American law and political thought more generally, to be challenged by successive waves of scholars, including those writing from the perspective of critical legal studies, 18 feminist theory, 19 and even law and economics.

This conventional account, however, leaves out the international dimension of the crystallization of the public/private distinction in the 19th century. While this account is obviously and understandably focused on domestic law, domestic law did not exist in an isolated bubble, nor is it merely coincidental that the public/private distinction crystalized in international law around the same time period. Indeed, the two developed in tandem and it is likely that they mutually influenced one another.

B. The Public-Private Distinction in International Law

The public-private distinction is not unique to American law, but is also central to international law. “International law” is typically defined today as the body of public law governing relationships between nation-states. International human rights law, governing states’ treatment of individuals, is treated as a recent extension and exception to the generally inter-state nature of public international

17 Id. at 1426.
18 See, e.g., Kennedy, supra note __.
19 See, e.g., MacKinnon, supra note __.
Aside from this general conceptual distinction, there is a broader tendency to marginalize the legal regime related to trade and commerce in the study of public international law. The law of international trade, while technically a species of public international law (because it governs the relationship between nation-states, though obviously affecting private actors), is often not covered in public international law survey courses, nor are international institutions like the IMF or World Bank. The field of private international law, sometimes called conflict of laws in common law countries, is a separate field entirely.21

The division of what had been called the law of nations into public and private occurred at some point in the nineteenth century (the point at which the fields diverged is a subject of some debate and did not take place in all countries at the same time or in the same way). Public and private spheres had a more fluid relationship in earlier conceptions of the law of nations. In late eighteenth and early nineteenth century law in the United States, “[i]n its broadest usage, the law of

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20 The Restatement of Foreign Relations defines “international law” as “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.” Restatement (Third) of Foreign Relations Law of the United States, § 101

21 John. R. Stevenson, The Relationship of Private to Public International Law, 52 Colum. L. Rev. 561 (1952) (defining private international law as “the body of norms applied in international cases to determine the judicial jurisdiction of a State, the choice of the particular system or systems of law to be applied in reaching a judicial decision, and the effect to be given a foreign judgment.”)
nations comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states.”

One often-cited player in the transition from a unified law of nations to a discrete public international law is Jeremy Bentham. Bentham is said to have coined the term “international law” as a replacement for the older term the “law of nations” in 1789. Bentham’s definition represented a substantive shift as well, for he suggested:

“Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of these states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other: the sovereign reducing himself, pro re nata, to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. There remain then the mutual transactions between sovereigns as such, for the subject

22 Stewart Jay, _The Status of the Law of Nations in Early American Law_, 42 _Vand. L. Rev._ 819, 821-22 (1989). See also Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004); see id. (noting definitions of the law of nations to include “‘the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights,’” E. de Vattel, _Law of Nations_, Preliminaries § 3 (J. Chitty et al. transl. and ed. 1883) (hereinafter Vattel) (footnote omitted), or “that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other,” 1 J. Kent, _Commentaries on American Law _*1)); see also Sosa v. Alvarez-Machain (noting that “[i]n the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other” and the second consisting of “judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor”).

23 See Mark W. Janis, _Jeremy Bentham and the Fashioning of “International Law,”_ 78 _Am. J. Int’l L._ 405, 409 (1984) (“[H]e assumed that international law was exclusively about the rights and obligations of states inter se and not about rights and obligations of individuals.”).
of that branch of jurisprudence which may be properly and exclusively termed international.”

As Mark Janis notes, Bentham’s exposition encompassed two important distinctions:

“First, he assumed that international law was exclusively about the rights and obligations of states inter se and not about rights and obligations of individuals. Second, he assumed that foreign transactions before municipal courts were always decided by internal, not international, rules.”

This diverged from earlier understandings; for example Blackstone had described the law of nations as involving “that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each” and stated that the law of nations was ‘adopted in it's full extent by the common law.”

But while Bentham may have posed the new categorization, his idea did not immediately take hold in legal thought or practice. Martii Koskenneimi, for example, suggests that “[t]he lawyers of 1871 had understood public and private law as a unity that reflected the modernity of a single, cosmopolitically oriented European civilization” and it was only later, “[w]ith the break of that latter notion, [that] public and private international law drifted apart.” By 1892, the fifth edition of Theodore Dwight Woolsey’s Introduction to the Study of International Law reflected a divergence between the still-unified fields that would only grow further apart with time:

24 Jeremy Bentham, An Introduction to the Principles and Morals of Legislation
26 Id. (quoting Blackstone Commentaries).
27 Available at: http://www.helsinki.fi/eci/Publications/Koskenneimi/Columbia%200405.pdf.
“[t]his law governing the intercourse between nations, together with political law, or the doctrine concerning the constitution of the state and the relations of the state to its people, is called public law, as opposed to private, which is the system of laws within the state, by which the relations of its individual members are defined and protected. And yet there is a branch of this law which has both a private and a public character, -- private as relating to persons, and public as agreed upon between nations. The law, or system of relations between states, is now extensively called international law.”

[Note – I plan to expand the preceding discussion substantially, to include more 19th century writers on international law as well as diplomatic correspondence and court cases.] Oppenheim’s International Law Treatise in 1920 gives the classic early twentieth century view: “The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilized States consider legally binding in their intercourse, every State which belongs to the civilized States, and is, therefore, a member of the Family of Nations, is an International Person.” Aside from the League of Nations (which Oppenheim treats as sui generis), “sovereign States exclusively are International Persons – i.e. subjects of International Law.” Moreover, Oppenheim asserts, “the character of a subject of the Law of Nations and of an International Person can be attributed neither to monarchs, diplomatic envoys, private individuals, nor churches, nor to chartered companies, nor to organized wandering tribes.”29 Similar definitions are

28 Theodore Dwight Woolsey, Introduction to the Study of International Law (Theodore Salisbury Woolsey, ed., 1892 (5th ed.).
29 1 Lassa Oppenheim, International Law: A Treatise 125-26 (Ronald F. Roxburgh ed., 3d ed. 1920). Oppenheim suggests four conditions necessary for the existence of a State: a people living together in a community, a country in which that people have settled down, a government, and that the government be sovereign, that is that it be a "supreme authority, an authority which is independent of any other earthly authority."
As entrenched as the public/private distinction in international law is, it has certainly not gone without criticism in this realm as in others. Feminist authors have noted that “the liberal opposition between public life, the domain of business, economics, politics and law, and private life, the domestic sphere of the family, has both supported and obscured the structural subordination of women.” Others have written more broadly about the topic of human rights in the private sphere. But the distinction between public and private international law, and the primacy of territorial nation-states, remains bedrock in the current framing of the field.

II. Companies, States, and Empire

When, exactly, did the nation-state described in 20th century legal treatises become the central unit of international analysis? In the conventional modern account, the Treaty of Westphalia in 1648 acknowledged the sovereign authority of various European monarchs “marked the advent of traditional international law, based on principles of territoriality and state autonomy” in which “[s]overeign
states functioned as the chief actors within the system, while intergovernmental and nongovernmental organizations played relatively minor roles.” This account of the peace of Westphalia apparently bears little resemblance to historical reality.

Despite trenchant criticism from a variety of disciplinary perspectives, the Westphalian myth continues to be repeated on a regular basis. But, perhaps most interestingly, the myth of Westphalia is primarily a late nineteenth and twentieth century myth. [Eventually, I plan to expand on this section and describe how and why the Westphalian myth assumed prominence in this time period.] In the centuries that immediately followed the Peace of Westphalia, multiple forms of overlapping

37 See, e.g., Sarei v. Rio Tinto, PLC, 671 F.3d 736, 804 (9th Cir. 2011) (“This bedrock principle stems from the settlement of the Thirty Years’ War by the Peace of Westphalia in 1648.”); Andreas Osiander, Sovereignty, International Relations, and the Westphalian Myth, 55 International Organization 251, 260-61(2001) (collecting quotes)
38 See Osiander, supra note __, at 251(“In the process it will become clear that ‘Westphalia’—shorthand for a narrative purportedly about the seventeenth century—is really a product of the nineteenth- and twentieth-century fixation on the concept of sovereignty.”) For example, Henry Wheaton’s 1842 treatise on the history of the law of nations describes the Peace of Westphalia as the “epoch from which to deduce the history of the modern science of international law,” but does not suggest that the signal accomplishment of the Peace of Westphalia was the entrenchment of the nation-state as the basic building block of international order. Rather, the description that follows of the actual structure set up by the Peace of Westphalia is one not of atomistic nation-states but of empire and overlapping government powers in which the Peace “rendered the states of the empire almost independent of the emperor, its federal head.” Henry Wheaton, History of the Law of Nations in Europe and America: From the Earliest Times to the Present 69-70(1842 ed.). Only later, and in the context of the transformation of empire in the late nineteenth century, does Westphalia become a shorthand for an idealized international system of equal and independent sovereign states.
power co-existed and nothing resembling the modern nation-state was a main form of human organization.  

A. The Era of Company-States

1. Trading Companies and Early Modern Empire

[To my NYU Readers – material from this next section was included in my Cornell L. Rev. piece. Though I will eventually have edit this version of the argument to eliminate redundancy, I have left it here to show the flow of the argument.] An important predecessor of the modern business corporation was the joint stock company, which flourished with European exploration, trade and expansion in the seventeenth century. When the Netherlands granted the Dutch East India Company (also known as the Vereenigde Oost-Indische Compagnie or “VOC”) a monopoly on trade with Asia in 1602, the Amsterdam stock exchange grew up to facilitate the sale of shares in the company. Queen Elizabeth had granted a similar monopoly to the English East India Company two years earlier. In the early modern period, chartered trading companies of this sort were numerous: the Royal African Company, the Dutch West India Company, the French East India Company, the Portuguese East India Company, the Virginia Company, the Massachusetts Bay

40 This section also doesn’t yet have any cross-citations to my Cornell L. Rev. piece, though if I were to publish this I would have to include them since portions of it are exactly the same!
42 When founded was formally called the “Governor and Company of Merchants of London trading into the East Indies.”
Company, the Hudson’s Bay Company, the Real Compañía de Comercio de Barcelona, to name just a few. These companies played such an essential role in European expansion that the “early modern European overseas empires . . . more often than not were pioneered and governed not by states alone but in cooperation and competition with a medley of companies and corporations, conquistadores, explorers, privateers, proprietors, and itinerant merchant, family, and religious networks.”

Obviously, the trading companies served an economic function, engaging in the purchase, transportation and sale of goods. The proceeds enriched investors, and sometimes the governments of the countries that had chartered them. Moreover, their economic structure was of a particular form. Monopoly was the name of the game in this period. Historian Emma Rothschild has described the ways in which the economic and colonial structures varied by geographic region. In America, “each empire attempted to exclude the merchants of all other nations from its own colonies” while in the East Indies “the empires attempted to exclude all merchants other than those of a single, privileged company.”

But the trading companies often served a governance function as well, acting “in a dual capacity, as commercial organizations as well as bearers of sovereign powers . . .”

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44 Emma Rothschild, Global Commerce and the Question of Sovereignty in the Eighteenth-Century Provinces, Modern Intellectual History 1, no. 01 (2004): 9, doi:10.1017/S147924430300009X.
delegated to them in their charters."\textsuperscript{45} In so doing, they exercised what we would view today as unusual combinations of public and private functions. As one political scientist has observed, “[w]ith these curious institutions, all analytical distinctions—between the economic and political, nonstate and state, property rights and sovereignty, the public and private—broke down.”\textsuperscript{46} The Dutch East India Company’s Charter, for example, gave it authority “to make war, conclude treaties, acquire territories and build fortresses,”\textsuperscript{47} and the English East India Company exercised similar powers. As another scholar notes, “[t]hese companies made treaties with each other and with foreign governments, governed subjects of their home states, raised armies, and even coined their own money.”\textsuperscript{48} The Governors-General of the companies in India even set up “quasi-royal courts on the Asian pattern.”\textsuperscript{49}

In his recent book, historian Philip Stern describes the English East India Company as a hybrid entity: a “company-state.” Stern argues that not just the East India Company, but other trading companies like it, were “far more than intermediary bodies or outsourced, privatized extensions of the state. In early modern parlance, they were themselves forms of ‘commonwealth’ bodies politic responsible for governing over the economic, political, religious, and cultural life of

\textsuperscript{45} Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies 27.
\textsuperscript{46} See Thompson, supra note __, at 32.
\textsuperscript{47} See Thompson, supra note __, at 11.
\textsuperscript{48} See Thompson, supra note __, at 11.
\textsuperscript{49} Alexandrowicz at 37.
those under their charge, with their own claims to property, rights, and immunities at law that generated claims to jurisdiction, allegiance, and subjects and citizens."

He suggests that “[c]orporations were not only economic entities. They oversaw religion, justice, and education; they conducted diplomacy and fought wars; and at times they spawned a 'public sphere' that provided a focus for sociability and allegiance.” Moreover, his work suggests that “[e]mphasizing the resemblance of overseas companies to a commonwealth writ small questions the conventional hierarchical distinction between supposedly superior states and dependent corporations.”

As Stern notes, the carrying out of governance functions by trading companies in the context of empire was hardly aberrational in light of the understanding of the corporate form at the time: “[w]hile today the term [corporation] perhaps most immediately calls to mind an economic firm, a corporation as a legal and political idea was far broader and far more public in its nature” in the early modern period, when corporations formed the basis for “cities and towns,” “churches and religious organizations, schools, learned societies, hospitals, charity organizations, professional and voluntary associations,” as well as business enterprises.

Examining the practice not only in India, but also in the Western Hemisphere, Stern concludes that “corporate and proprietary government was the rule, not the

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51 Philip Stern, *Bundles of Hyphens: Corporations as Legal Communities in the Early Modern British Empire*, in EMPIRES AND LEGAL PLURALISM (Benton and Ross, eds.).
exception, in shaping the early English Atlantic plantation and promoting and protecting its legal and political integrity.” In the seventeenth and eighteenth century, companies were a common tool in the construction of European empire.\textsuperscript{52} The Company’s history offers, Stern suggests, “a serious challenge to normative conceptions of international legal order embodied solely in a system composed exclusively of territorially bounded states.”\textsuperscript{53}

\section*{2. Trading Companies and the Law of Nations}

Trading companies also played a central role in the development of the law of nations, which grew to reflect their commercial needs and the imperatives of empire. There is no clearer example of this than the work Hugo Grotius, the Dutchman generally acclaimed as the “father of international law.”\textsuperscript{54} Grotius is today

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\textsuperscript{52} Stern, supra note \textsuperscript{2}, at 441.
\textsuperscript{53} In more recent work, Stern describes the popularity of the British East India Company as an object of study and a source of analogy in diverse areas of business, legal, and historical scholarship with a note of caution. See Philip J. Stern, The English East India Company and the Modern Corporation, Legacies, Lessons, and Limitations, 39 Seattle U. L. Rev. 423 (2016). “[W]hat the East India Company’s history shows us is how state and corporation are mutually constituted, and in fact, derive from similar and shared ideological and historical contexts.” Id. at 440-41. Moreover, he notes, “[i]f the history of the colonial corporation cautions us not to regard the distinction of public and private as natural, or historically or legally fixed, the history of the East India Company may be rendered apposite as an example of the modern corporation not because it resembled modern forms of capital organization but because it, in somewhat exaggerated ways, blends the public and private and the commercial and political in ways many transnational corporations, from state-owned enterprises to “private” banks, do today.” Id.
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remembered primarily as a political theorist, but he was also a kind of early corporate lawyer.\textsuperscript{55}

Grotius was born to a prominent family in Delft in 1583. He studied at Leiden University from the age of 11, and received a doctorate in law from the University of Orleans in France at age 15. He then returned to the Hague and began work as a lawyer arguing civil cases before the Court of Holland.\textsuperscript{56} Like many prominent Dutch families of the time, Grotius’s family was deeply involved in the East India trade; his “cousins included directors of the . . . East India Company and admirals in its service, while his father as burgomaster of Delft was responsible for nominating to one of the seats on the company's board.” \textsuperscript{57} Thus, it is not surprising that he was drawn into the international legal disputes about the rights and status of the Dutch East India Company (VOC).

\textbf{a. Trading Companies and the Law of Nations on Freedom of the Seas}

One of the main international law disputes of the early seventeenth century concerned the right of free navigation through the seas. The Spanish and

\textsuperscript{55}\textit{Cf.} James Brown Scott, \textit{Introductory Note}, in \textsc{Hugo Grotius, The Freedom of The Seas vi} (James Brown Scott, ed., 1916) (noting that “neither the law of prize nor the \textit{Mare Liberum} was a philosophic exercise, for it appears that Grotius had been retained by the Dutch East India Company to justify the capture by one of its ships of a Portuguese galleon in the straits of Malacca . . . that the treatise on the law of prize, of which the \textit{Mare Liberum} is a chapter, was in the nature of a brief; and that the first systematic treatise on the law of nations – The Law of War and Peace – was not merely a philosophical disquisition, but that it was the direct outgrowth of an actual case and of professional employment.”).


\textsuperscript{57} Richard Tuck, \textit{The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant} (1999.)
Portuguese had claimed ownership of portions of the oceans important for trade to both Asia and the Americas and sought to exclude foreign ships from navigating through those waters. The Dutch, having only recently prevailed in the latest iteration of a long-running struggle for independence, were still in a state of hostility with Spain and Portugal. A series of confrontations between Dutch traders and Portuguese had taken place as the Portuguese sought to prevent the Dutch from gaining a toehold in the trade with Asia. In one incident in 1602, most of the crew of a Dutch ship had been killed by hostile Portuguese personnel in Macao.\textsuperscript{58} In retaliation, in February 1603, ships owned by the Dutch East India Company (VOC) attacked a Portuguese trading ship, the \textit{Santa Catarina}, near Singapore.\textsuperscript{59} The commander of the Dutch ships was Jacob van Heemskerk, one of Grotius’s cousins.\textsuperscript{60} Like all VOC commanders, van Heemskerck had a commission from the United Provinces, and VOC’s charter named “Portugal together with Spain as an enemy of state, rendering their interests liable to attack and seizure as booty of war.”\textsuperscript{61}

The \textit{Santa Catarina} was carrying a valuable cargo including gold and copper, gems, spices, expensive silks, porcelain, and other goods.\textsuperscript{62} The ship’s crew and passengers were let go, and the cargo returned to the Netherlands in 1604 for disposition in a prize proceeding. The case was tried before the admiralty board in


\textsuperscript{59} See Borschberg, \textit{supra} note __, at __.

\textsuperscript{60} See __.

\textsuperscript{61} Borschberg, \textit{supra} note __, at 55.

\textsuperscript{62} Borschberg, \textit{supra} note __, at __.
Amsterdam, which upheld the seizure. At auction, the cargo was sold for some 3.5 million guilders – a sum that was “roughly equivalent to one-half of the young VOC’s capital base and more than double that of the Honourable English East India Company.”

The auction of the luxurious goods from the ship apparently drew enormous public attention, and highlighted the potential wealth to be gained from trade. The VOC retained most of the proceeds, with a share paid to the Dutch admiralty board.

Grotius’s first major work, which he called *De Indis*, was begun at the behest of the Amsterdam directors of the Dutch East India Company in the winter of 1604-05 “as an apology for the capture” of the *Santa Catarina*. The full text of Grotius’s manuscript did not appear in print until the nineteenth century, when it was found and published under the title *De iure Praeda (The Law of Prize)*.

The manuscript was not published upon its completion due to the advent of a truce and peace negotiations between the Dutch Republic and King Philip III of Spain. However, Grotius published an edited version one of its chapters under the title *Mare Liberum* in 1609, at the specific request of the directors of the Dutch East India Company. This chapter was edited “in the context of the negotiations towards what would become the Twelve Years’ Truce between Spain and the United

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63 Id. at 56.
64 Borschberg, supra note __, at 35.
65 Id. at 56.
66 Grotius himself referred to this work as *De Indis*, but when the book was discovered in the sale of the Grotius family papers in 1864, the publisher renamed it *De iure Praedae*. Tuck, supra note __, at 81–82.
In letters to Grotius, the VOC directors urged that a vigorous legal defense of the right of navigation was necessary so that the Company might “enjoy the benefit during the negotiations” of Grotius’s arguments and use them to influence both the Dutch and Spanish negotiators.69

In the published version of Mare Liberum, Grotius argued that it was a “specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to ever other nation, and to trade with it.”70 Grotius contended that the Portuguese had no right of dominium over the seas based on discovery, papal donation, war, occupation, prescription or custom. The use of the oceans by one party did diminish the ability of others to use them as well, Grotius contended, and since oceans by their very nature could be occupied by no one, therefore they could be owned by no one.71 Nor did the Portuguese have dominium over the lands of the

68 ARMITAGE, supra note __, at 109–110.
69 Van Ittersum, supra note __ at 255; id. at 269 (quoting letter from VOC directors suggesting they wanted Grotius’s arguments “to persuade both our government and neighboring princes to staunchly defend our, as well as the nation’s rights.”).
70 GROTIUS, supra note __, at 7; van Ittersum, supra note __, at 251-52 (discussing Grotius’s correspondence with the VOC directors and its impact on the manuscript); HUGO GROTIUS AND INTERNATIONAL RELATIONS (Oxford 1990) (“Grotius, it seems likely, acted as advocate for the Dutch EIC before the prize court.”), 70; CHARLES HENRY ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES: 16TH, 17TH AND 18TH CENTURIES 44 (1967) (“It is probably that he [Grotius] acted in the case [on Santa Caterina] as counsel for the Dutch East India Company and it is beyond doubt that he had access to its documents, which revealed to him the importance of the East Indies to European trade and led him to an examination of the position of Asian Rulers in the law of nations.”).
71 Lauren Benton and Benjamin Straumann, Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice, 28 LAW AND HISTORY REVIEW 28, 29 (2010) (explaining that “res nullius was used by Grotius on behalf of the nascent
East Indies, because these were not terra nullius but had their own local
governments, and thus the Portuguese had no right to preclude others from trading
with the peoples in these lands. Moreover, he concluded, the Dutch were entitled to
enforce their right to trade by war if necessary.  

Grotius’s 1609 version of Mare Liberum, because it was published in the context
of peace negotiations, toned down the arguments for war. But the full version of De Indis/De Iure Praedae contained a much longer discussion of principles of just war. Chapters 2 through 10 contained an extended discussion of the natural law principles governing just war and principles of self-defense. In Chapter 11, Grotius described the facts of the Santa Catarina case, in the light most favorable to the VOC. Chapter 13 presented the argument that the VOC was allowed to engage in acts of public war on behalf of the Dutch state. But Chapter 12 presented the argument that the attack was also justified as an act of private war; in essence, Grotius argued that “a company of private merchants like the VOC could exact damages of injuries sustained from every subject of Philip III, whether merchant or soldier” on the basis of violations of natural law by the Portuguese. Nothing in the VOC’s private or corporate character precluded it from engaging in just warfare in these circumstances, Grotius asserted.

United Provinces and its trading companies to counter monopolist Iberian claims to
ing rights of navigation on the high seas and to defend the doctrine of the free sea.

72 GROTUS, supra note __, at 72-76.
73 van Ittersum, supra note __ at 259.
While the 1609 truce ended fighting between the Dutch and the Iberians in Europe for twelve years, in fact, hostilities between the VOC and Portuguese continued unabated on the other side of the globe.74

Moreover, Grotius returned to the themes of *Mare Liberum* between 1609 and 1613 “to defend the Dutch against English accusations that they were now insisting on a Portuguese-style *dominium maris* in the Far East, and on each occasion he insisted that the treaties which the Dutch had struck with the local rulers entitled the company to monopoly trading privileges without violating the general principles of *Mare Liberum*.“75 At that point, “[r]elations between the English and Dutch in the East Indies reached an impasse in 1612-1613, which could only be broken by negotiations between representatives of the two companies.”76 In this confrontation, the English deployed the very argument for freedom of the seas that the Dutch had developed in their disputes with the Portuguese; “most ironically of all, that principle was thrown in the face of Hugo Grotius himself, who was one of the four Dutch commissioners sent to negotiate with the English East India Company.”77

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74 See van Ittersum, Profit and Principle, at 283-483.
75 See Tuck, supra note __, at 95. Tuck notes that “ the original draft of the *De Indis* included a full defence of such treaties, so Grotius’s repeated claim that they were not inconsistent with *Mare Liberum* was justifiable--though it was greeted with understandable scepticism by his opponents.” Id.
76 See Armitage, supra note __ at 111–112.
77 See id. at 111–112. See also Hugo Grotius and International Relations 66 (1990) (noting that Grotius has been criticized for “varying his interpretations of international law to suit the interests of his clients. It is said, for example, that in 1613 and 1615 when Grotius was a member of Dutch delegations to conferences at which he defended Dutch claims to a monopoly of trade in the East Indies against
Over time, as international disputes evolved from a focus on maritime routes towards control of land, Grotius turned his attention to colonial endeavors on land, as “from 1619 onwards (spurred on by increasing English and French competition in the East, and indeed by armed conflict with the English)... the [VOC] company began forcibly to annex native territory (hitherto all forts and factories had been set up by agreement with native rulers).”\(^78\) These events “focused Grotius’s attention on the implications of his general theory of property for the occupation and ownership of uncultivated land; and he perceived that if the sea could not be owned by the men who hunted over it, neither presumably could the land.”\(^79\) Grotius went into exile in 1621 as the result of religious and political disputes, but continued the work he had begun. By the time he published *De iure Belli Ac Pacis* in 1625, Grotius’s account of the origins and development of property had evolved.\(^80\) Here, too, his theory supported the construction of empire as it was evolving in practice at the time.\(^81\) Moreover, *De iure Belli Ac Pacis* dealt “not only with what today would be called public international law but with private international law, and also with

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\(^{78}\) Tuck, *supra* note __, at 104.

\(^{79}\) *Id.*, 104.

\(^{80}\) Monica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas*, 64 *Journal of the History of Ideas* 361, 370 (2003).

Global commerce required global law.

In 1625, the Portuguese writer Serafim de Freitas in his *De Justo Imperio Lusitanorum Asiatico* answered Grotius’s arguments in *Mare Liberum* with arguments for exclusive control of the seas, relying in part on the right “of the Portuguese to spread the Christian faith and civilization in the East.” This was followed in 1636 by English writer John Selden’s defense in *Mare Clausum* of England’s claim of exclusive control of fishing rights in territorial waters. Disputes over the freedom of the seas continued intermittently for decades, though “[b]y the late eighteenth century, most claims to vast sea areas abated or became special jurisdictional claims”; by the nineteenth century, there was widespread support for freedom of the seas and this position is still entrenched in modern customary international law. In a sense, it was the interests of the trading companies in unfettered traffic – not the interests of states in exclusive ocean zones – that prevailed.

Stepping back, it is notable that Grotius’s account of international law does not focus exclusively on states. As one commentator has noted, “while Grotius (unlike

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82 *Hugo Grotius and International Relations*, 84.
83 Alexandrowicz, at 229.
84 See, e.g., Monica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas*, 64 *Journal of the History of Ideas* 361 (2003).
Suarez) does not portray a cosmopolitanist international society consisting primarily of individual humans, neither does he present an international society comprised only of states or similar entities."  

In his explication of natural law principles undergirding the law of nations, Grotius asserted “that an individual in nature (that is, before transferring any rights to a civil society) was morally identical to a state, and that there were no powers possessed by a state which an individual could not possess in nature.”  

Grotius argued that, if even we “consider the cause of the East India Company as something apart from the public cause of the Dutch nation,” the “war which is being waged by the East India Company against the Portuguese . . . is a just war.”  

Thus, “[h]aving made this remarkable claim, that there is no significant moral difference between individuals and states, and that both may use violence in the same way and for the same ends, Grotius had of course accomplished one of his primary tasks -- to show that private trading companies were as entitled to make war as were the traditional sovereigns of Europe.”

b. Trading Companies and Treaties

The great trading companies also directly influenced the development of the law of nations through treaty-making in the course of imperial expansion. As one legal historian puts it, in their trade with Asia, “the Portuguese soon discovered their inability to deal with local communities” on the basis of legal justifications grounded in European conceptions of the law of nations, such as discovery, occupation or the

87 HUGO GROTIIUS AND INTERNATIONAL RELATIONS at 12.
88 Id., 82.
89 GROTIIUS, DE IURE PRAEDEAE at 217, 281.
90 TUCK, supra note __ 85.
title of Papal donation of overseas territories.\textsuperscript{91} Because “[a]ll the major communities of India as well as elsewhere in the East Indies were politically organized” with their own legal systems, European traders had to reach agreements with local officials.\textsuperscript{92} While the Portuguese crown was not operating through a trading company and thus entered into treaties with local sovereigns through its direct representatives, “the Dutch, English and French formed East India Companies which, endowed with delegated sovereign powers” entered into agreements on their own.\textsuperscript{93}

One common topic of treaties was jurisdiction over European traders. The Dutch and English East India companies for example entered into treaties with local sovereigns setting forth how “jurisdictional issues were to be settled and how the exercise of jurisdiction over various groups of persons was to be assigned to the Company or the local Ruler and shared by them.”\textsuperscript{94} As a result of these treaties, “[t]he position of the European trader was . . . a legally complicated one, for he was strictly speaking under the territorial jurisdiction of a foreign Ruler, but at the same time under the personal and disciplinary jurisdiction of his Company, which often claimed semi-territorial and sometimes a vassal-like status within the precincts of a settlement flying its own national flag.”\textsuperscript{95} Moreover, at least the English East India Company “treated the entirety of the eastern hemisphere as a zone in which it, rather than Crown or Parliament exercised final say over English people places and

\textsuperscript{91} Alexandrowicz at 14.

\textsuperscript{92} Alexandrowicz at 14.

\textsuperscript{93} Id. at 15.

\textsuperscript{94} Alexandrowicz, at 103.

\textsuperscript{95} Id. at 106
things” and “[f]or its advocates, what modern historians have understood in staist terms as a purely economic category of ‘monopoly’ was in fact a form of jurisdiction.”

The Dutch East India Company also concluded treaties granting it the exclusive right to trade with certain local sovereigns, which led to protests by the English that this violated the very principles of free trade that they had argued against the Portuguese. Later treaties addressed the establishment of settlements and control of territory. In short, treaties between the trading companies and local rulers addressed a very wide range of issues.

**B. Companies and Political Theory**

Grotius’s personal involvement in the activities of the Dutch East India Company was hardly unusual. Numerous other political theorists in the decades and centuries that followed were directly involved in the politics of the development of empire. As one scholar has noted:

“The British empire in India provides the most striking illustration of this exchange [between theory and empire]; some theorists, like Mills, were employed in the East India Company; others like Henry Maine and James Fitzwilliam Stephen were colonial administrators for the Raj; and yet others like Burke, Bentham, Malthus, and Richard Price incorporated Indian affairs into their reflections on political economy and theory.”

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96 Richard J. Ross and Philip J. Stern, Reconstructing Early Modern Notions of Legal Pluralism, in **Legal Pluralism and Empires**.
97 *Id.* at 58-59.
98 See *id.* at __.
99 Sandra den Otter, *Empire and International Relations in Nineteenth-century Political Thought*, in **Victorian Visions of Global Order** 86, 89 (Duncan Bell, ed. 2007).
Burke, for example, was chair of the parliamentary committee on East Indian affairs, and led the parliamentary effort to impeach William Hastings, an English East India Company official who had served as the first governor-general of Bengal. It was in connection with this trial that Burke famously said that “the Constitution of the Company began in commerce but ended in empire.”

Moreover, as Emma Rothschild explains, “disputes over sovereignty and global commerce in the 1760s and 1770s” were tied up with perceptions of trading companies and their impact.

“The economists of the time, including Turgot, Mirabeau, Dupont de Nemours, Baudeau and Adam Smith, were also intensely interested in the merchant sovereigns of the French, English and Dutch East India companies, and in the new colonial ventures of the post-Seven Years War period. . . . [T]he economists’ writings on global connections were the occasion for some of their most profound reflections on the political consequences of laissez-faire, on theories of sovereignty, on the difficulties of transporting information or instructions over very large distances, and on the changing relationships between power, law and commerce. The disputes over long-distance commerce provide an interesting insight, the paper suggests, into ways of thinking which were at the same time scientific and administrative, global and provincial.”

Adam Smith, of course, was particularly critical of the monopolies that had been granted to the trading companies: “[o]f all the expedients that can well be contrived to stunt the natural growth of a new colony, that of an exclusive company is undoubtedly the most effectual.” Moreover, he contended, the vesting of

100 EDMUND BURKE, SELECTED WRITINGS AND SPEECHES, at 474.
101 Id., 3.
102 WEALTH OF NATIONS, at 73. See also Emma Rothschild and Amartya Sen, Adam Smith’s Economics in The Cambridge Companion to Adam Smith 342 (Haakonsen, ed., 2006); Sankar Muthu, Adam Smith’s Critique of International Trading Companies: Theorizing ‘Globalization’ in the Age of Enlightenment, 36 POLIT. THEORY 185 (2008).
sovereign power in the companies was a further disaster, for companies could never
manage a country in the best interests of its residents as a whole. As Smith
explained, “a company of merchants are, it seems, incapable of considering
themselves as sovereigns, even after they have become such. Trade, or buying in
order to sell again, they still consider as their principal business, and by a strange
absurdity regard the character of the sovereign as but an appendix to that of the
merchant.”103 Because “[t]heir mercantile habits draw them in this manner . . . to
prefer upon all ordinary occasions the little and transitory profit of the monopolist
to the great and permanent revenue of the sovereign.” It was this set of perverse
incentives that led the Dutch to burn large portions of the spice crop to avoid
reducing prices at which they could sell them in Europe. In summary, Smith
suggested, “[a]s sovereigns their interest is exactly the same with that of the country
which they govern,” but “[a]s merchants their interest is directly opposite of that
interest.”104 The problem, in Smith’s view, was not just that the state was meddling
in the marketplace or that trading companies enjoyed state-granted monopolies; it
was that the trading companies pervasively used their economic and political power
to distort the functioning of government.105

C. Nation, Empire and Economy: the 19th Century Reconceptualization

As influential as they were, the enormous company-states of the seventeenth
and eighteenth century did not survive the nineteenth century. The Dutch East

103 Id. at 133-34.
104 Id.
105 See Muthu, supra note __, at __.
India Company went bankrupt in the late 18\textsuperscript{th} century, and the Dutch government took over its territories, including what would be come Indonesia. The British company continued for several decades longer, but British rule in India transitioned from Company to Crown in 1858. Stern suggests that the English East India Company’s decline was:

“inseparable from the broader shifts in debates between corporate and individual foundations to society, understandings of property as economic rather than a political right, and, ironically, the alliance of capital and the state that came after, not before, the financial revolution. It was a casualty of evolving definitions of public and private, and the growing consensus that the economy were ‘fields of intervention’ for the polity rather than sites of government in their own right.”

Moreover, as he suggests, “[c]ompanies became economic units and ‘corporation’ came most readily to signify a commercial firm more readily than a body politic.”\textsuperscript{106} While chartered companies did not disappear entirely,\textsuperscript{107} they were no longer as visible or as dominant.

Parallel developments were happening in American corporate law, where doctrinal developments in the mid-nineteenth century helped free “the newly emerging business corporation from the regulatory public law premises that had dominated the prior law of corporations, whether municipal or trading

\begin{footnotes}
\textsuperscript{106} Stern, at __.
\textsuperscript{107} See Steven Press, Rogue Empires: The Untold Story Behind Europe’s Scramble for Africa (forthcoming Harvard Univ. Press) (exploring revival of chartered-company governments in the late nineteenth century). [I PROBABLY NEED TO DISCUSS HIS WORK MORE IN TEXT.]
\end{footnotes}
corporations, both of which were regarded as arms of the state." Commentators have largely treated the transformation of the corporation in American law in the nineteenth century from quasi-public creature to a private business entity as a purely domestic phenomenon. But in fact this was a global phenomenon, tied up with changing notions of empire, state and economy and the entrenchment of the public/private distinction that frames our thinking today. [I plan to add more on the changes in domestic law on corporations in this time period, perhaps a lot more.]

By the late nineteenth century, commentators on international were roundly rejecting the exercise of governmental powers by trading companies. Salomon, for example, viewed as problematic “‘to colonize anonymously, without costs and without responsibility, to exclude large territories from the civilising activities of other powers in order to hand them over to private companies that pursue no other objective than immediate personal enrichment.’” Trading companies could never carry out governing functions properly because “‘[i]t would be naive to require a limited liability company to make sacrifices in order to improve the condition of the natives at the risk of diminishing its dividends.’” The German scholar Heimburger likewise agreed that companies could not possess sovereignty, and could act only as

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110 Koskenniemi, at 144-45.
agents of States rather than subjects of international law. Similarly, “[i]n 1889, Rolin argued that colonization by chartering companies to deal with territorial administration failed to distinguish between ownership and imperium and to effect the humanitarian treatment of the populations.” This was important, for the justification and rationalization of the colonial project in the late nineteenth century depended on the idea that European governments were benign and civilizing rulers of colonized territories.

The end of the era of great chartered trading companies was not the end of colonialism and empire, but rather the beginning of a new imperialism that began with the scramble for Africa and lasted until the period following World War I. Scholars have argued that, in the late nineteenth and early twentieth century, as in the period before, empires were central to global political structure. But it was important in a different way. In this period, “colonialism was central to the constitution of international law in that many of the basic doctrines of international law -- including, most importantly, sovereignty doctrine -- were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.” This “took place in the context of an uneven and gradual extension of the states system” in which “[t]he national state that emerged in 1900 was a fundamentally different

111 Id.
112 Id.
114 VICTORIAN VISIONS OF GLOBAL ORDER at 47.
It was ironically at this moment – alongside and in response to the expansion of empire in a new form – that the image of the Westphalian state (the most perfect form of sovereignty) and the sharp division of public and private law assumed a more hegemonic role in international law.\(^\text{116}\)

### III. The Missing Hemisphere: Latin America and the “Banana Republics”

While the late 19\(^{\text{th}}\) and early 20\(^{\text{th}}\) century colonial expansion by European powers in Africa and Asia did take a territorial and state-centric form, this co-existed alongside a very different structure of relationships between states in the Americas. This portion of the project will examine (in a section not included here)\(^\text{117}\) the ill-defined role of the Monroe Doctrine in international law,\(^\text{118}\) as well as (in the section you have parts of below) the role of large transnational companies like United Fruit Company in Latin America in the 20\(^{\text{th}}\) century. [NOTE: THIS DRAFT IS VERY PRELIMINARY – IT IS MORE OF A SKETCH OF AN ARGUMENT THAN THE ARGUMENT ITSELF.]


\(^{117}\) The section on the Monroe doctrine is also likely to discuss some of the material related to the U.S.’s brief foray into territorial empire with insular acquisitions from the Spanish-American war, and some of the material related to that from the Cornell L. Rev. piece.

As the term “banana republic” evocatively captures, the weak nation-states of Latin America in the early and mid 20th century were susceptible to control by strong transnational business entities, which translated their monopoly power in the economic sphere into governmental and even military power. The United Fruit Company – commonly called “El Pulpo” or “the octopus” in Latin America because of the perception that its tentacles reached into every aspect of society -- was the quintessential example of this type of enterprise, though other transnational companies in different industries exercised significant influence. At times, these companies de facto controlled territory, commanded armies, toppled governments, collected taxes, and administered justice all without having formal sovereignty. Sometimes aided by “gunboat diplomacy” and covert military action from the United States, transnational business enterprises shaped the development of the region. While much studied by historians and political scientists in and of Latin America, the effect of this period on the development of international law has been too little examined by international legal scholars. And yet this history has left distinctive footprints in contemporary public and private international law. While popular and political critiques of “economic imperialism” were common in the 20th

119 CHAPMAN, supra note __, at 7–8.
120 See id. at 3.
121 Article 36 of the OAS Charter, for example, now provides that “[t]ransnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.”
century\textsuperscript{122} (and indeed, today), international legal scholarship has done very little to account for the role of private business enterprises in the global order. Indeed, it has rather studiously ignored them. For example, a search of the preeminent journal of international law, the \textit{American Journal of International Law}, which has been published since 1907 reveals that though “United Fruit” is mentioned in 103 articles, the vast majority of these references are citations to one case, \textit{American Banana Co. v. United Fruit Co.}\textsuperscript{123} There is almost no sustained discussion of the company and its larger impact.

\textbf{B. El Pulpo: The United Fruit Company}

The United Fruit Company is perhaps the most notorious transnational company in the history of Latin America. Chilean author Pablo Neruda described it as follows in his poetic account of the history of Latin America, the \textit{Canto General}:

\begin{quote}
When the trumpet blared everything
on earth was prepared,
and Jehovah distributed the world
to Coca-Cola Inc., Anaconda,
Ford Motors and other entities:
United Fruit Inc.
\end{quote}

\textsuperscript{122} See, e.g., Charles David Kepner & Jay Henry Soothill, The Banana Empire 3 (1935) (“What is known as modern economic imperialism is one of the most characteristic and important historical developments of contemporary times.”) The authors of this work write from a declared left-wing perspective. Kepner was a Congregational minister who undertook graduate study at Chicago and Columbia and conducted research for the book under the auspices of the American Fund for Public Service. His co-author, Soothill, was employed by United Fruit from 1912 to 1928, ending as superintendent of the export and marine departments in Costa Rica. Review, \textit{Journal of Political Economy}, at 838 (1937).
\textsuperscript{123} 213 U.S. 347 (1909).
reserved for itself the juiciest,
the central seaboard of my land,
America’s sweet waist.
It rebaptized its lands
the “Banana Republics.\textsuperscript{124}

Novelist Gabriel Garcia Marquez likewise included in\textit{One Hundred Years of Solitude} a fictionalized account of the 1928 massacre of labor protestors in Colombia at the behest of United Fruit and named the fictional town in which the novel is centered “Macondo” after a United Fruit plantation.\textsuperscript{125}

In short, the United Fruit Company has shaped the popular understanding of history in Latin America in significant ways. While not the only transnational company that exercised exceptional power and influence in the region, it is the prototypical example of such a company.

1. Origins and Monopoly Power of the United Fruit Company

The United Fruit Company achieved political dominance in Latin America as a consequence of its largely unchecked economic monopoly control of both the market for bananas (one of the world’s most significant commodities) as well as infrastructure related to the transportation and sale of bananas, most notably railroads and shipping ports.

At the same time, it had tremendous opportunity for influence because of the

\textsuperscript{124} Pablo Neruda,\textit{United Fruit Co.}, \textit{in Canto General} 179 (Translated by Jack Schmitt, Univ. of Cal. Press 1991).
\textsuperscript{125} Gabriel Garcia Marquez,\textit{One Hundred Years of Solitude} 9 (Translated by Gregory Rabassa, Perennial Classics 1998); \textit{see also} Chapman, \textit{supra} note \textsuperscript{__,} at 3 (noting Marquez’s use of the historical strike in his novel).
weakness of the national governments in the areas where it operated. While
nominally sovereign under international law, the governments in question were
weak in de facto exercise of sovereign powers. In many cases, they had limited
control over large portions of their territory, much of which was undeveloped and
sometimes impenetrable jungle without significant roads, railways, telephone or
telegraph lines or other infrastructure that would allow national power to be easily
projected into the countryside. National post-colonial boundaries were sometimes
ill-defined and disputed, and were in any event not stringently enforced because the
states lacked the physical power or resources to do so. Capacity for enforcement of
both civil and criminal laws was limited. So too were states’ ability to collect and
hold on to tax revenues. Indeed, state capacity to collect taxes was so limited that at
one point tax collection in Honduras was outsourced to J.P. Morgan, as part of an
effort by the U.S government in “dollar diplomacy” to stave off intervention by
British creditors based on the Honduran government’s inability to collect taxes
adequate to pay off its debts.\textsuperscript{126}

Transnational companies stepped into this power vacuum largely free of
constraints from the legal systems of their home countries. As I have discussed
elsewhere,\textsuperscript{127} it is ironic that the presumption against extraterritoriality in United
States statutory law was announced in an antitrust case involving United Fruit, the

\textsuperscript{126} See Chapman, supra note __, at 70-71
\textsuperscript{127} See Jenny S. Martinez, \textit{New Territorialism and Old Territorialism}, 99 Cornell L.
Rev. 1387 (2014). [Portions of this section in the current draft draw verbatim on
this earlier article of mine.]
very corporation viewed by many observers as the pernicious embodiment of a particular form of economic and private -- rather than sovereign, public, and territorial -- imperialism. In the 1909 decision in *American Banana Co. v. United Fruit Co.*, the Court in an opinion by Justice Holmes held that the Sherman Antitrust Act did not apply to the conduct of the Boston-based United Fruit Company in Latin America. In the course of the decision, Holmes pronounced the general rule that "in case of doubt . . . any statute [should be construed] to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." While the specific holding of *American Banana* with respect to the Sherman Antitrust Act was eroded by later decisions applying that particular statute extraterritorially, the core of its holding on the statutory presumption against extraterritoriality remains an important aspect of U.S. statutory law, and reflects the centrality of territory to conceptions of jurisdiction.

The Company was founded in 1899 and quickly began acquiring or driving out of business competing firms. At times, it is estimated that it controlled 90 percent of the banana market. The principal banana-producing countries in Central America, including Costa Rica, Guatemala, Honduras, Colombia, Ecuador and Panama all came under its strong influence, and indeed de facto control at times.

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129 *Id.* at 357.
At the time of its incorporation in 1899, the United Fruit Company “had 112 miles of railroad; 212,394 acres of land, of which 61,263 acres were in production; and a capital of $11,230,000.”\(^{130}\) The company’s construction and subsequent control of railroads proved to be pivotal in its influence.\(^ {131}\) The railroads were needed to transport the bananas to coastal ports in time for them to be shipped to ultimate markets before spoiling. The railroads were essential infrastructure allowing access to previous undeveloped regions.

As one rather sympathetic study of the United Fruit Company written in the 1950s described it:

“The banana-producing countries were poor; few mineral resources had been developed; they depended almost entirely on the agriculture of their cool, high, inland valleys. Their coastal lowlands were covered by virgin jungles; the few so-called ‘ports’ that served to maintain tenuous contact with the outside world were pestholes. No wonder the governments were eager to attract those enterprising Americans that had found a use for their wastelands and were willing to invest unheard-of amounts of dollars in clearing the jungle and building railways for the growing of bananas. This explains why national governments were willing to sign contracts and grant concessions on terms that today would be considered grossly unfavorable.”\(^ {132}\)

Indeed, the company’s monopoly control of railroads was in some places more significant than its control of the banana market. When it was freed from U.S. antitrust laws in 1909, United Fruit began to acquire its competitors, averaging a 60

\(^{130}\) Stacy May & Galo Plaza, The United Fruit Company in Latin America 7 (1958). This entire source is, it should be noted, very sympathetic to United Fruit.

\(^{131}\) Id. at 9.

\(^{132}\) Id. at 19.
percent share of the total banana trade in the period from 1910 to 1930. In 1929, it acquired its most significant competitor, the Cuyamel Fruit Company. Cuyamel’s owner, Samuel Zemurray, took a large share of stock in the parent company and eventually became its head.

a. Territorial Control & Construction of Borders

Control of territory is considered a core aspect of state sovereignty in the Westphalian model. At times, the United Fruit Company exercised *de facto* exclusive control over vast areas of land with little oversight by any state government. Before the arrival of the banana industry, large tracts of land in Central America were undeveloped and sparsely populated. The nature of banana cultivation led United Fruit and its competitors to try to purchase or lease land areas greater than those needed for immediate use. The spread of plant diseases that infected and destroyed the main species of banana in cultivation in the early 20th century led to the abandonment of plantations where disease had stricken, and so United Fruit preferred to keep large tracts of land in uncultivated reserve to move into once previously cultivated tracts had to be abandoned. The company also chose to try to own and uncultivated large masses of land in order to prevent competitors from utilizing those lands in the meantime. By 1955, it held legal title to 1,726,000 acres (2,700 square miles) in the six main banana-producing countries (Costa Rica, Guatemala, Honduras, Colombia, Ecuador and Panama), less than 25 percent of

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133 Id. at 13.
134 Id. at 14-17.
which was in active use.\textsuperscript{135} It also leased and otherwise controlled another vast quantity of land. One account in 1937 suggested:

“The United Fruit Company, with its ‘international farm’ of 3,482,000 acres (the size of Connecticut and Rhode Island, but 85 percent unimproved), its 1,500 miles of railway, its Great White Fleet of 100 ships, its 3,5000 miles of telephone and telegraph lines and 24 radio stations, its hotels, hospitals, towns, commissaries, and wharves, is a private enterprise only in the sense of legal ownership. The Company’s activities bring about the economic development of whole provinces, and when its banana plantations are abandoned ten years later economic decay follows.”\textsuperscript{136}

An antitrust suit by the U.S. government in 1954 alleged that “[w]ith the exception of land in Ecuador, United owns, leases, or otherwise controls 85\% of the land in the American tropics suitable for banana cultivation.”\textsuperscript{137}

Of course, ownership of large tracts of land does not alone make a company like a state. But due to the remoteness of its holdings and the weakness of state authorities, United Fruit exercised an unusual degree of autonomy on many of its plantations. In some cases, plantations were operate under concession agreements with the state that exempted the plantations from otherwise applicable legal rules.\textsuperscript{138} For example, after Panama enacted labor legislation requiring overtime pay, the government signed a contract with United Fruit’s Chiriqui Land Company stating:

\textsuperscript{135} Id. at 80.
\textsuperscript{136} Eugene Staley, Review of The Banana Empire, 45 Journal of Political Economy at 839 (1937).
\textsuperscript{137} Id. at 88.
\textsuperscript{138} Charles David Kepner, Social Aspects of the Banana Industry at 141 (1936) [Add more examples].
“The contractor shall have liberty to contract with its employees the conditions of service and the amount of wages, as well as the benefits which they can receive from the contractor.”

A port contract between the Guatemalan government and United Fruit likewise provided:

“The company will have the right to contract its employees and laborers as it judges convenient, and to enter into arrangements with them in the form that, freely and bilaterally, they agree upon . . . . It may during the period in which this contract is in force, maintain the activities of its enterprises, by night as well as by day and on Sundays or holidays.”

While agreements in the form of contracts and concessions between companies and states do not always, in and of themselves, blur the boundaries between public and private authority, agreements making different laws applicable in territory granted to the companies evoke treaties as much as classic contracts. [Expand on this idea.]

At other times, nominally applicable laws were simply not enforced. For example, laws requiring limiting working hours and requiring overtime pay were reportedly routinely ignored by United Fruit with no consequences.

The company also exercised influence and control over international borders. For example, repeated conflicts between Honduras and Guatemala in relation to their territorial boundary were in large measure disputes over territory

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139 Id. at 141.
140 Id. at 142.
141 Kepner, Social Aspects of the Banana Industry at 139 (citing example of Honduran 8-hour day and Panamanian overtime legislation).
between United Fruit and its erstwhile rival, the Cuyamel Fruit Company (with which it later merged). After intermittent skirmishing, this culminated in the 1933 arbitration of the boundary dispute.

During the 1954 coup in Guatemala, rebel forces reportedly entered Guatemala across the border from Honduras through United Fruit plantations and with logistical support from the company. The elected government of Guatemalan President Jacobo Arbenz had enacted agricultural reform legislation that nationalized large amounts of land owned by United Fruit, with compensation to the company based on the nominal value of the land on which the company had been paying taxes. According to United Fruit, this greatly undercompensated the company because it had been systematically and grossly understating the value of its lands for tax reasons. Observers debate the precise role of United Fruit in lobbying the U.S. government to covertly support the coup, but it is clear both that United Fruit wanted the government ousted, that it had close contact with many high level U.S government officials, and that it was delighted by the successful outcome. In the context of broader fears about communist encroachment in Latin America, the U.S. government determined to covertly back a coup. Colonel Carlos Castillo Armas was chosen to lead the coup, and he and his troops “were housed, fed

\footnotesize
143 See, e.g., Chapman, supra note __ at 13041.
145 See generally id.
and watered on a United Fruit plantation on the Honduran side of the border with Guatemala.”\textsuperscript{146} The coup filtered into the realm of public international law as it led to a significant debate in the U.N. Security Council about that body’s relation to the Organization for America States.\textsuperscript{147}

[Additional examples to be added.]

\section*{b. Military Power}

Of course, a large number of military interventions by the United States in Latin America in the first part of the 20\textsuperscript{th} century were motivated by interest in protecting private investments. As one book in 1935 described it:

\begin{quote}
“To protect foreigners, maintain order, and give our investors security we have set up military governments in Cuba, Haiti, Santo Domingo and Nicaragua. We have temporarily intervened in Panama seven times, Nicaragua six times and in Guatemala and Costa Rica once each.”\textsuperscript{148}
\end{quote}

As noted, United Fruit played a part in the United States government’s decision to covertly support the 1954 Guatemalan coup.\textsuperscript{149} There are other examples of U.S military intervention that in one degree or another was motivated by concern for U.S. company’s economic interests. [Add more examples.]

But, while demonstrating an entanglement of state and private economic interests, these interventions do not directly upset the public/private distinction as such. More interesting in this regard are military adventures in which the

\begin{flushleft}
\textsuperscript{146} Chapman, at 140.
\textsuperscript{148} Kepner & Soothill, supra note ___ at 19.
\textsuperscript{149} See generally Schlesinger, supra note __, at __.
\end{flushleft}
companies actually controlled troops. For example, during the Honduran revolution in 1910-11, Samuel Zemurray (then head of the Cuyamel Fruit Company, which later merged with United Fruit) himself provided a boat which carried the exiled General Bonilla, his supporters, rifles, and ammunition from New Orleans back to Honduras. After a complicated series of diplomatic and military events in the next several months, Bonilla became President of Honduras. Upon assuming office, President Bonilla granted Zemurray’s company substantial loans and concessions.150

[Additional examples to be added.]

c. Currency

The issuance of currency is another classically state function. For significant periods, United Fruit workers were paid in company scrip rather than money coined by the state. This was a source of ongoing labor tension, as workers complained that they could only use the money to purchase things in company stores, exacerbating their dependence. Advances on wages not yet earned kept them tethered to the plantations. And workers complained that wages remained stagnant while commissary prices increased.

Indeed, one of the major claims of workers in the 1928 strike in Colombia that led to the killing of hundreds of protestors (and inspired Marquez's fictional massacre) was the demand to be paid weekly in cash rather than fortnightly with commissary orders.151 Workers in Guatemala also received large proportions of

150 Kepner & Soothill, supra note __ at 109.
151 See Kepner at 188-89; see also Kepner & Soothill at 319-21
their pay through commissary advances even though labor laws ostensibly limited this practice.\textsuperscript{152}

[This section to be expanded.]

d. Police Power

[I plan to add a section about the exercise of police powers and law enforcement on banana plantations.]

e. Responses in Public International Law

This history has left its marks in public international law. In 1975, the Organization of American States (OAS) Permanent Council issued as resolution on “Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises.”\textsuperscript{153} The resolution noted that:

“problems that may arise as a consequence of the improper behavior of some transnational enterprises operating in the region” and “[t]he necessary respect that must be maintained for the sovereignty and laws of the countries in which transnational enterprises operate.” It noted “news stories have recently come to public light concerning actions constituting manifestly immoral conduct, as well as interference on the part of some transnational enterprises in the domestic affairs of some countries of the hemisphere.”

In language presaging the 1985 amendments to the OAS Charter, the resolution declared that “transnational enterprises should be subject to the legislation and to the jurisdiction of the competent national courts of the countries in which they carry out their activities and should conform to the development policy of those countries.”

\textsuperscript{152} Id.

As amended in 1985, Article 36 of the OAS Charter currently provides:

“Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.”\textsuperscript{154}

This is one of relatively few references to multinational business entities in public international law, and reflects the experience of Latin America in the 20\textsuperscript{th} century.

The United States, upon signing the Protocol of Amendment, stated that it understood that this provision

“does not derogate in any way from the obligation of states reflected in Article 3 faithfully to fulfill their international obligations with respect to transnational enterprises whether derived from treaties and agreements or other sources of international law, nor does it derogate from the jurisdiction other states may have with regard to such enterprises.”\textsuperscript{155}

This legacy is further reflected in the proliferation of bilateral investment treaties in the past two decades, with provisions for investor-state arbitration. Controversial cases like the Chevron-Ecuador matter exemplify the ongoing disputes over state and private authority in systems with weak rule of law.\textsuperscript{156}

IV. Companies, Empire, and the Public-Private Distinction, Redux

The mid-twentieth century saw another massive shift in the international legal order with decolonization in Africa and Asia. In the conventional view, this

\textsuperscript{154} PROTOCOL OF AMENDMENT TO THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES (A-50) "PROTOCOL OF CARTAGENA DE INDIAS" (1985) (originally numbered Article 35)

\textsuperscript{155} http://www.oas.org/dil/treaties_A-50_Protocol_of_Cartagena_de_Indias_sign.htm

\textsuperscript{156} Chevron Corp v. Republic of Ecuador, __ F.3d __ (D.C. Cir. 2015).
further entrenched the Westphalian state as the paradigmatic building block of international order. But the stylized view presented by contemporary public international law of equal sovereign states that are the sole authors of international law is a formalistic and normative ideal that is not the most accurate description of reality. All states get an equal vote in the U.N. General Assembly, but all states are not even formally equal in the U.N. Security Council, let alone in the realm of economic and military power. Private entities play a role in creating and enforcing international legal norms.¹⁵⁷ States wage war with non-state actors. And, as I have noted, many private entities dwarf nation-states in their economic and geographic scope.

I began by suggesting that we need to recognize the power and influence of multinational corporations as a form of global organization and power. The first dictionary definition of empire is one that reflects the early twentieth century form of empire: “an extensive group of states or countries ruled over by a single monarch, an oligarchy, or a sovereign state.”¹⁵⁸ This definition, of course, reflects the current analytic categories rather than supports them. The secondary meaning of the term is described as “an extensive sphere of activity controlled by one person

¹⁵⁷ See Paul Stephan, Privatizing International Law, 97 Va. L. Rev. 1573 (2011) (suggesting that the “old understanding of international law as something created solely by and for sovereigns is defunct. Today the production and enforcement of international law increasingly depends on private actors, not traditional political authorities” and noting the role of, inter alia, NGOs, private dispute resolution mechanisms, private standard-setting bodies, and civil suits and settlements initiated by private parties)
¹⁵⁸ http://oxforddictionaries.com/definition/english/empire
It is in something akin to this that I suggest we need to recognize the influence of multinational business corporations as entities that bridge the public/private divide, and that our modern classification of them as purely “private” actors distorts the way we view them, and the way we view the system of international relations.

By recalling the earlier periods and the ways in which spheres of power and influence were extended around the globe in private as well as public guise, we may be better able to understand the projection of power today. It is important to note that I am not arguing that the structure of the world today is somehow the same as it was in previous times, or that the history dictates particular doctrinal or legal results. Rather, I suggest, the history should open our minds to the historical contingency of the categories that today seem so inevitable. How and why were these analytic divisions developed? In what historical, economic, and social circumstances? What interests did they serve? Answering these questions can help us understand how well, or how poorly, they fit current needs and circumstances.

\[159 \text{id.}\]