The Transnational Corporation in History: Lessons for Today?

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INTRODUCTION

An estimated twenty-nine to fifty-one of the world's 100 largest economic entities are multinational companies; the remainder are nation states. The gross domestic production of sub-Saharan Africa does not equal the revenues of General Motors and Ford combined.[1] Lawyers may observe these facts, but lack legal classifications with which to deal with them. In our liberal legal tradition, no matter how powerful transnational corporations may become, they are not states and should not be subjected to the same legal obligations and duties as states. Their private rights are deserving of protection and their private obligations are demanding enough. Our familiar forms of legal classification, it seems, cannot take us much further. We do not have the concepts with which to deal with private aggregations of power.

Corporations and states are commonly represented as having an oppositional relationship. Corporations represent the private; states represent the public. Corporations represent the efficient, the natural, and the spontaneous; states represent the inefficient and the contrived. The ascendancy of the corporation means the decline of the state. But these commonly held views are ahistorical and tend to ignore the complex relationships between states and corporations. Modern incorporation is simply a matter of fulfilling formal registration requirements. There are few surviving remnants of the old notion that incorporation is a privilege conferred by the state. This Article aims to redress the balance somewhat by telling aspects of the history of the corporate form that have been obscured by modern forms of incorporation and modern conceptions of the public and the private. In a modest way this Article intends to show just how recent the public/private paradigm actually is and how selectively such concepts have been applied.

This Article forms part of a larger project that seeks to evaluate how much the "new" phenomenon of globalization is a continuation of the processes of colonization. The history of colonial expansion is capable of being viewed as a history of the corporate form. This larger project seeks to assess the part that ideas of legal personality have played in these processes. In legal terms, nations, peoples,

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1. JANET DINE, THE GOVERNANCE OF CORPORATE GROUPS 151 (2000).

and economic entities have not always enjoyed the status of unified and permanent entities bearing rights and duties. Many collective entities that we would consider to exist as social, or economic, beings have not enjoyed legal recognition as distinct entities. Whether or not collectivities have enjoyed distinct legal identity has been crucial.

Part I will relate a narrative of the trading corporation and how the public/private distinction plays out within that history. Its purpose is to paint in rather broad strokes a picture about the use and consequence of different legal forms. In covering such a broad period of history, there is a risk of over generalization and over simplification in the pursuit of general trends and themes. The citing of specific, if diverse, examples will allow the reader some opportunity for testing the plausibility of these broader claims. The purpose of Part II is to consider whether there are parallels to be drawn between colonial processes and the modern world order and lessons to be learnt from this history about the relationships between corporations and states today.

I. A HISTORICAL NARRATIVE

A. The Early Joint-Stock Companies

The corporation in its historic and modern forms has this as its essence: It is conceived in law as an artificial legal person whose personality is separate from its constituent members. Separate legal personality usually brings with it a separate management hierarchy. Limited liability—often viewed as a *sine qua non* of the corporation—did not become an established feature of the corporate form until the late eighteenth century.[2]

The legal concept of the corporation was first applied to the King himself (or at least to the abstract and perpetual aspect of the kingdom). Households, guilds, universities, Inns of Court, convents, charitable foundations and cities were among the early medieval corporations.[3] One might even be tempted to suggest that it was the public that gave the corporate legal form to the private,[4] but that would be hopelessly anachronistic, not to say misleading.

The terms "public" and "private" cannot meaningfully describe the legal categories at that time. By the later Tudor period, the grant of incorporation was firmly established as part of the King's exclusive prerogative and could not be

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2. RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION 1720-1844, at 23-24 (2000). Limited liability was not necessary for the early corporation because it usually held assets in land and its exposure to tortious liability was low. In any event, the liability of each corporation depended on the terms of its charter. By the late seventeenth century, there is evidence of some sort of limited liability being available which protected shareholders from being arrested for the debts of the company. *Id.* at 127-29.

3. A.W. Brian Simpson, *How the Corporation Conquered John Bull*, 100 MICH. L. REV. 1591, 1591 (2002).

4. I have discussed elsewhere how subsequently private law may have given the corporate form back to the state. *See generally* Janet McLean, *The Crown in Contract and Administrative Law*, 24 OXFORD J. LEGAL STUD. 129 (2004).

acquired by long usage or prescription.[5] All incorporation depended on a direct, explicit, and ex ante authorization by the King in charter or letters patent. Corporation law was in those days categorized by lawyers as part of the Law of the King.[6] Corporations were artificial persons created by the King. Corporations were *not* spontaneous, voluntary, or aggregated natural persons. The corporate form was not originally used for business purposes. Indeed, business favored the partnership form where the people were real.[7]

In the late sixteenth century, this began to change. For the first time, the corporate form was used in risky "for profit" ventures. It is on these "for profit" forms of corporations that we shall focus. The vast majority of these were incorporated for overseas trade. They were our first "transnational corporations" if you will. In the first two decades of the seventeenth century, some forty companies were granted trading monopolies by their respective governments over much of the known world. Among the seventeenth century British companies were the British East India Company, the Hudson's Bay Company, the Royal African Company[8] and the London and Plymouth companies established by James I under the Charter of Virginia.

A central characteristic of these corporations was that they were granted monopoly powers by their respective governments. The English corporations were typically granted a monopoly over English trade that encompassed specified territory abroad. Additionally, the corporations received power to protect their monopoly and rights over English subjects within the territory.[9] The grant of monopoly status encouraged investors to engage in often highly risky ventures. For the first time, money could be raised in return for shares, profits could be divided among shareholders, and shares could be transferred among members and outsiders. Importantly, new investors among the gentry could be involved in business enterprises alongside the merchants.[10] Profit was the dominant motive of most of these companies and the commercial risk was high.

These organizations also had other more public purposes. They became the major source of public finance by which the monarch could raise revenue without Parliament and at the same time further foreign policy on a self-funding basis.[11] The costs of embassies, overseas representatives, fortifications, and sometimes, even wars, would be borne by the corporations themselves. They were an important instrument of settlement and colonization.

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5. HARRIS, *supra* note 2, at 17. Blackstone and Kyd, writing in the eighteenth century, found two ancient modes of creating corporations that did not require explicit Crown grant. They were by prescription (in the case of the City of London) and by the common law (in the case of bishops and deans). These modes were only available in those cases in which the corporations had existed since time immemorial. *Id.*

6. *See* SIR JOHN WILLIAM SALMOND, JURISPRUDENCE 347-55 (7th ed. 1924).

7. HARRIS, *supra* note 2, at 20.

8. Chartered in 1672, it held a monopoly over the British slave trade between West Africa and the West Indies. "Free" trade in slaves came in 1712 and from then until 1759 the company ran coastal forts for the British government.

9. This was established in *East India Co. v. Sandys*, 90 Eng. Rep. 103 (1684).

10. *See* THEODORE K. RABB, ENTERPRISE AND EMPIRE; MERCHANT AND GENTRY INVESTMENT IN THE EXPANSION OF ENGLAND, 1575-1630 (1967).

11. HARRIS, *supra* note 2, at 41, 46. James I and Charles I were particularly attracted to this revenue earning device. *Id.* Until 1719, unincorporated joint-stock companies were liable for prosecution for breaching the King's prerogative. *Id.* at 58.

The London and Plymouth companies, for example, used the legal form of the trading company for the purposes of political and religious self-government. They enjoyed sovereign powers. Chartered in 1603, they were empowered to fortify territory, coin money, and to impose customs duties.[12] Anyone who attempted to settle the territory without the corporation's consent could be expelled and those who committed certain crimes could be outlawed.[13] Under the terms of their charters, lands in the prescribed territories were to be held by the companies "of the King under the assumption that they formed part of an English manor."[14]

At that time, "State territory was still, as in the Middle Ages, more or less identified with the private property of the monarch of the state."[15] Rights of dwellers and cultivators were derived from the private and exclusive ownership of the Lord.[16] *Imperium* (the antecedent of the modern concept of sovereignty) and *dominium* (the antecedent of the modern concept of private ownership) were blurred during this transition from feudalism to territorial sovereignty. Feudal ties cut across national borders.[17] The North American settlements were considered to be dependent and subject to the realm of England. It was by this feudal conception that the King, through his delegate the Company, could acquire the land and sovereignty. That sovereignty was initially personal—giving the King or his delegate powers over the settlers alone. It later evolved into a kind of territorial sovereignty.[18] It was the corporation that exercised powers of *imperium* on his behalf, but always against the background possibility that its charters would not be renewed or would be withdrawn by the Crown.[19]

Charting the public and the private during this period was hazardous. Trade was closely connected to the law of the sea. It drew distinctions that we might be tempted to roughly approximate to the modern public/private divide. Pirates were unlawful, yet privateers were a lawful institution. The privateer was a commander of a private commercial ship who was authorized by the state to participate in

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12. *See* M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 93 (1926).

13. *Id.*

14. *Id.* The lands "were to be held of the king in free and common socage, as of the manor of East Greenwich, and not [the more onerous] *in capite*." This meant the company could sub-grant the land under its seal. Viola Florence Barnes, *Land Tenure in English Colonial Charters of the Seventeenth Century*, *in* ESSAYS IN COLONIAL HISTORY PRESENTED TO CHARLES MCLEAN ANDREWS BY HIS STUDENTS 5, 14 (1931).

15. According to Oppenheim about Grotius. 1 L. OPPENHEIM, INTERNATIONAL LAW 545 (H. Lauterpacht ed., 8th ed. 1955), *quoted in* YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 1 (1965). Grotius was legal advisor to the Dutch East India Company.

16. SIR PAUL VINOGRADOFF, THE GROWTH OF THE MANOR 308 (2d ed. 1951).

17. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 22 (1958).

18. *Imperium* was initially understood to be personal. The East India Company, for example, initially exercised governance only over British subjects and its own servants. As its factories, forts, and factory towns grew, the scope of governance also increased. By East India Company Letters Patent 1726, the Company's *imperium* was extended to all persons within certain Company territories. *See* P.G. McHugh, The Aboriginal Rights of the New Zealand Maori at Common Law 20 (unpublished Ph.D. dissertation, University of Cambridge) (on file with author). No great extent of territory was acquired by the East India Company until the middle of the eighteenth century. GEORGE CAWSTON & A. H. KEANE, THE EARLY CHARTERED COMPANIES, A.D. 1296-1858, at 120 (1968) (1896).

19. The Virginia Charters expired in 1624 and 1635.

"armed commercial ventures" by letters of marque from the King or Admiralty.[20] Pirates were considered criminals or outlaws.[21] Privateers, on the other hand, performed important public services when they intercepted ships, seized their cargos, and aided naval blockades. The presence of delegated authority from the sovereign seems to be the point of distinction between the lawful privateer and the unlawful pirate.

Closer inspection reveals that the pirate/privateer distinction may have its origins in an analogy to the laws of war and the laws of aliens, rather than in an embryonic form of the public/private distinction. Privateering originally served the purpose of self-defense.[22] Pirates were outlaws because they were effectively denationalized and did not belong to a flag state.[23] The difficulty throughout this period is to resist the tendency to see what we, through our modern lenses, are expecting to see.

The main point for our purposes is that during the early period trading corporations operated in a feudal context. The public/private distinction, as we understand it today, did not operate during that period. The British corporations were vested with sovereign powers according to the terms of their Charters—powers which they could augment and renew upon application to the King. The acquisition of an overseas territory by a trading corporation, vested with sovereign powers, automatically transferred feudal conceptions of ownership of land and governance over British subjects in that territory. International law ideas about territorial sovereignty were yet to grow out of these feudal conceptions. At the same time, very modern developments were taking place in the establishment of the earliest progenitors of the joint-stock company.[24] Innovative new methods of raising capital for risky "adventures" through experiments with the corporate form were being discovered. These were not the products of liberal ideology but of a much earlier mindset.

B. Spanning the Different Periods: The English East India Company

Ron Harris argues that from 1720 the linkages between the business corporation, the overseas trade monopoly system, and public finance loosened.[25] It is certainly even more difficult to generalize about the scope and scale of the trading companies in the late seventeenth and eighteenth centuries. Political troubles at home caused inconsistencies in both the granting and enforcement of

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20. WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 305 (Michael Byers trans., 2000).

21. *Id.*

22. *See id.* at 313.

23. *Id.* at 306.

24. ARTHUR BERRIEDALE KEITH, A CONSTITUTIONAL HISTORY OF INDIA, 1600-1935, at 4 (1936). Keith puts the date at which the East India Company moved from the old "regulated company" to the joint-stock company form at 1612. *Id.*; *see also* HARRIS *supra* note 2, at 25; Clive M. Schmitthoff, *The Origin of the Joint-Stock Company*, *in* CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 674 (Chia-Jui Cheng ed., 1988) (discussing the earlier history of the joint-stock companies). According to Hunter, the words "Joint Stock" first appear in the Royal Charter of 1686. He also notes that at various times in its history, there was pressure for the company to return to a regulated form. *See* 2 SIR W.W. HUNTER, A HISTORY OF BRITISH INDIA 118, 120 (1900).

25. HARRIS, *supra* note 2, at 58.

monopolies.[26] There was a struggle between the Crown and Parliament about which institution should grant the privilege of incorporation. Many of the old trading companies disappeared, failed, or were taken over by the British Crown.

Harris argues that the connection between the corporation and the State dwindled after 1720 is not entirely convincing for two reasons. For the purposes of his argument, he treats the English East India Company and the Hudson's Bay Company as anomalies.[27] The East India Company may have been one of the few trading corporations to survive from the early period, but it was one of the most important corporations financially, as an experiment in the joint-stock company form, and in terms of its contribution to imperial history. Moreover, both the English East India Company and the Hudson's Bay Company survived until the middle of the nineteenth century with varying levels of interference from the state.[28] The nineteenth century saw the revival of the trading company form for the purposes of colonial expansion. This second wave of colonization by trading companies in 1815-1870[29] is partly outside the period of the Harris inquiry. It is hard to resist, however, the suggestion that the continued existence of these two great trading companies may have contributed to the nineteenth century revival of the form. It may well be that the existence of a corporation exercising mixed entrepreneurial and governmental functions cannot help but look anomalous to modern eyes. To excise these corporations from the general history of the corporate form, as Harris and others tend to do, does not do justice to the contributions of such trading enterprises.

Compared with the French trading companies generally, the English and Dutch companies were considered to be much more independent and able to operate at arms length from their respective governments.[30] The agents of the Dutch and English companies were regarded as employees and servants of groups of merchants, rather than the subordinates of their governments. The British considered themselves traders first and territorial rulers second.[31] Of course, the proper mix of the East India Company's functions was contested, tended to be in the eye of the beholder, and changed dramatically over the period of the company's existence. In 1615, some commentators regarded the British East India Company as insufficiently representative of the British Nation and its aspirations. According to Rabb, "Discussions of national prestige [within the British East India Company]

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26. The Statute of Monopolies, enacted in 1623, made an exception for existing monopolies and trading companies. *See* 21 Jam. 1, c.3, § 9 (Eng.).

27. HARRIS, *supra* note 2, at 45, 53-59, 204-07.

28. GREWE, *supra* note 20, at 300. The Hudson's Bay Company was privileged in 1670; in 1749, Parliament discussed its abrogation; and in 1859, its trade monopoly was abolished. It continued to exercise its political and administrative powers for another ten years. *Id.*

29. I adopt Koskenneimi's view here. MARTTI KOSKENNIEMI, THE GENTLER CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 110-12 n.63 (2002).

30. GREWE, *supra* note 20, at 301. Grewe describes the seventy-five French companies between 1599-1789 as the "artificial products of a clearly conceived political will of [the] State" and as lacking the private individualistic spirit of enterprise of the English and Dutch. *Id.*

31. K.N. CHAUDHURI, THE TRADING WORLD OF ASIA AND THE ENGLISH EAST INDIA COMPANY, 1660-1760, at 115 (1978). At various times in its history, accusations were made that the company's handsome profits "were made at the expense of the nation." *See* SIR PERCIVAL GRIFFITHS, A LICENSE TO TRADE: THE HISTORY OF ENGLISH CHARTERED COMPANIES (1974).

were entirely absent: in fact, it had to be reminded by the government of its national obligations; and even the tracts written on its behalf dealt more with economics than glory."[32] A century later, the British East India Company Directors were reporting that "the Company traded more for the benefit of the nation [England] than for itself."[33] Its importance to the public revenue is undeniable. When the two rival British East India Companies were united in 1709, their entire permanent capital of three million pounds was loaned to the Crown and the company traded on borrowed funds.[34] Capital was often "violently withdrawn" to serve the State's needs.[35] In a perhaps predictable reversal of this trend, the Company's application to the Government for a loan of one million pounds in 1772 led to the enactment of the Regulating Act of 1773.[36] This would be a decisive step in the deepening involvement of the British government in the administration of India.[37]

The British East India Company certainly took advantage of its ambiguous status—successfully emphasizing its sovereign powers when it wished to avoid contractual debts to local rulers,[38] protesting to the Royal Navy that its status would be reduced in the eyes of the locals if it had to acknowledge the superiority of the British naval fleet,[39] and all the time relying for its trading advantage on the might of British naval power and on the calculated and limited use of force. It charged merchants fees for safe passage[40] and was able to do so as an exercise of its monopoly and sovereign powers. It was graphically and finally reminded of its subordinate status, however, when Queen Victoria took over from the company in 1858.[41] The company had survived in various guises and with mixed public and private motives for 250 years.[42]

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32. RABB, *supra* note 10, at 39-40. Rabb attributes this lack of nationalism to the higher participation of merchants than gentlemen in this joint-stock, as compared, for example, with the Virginia Company. *Id.* at 39.

33. CHAUDHURI, *supra* note 31, at 121.

34. *Id.* at 120.

35. WILLIAM ROBERT SCOTT, COLLECTED ARTICLES RELATING TO THE CONSTITUTION AND FINANCE OF BRITISH AND IRISH JOINT STOCK COMPANIES UP TO 1720, at 199 (1910).

36. JOHN KEAY, THE HONOURABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY 384 (1994).

37. *Id.* at 384-91.

38. *See* Nabob of Arcot v. East India Co., 29 Eng. Rep. 841 (Ch. 1793) (holding that a bill could not be maintained by a sovereign prince in India against the East India Company for an account).

39. CHAUDHURI, *supra* note 31, at 109. The company protested to London that acknowledging the superiority of the British naval fleet "lessened the status of the Company's servants in the eyes of the Indian political rulers." *Id.*

40. *Id.* at 121.

41. JEREMY BERNSTEIN, DAWNING OF THE RAJ: THE LIFE AND TRIALS OF WARREN HASTINGS 285 (2000). In 1858, the Government of India Act transferred all the Company's rights to the Crown. *Id.* This was only one in a series of Acts of Parliament which foretold the British East India Company's eventual dissolution. The first was the Regulating Act of 1773, which declared all acquisitions made by the company to belong to the Crown (describing these as having formerly been vested in or exercised by the company in trust for the Queen). It was followed by the 1784 India Act and the 1813 Charter Acts. *See* KEAY, *supra* note 36, at 393; LINDLEY, *supra* note 12, at 95.

42. KEAY, *supra* note 36, at 9, 393. James Mill (who worked for the company) argued that the trading and "sovereign" functions should be separated. HARRIS, *supra* note 2, at 205-

Under eighteenth century English law, there was still no explicit conception of the corporation as a public or private person. Shares held in a corporation were not considered a protectable property right and there was no distinction between the public or private monopoly. The larger a corporation, the more likely the state would interfere.[43] Shares of corporations of all kinds were held by private shareholders and traded on the stock exchange.[44] The corporation as a legal form for business enterprise gained strength during this period, long predating industrialization.

C. Nineteenth Century Revival

The next wave of overseas trading corporations was in the nineteenth century.[45] The experience of companies such as the British East India Company had by then helped establish the corporate form as the dominant form of business association. The joint-stock company form had proven itself in large part through that great state trading organization. By mid-century, a general power of incorporation was available to joint-stock companies. Fourteen months after the Companies Registration Act of 1844 was enacted, ten times the previous number of joint-stock companies had been provisionally registered.[46]

By the nineteenth century the public/private distinction was crystallizing.[47] Perhaps surprisingly then, it saw a renewed attraction to the corporate form as a method of political and trade expansion. "More than 75 percent of British acquisitions south of the Sahara were acquired by chartered companies."[48] The most ambitious of these was Cecil Rhodes British South Africa Company 1889. The chartered company had already proven itself as a revenue saving method of colonization. By the nineteenth century, there were additional advantages in maintaining "informal" empires. John Westlake described the State trading of enterprises in the 1890s as "mediate sovereigns."[49] Their ambiguous status served the interests of the chartering state well and had the effect of portraying the colonial encounter as an encounter between "equals." Trade was a pure and liberal endeavor

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06. *See also* ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA (1959). For the younger Mill's views, see generally JOHN STUART MILL, WRITINGS ON INDIA (John M. Robson et al. eds., 1963) (1828-71).

43. HARRIS, *supra* note 2, at 113.

44. *Id.* at 114. The trading of corporate shares continued until the passing of the 1844 Registration Act. *Id.*

45. LINDLEY, *supra* note 12, at 99-100; KOSKENNIEMI, *supra* note 29, at 110-12 (placing the "informal empire" of British overseas dominance as spanning the period 1815-1870).

46. HARRIS, *supra* note 2, at 281. Some 1639 companies were provisionally registered under the Registration Incorporation and Regulation of Joint Stock Companies Act of 1844 during that period. *Id.*

47. *See generally* MICHAEL TAGGART, PRIVATE PROPERTY AND ABUSE OF RIGHTS IN VICTORIAN ENGLAND: THE STORY OF EDWARD PICKLES AND THE BRADFORD WATER SUPPLY (2002) (detailing the absence of an abuse of rights doctrine in English tort law). The liberal distinction made in the United States cases of *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) and *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) was not observed in England. HARRIS, *supra* note 2, at 113.

48. KOSKENNIEMI, *supra* note 29, at 117.

49. JOHN WESTLAKE, THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 196-97 (L. Oppenheim ed., 1914).

as compared with the more expensive and already sometimes odious practices of colonization. Consequently, informal empire was often preferred to formal empire.

During this second wave of "colonization by trading company," in the nineteenth century, public *imperium* and private *dominium* had established themselves as separate categories in international law. As a consequence, the use of the corporate form affected how property was conceived within the colonial encounter. Colonial enterprises were not only the "principal engines of [trade] and organisers of the overseas settlements,"[50] they effectively prevented the European law of nations from applying to the colonies. The colonies required different standards since it was not the states themselves that were confronting each other, but rather their corporations. Wars between rival corporations could be waged abroad without necessarily engaging the European powers in hostilities at home.[51] A separate flexible law of nations developed: not a universal law of nations, but a separate French, English, or German colonial law.[52] This prevented transfer to the colonial sphere of the European concept of the nation state, sovereignty, and territorial borders.[53] The concept of natural frontiers, which was central to the European concept of nationhood, would not apply in the colonies.[54]

Because the legal nature of corporations was not determined by international law, but rather by national or colonial law, the status of the different corporations varied. For example, "[t]he French nation was constitutionally prevented from delegating sovereignty to private entities."[55] Such was the disjunction between the law of nations and the law of national corporations, that some international lawyers at the time argued that these corporations should be treated as subjects of international law. The orthodox position that they were merely delegates (however tenuous at times) of their parent states, nevertheless prevailed.[56]

What about the relationships between the European corporations and the indigenous inhabitants? The legal framework tended to portray the encounter as a clash between individuals. A state trading corporation could acquire land and trade from indigenous peoples as if it were a purely private person. Only later when the company's assets were taken over by the state did that transaction cngage legal conceptions of sovereignty. British colonial law recognized minimal occupational rights of the indigenous peoples.[57] These flowed from natural law ideas about universal rights and ideas of the "noble savage." The level of recognition, however, seemed to vary according to the colonizers' perception of the state of "civilization"

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50. GREWE, *supra* note 20, at 298. Grewe puts it strongly when he states, "Their very function was to prevent the transfer of the concept of the state to the non-European world." *Id.* at 302.

51. *Id.* at 303; LINDLEY, *supra* note 12, at 99 ("The British East India Company was certainly a sovereign Power so far as the native states of India were concerned . . . making war . . . with the Portuguese Dutch and French—on occasions when the respective governments in Europe were at peace. . . .").

52 GREWE, *supra* note 20, at 298.

53. *Id.* at 302.

54. *Id.*

55. KOSKENNIEMI, *supra* note 29, at 144.

56. *Id.* at 122. One successful instance of achieving recognition for a corporation was the 1884 recognition by the United States Senate of the Association Internationale du Congo—a state founded by a private individual. *Id.* at 122-23.

57. *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823).

of the indigenous peoples.[58] In most cases, these were recognized only as private rights that fell far short of *imperium* or sovereignty. In many such cases, the rights were so "personalized" and "individualized" that the common law even imposed restrictions on the alienability of land holdings by indigenous peoples.[59] The fate of populations then, depended a great deal on whether they belonged to legally cognizable collectivities. Whether individuals were capable of collective abstract perpetual property holding determined how "public" their existence could be. The joint-stock holders, of course, had long enjoyed such a corporate status by operation of law. Corporations were, relatively at least, more "public" in this sense than many indigenous populations.

While the blurring of *imperium* and *dominum* was to the advantage of the colonizer in the seventeenth century, the distinction between *imperium* and *dominium* was avowedly to the colonizing corporation's advantage in the nineteenth. They could own property as a collectivity and in perpetuity, could avoid entanglement with international territorial principles, and could pretend to equality, as individuals rather than sovereigns, within the encounter.

Formal colonization followed, at which point the state would often take over such land as had been acquired by the corporation and engage notions of *imperium*. The reasons for formalizing empire were many and various and there is not space to go into them here. In sub-Saharan Africa, it became increasingly difficult for trading companies to use their moral suasion to end slavery in the territories.[60] It meant something different for a corporation rather than a state to be engaged in such a dialogue. In other countries, such as New Zealand, formal colonization by England was adopted for the purpose of preempting the claims of European rivals for the territory.[61]

Even when formal colonization was the preferred method, where the colonial encounter was with a state rather than a corporation, and even when formal treaties were entered into, contemporary international lawyers did not view *all* colonized peoples as enjoying the status of "states." Treaties were often considered as merely political agreements calculated to ease transition and compliance and having no legal force. "Treaties" with "ignorant Chiefs" were regarded as incapable of either creating or transferring "sovereignty."[62] European international lawyers viewed such treaties as merely creating private rights that the sovereign should honor.[63]

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58. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 44-45 (1999); *see also* McHugh, *supra* note 18, at 33-34. In India, preexisting government was recognized and the Mughal's consent was sought or inferred. *Id.*

59. *E.g.*, *Johnson*, 21 U.S. at 574.

60. KOSKENNIEMI, *supra* note 29, at 116-21.

61. The French and Americans were potential rivals. *See generally* CLAUDIA ORANGE, AN ILLUSTRATED HISTORY OF THE TREATY OF WAITANGI (1987) (providing history of the treaty).

62. KOSKENNIEMI, *supra* note 29, at 138. *See also* Anghie, *supra* note 58, at 7. In the case of New Zealand, see Wi Parata v. Bishop of Wellington [1877] 3 N.Z.L.R. 72 (holding that so far as it purported to cede sovereignty over New Zealand, the Treaty of Waitangi 1840 was "a simple nullity").

63. KOSKENNIEMI, *supra* note 29, at 138 (citing Westlake and Rolin). *See also* Joravarsingji v. Sec'y of State for India, 51 Ind. App. 357 (P.C. 1924); Oyekan v. Adele, 2 All E.R. 785 (P.C. 1957).

Only one side of this transaction had sufficient legal personality to treat, or to enjoy, sovereignty.[64]

In New Zealand, Maori post-1840[65] were considered without capacity to alienate property to anyone but the colonizing State. This was both the common law position and given effect by treaty.[66] Accordingly, the colonial government bought land cheaply and sold off land to settlers for vast profits. In this way, the Maori people effectively funded settlement.[67]

II. MODERN RELEVANCE

This is a rich history that requires retelling because most modern international law and company law texts tend to forget about the role of the trading enterprise. Are there broader lessons that we can draw from this history for today?

A. From a Colonized Peoples Perspective:

The ideology and rhetoric of the "new" world order shares much with the ideology of the nineteenth century. Britain's choice of contact via trading corporations rather than direct imperial force in the nineteenth century was based on liberal values and a belief in the value of free trade—just as it is today. From a colonized peoples' point of view it did not, and still does not, so much matter whether they are engaged in an encounter between states or transnational corporations because the effects of such encounters have been, and still are, pretty much the same. This is not because concepts of public or private do not matter but rather because, as they have evolved, they have been applied to the colonized peoples' disadvantage. The new world economic order is built on this colonial legacy.

Conceptions about the public and private aspects of property have been central to the experience of colonization by the colonized. Both the fusion of *imperium* and *dominium* (sovereignty and ownership) in the early seventeenth century, and the separation of them in the nineteenth century served the colonizers. Ownership and sovereignty (or governance) are *now* treated differently again by the international economic order. After having perhaps only recently acquired nation state status or sovereignty, new nations are being "encouraged" to privatize ownership of strategic national assets to relinquish the control and power that comes from

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64. The requirement of the "intention to create legal relations" was not declared in contract law until the nineteenth century. *See* J. BEATSON, ANSON'S LAW OF CONTRACT 70 n.271 (27th ed. 1998). Presumably the more exacting legal formalities for "international contracts" such as treaties than for domestic contractual arrangements, during earlier times, effectuated the conduct of trade.

65. The Treaty of Waitangi refers in the English text to individual Chiefs, and in the Maori text to Chiefs and their families. Treaty of Waitangi, Feb. 6, 1840, Eng.-N.Z., *at* http://www.waitangi-tribunal.govt.nz/about/treatyofwaitangi/treatyofwaitangi.asp (English Text) (last visited Jan. 28, 2004); *and* http://www.waitangi-tribunal.govt.nz/about/treatyof waitangi/treatyofwaitangimaori.asp (Maori Text) (last visited Jan. 28, 2004).

66. Treaty of Waitangi, *supra* note 65, art. II. (English Text) *See also* R. v. Symonds [1847] N.Z.P.C.C. 387 (holding that at common law the State is the only source of private title).

67. Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand*, 34 LAW & SOC'Y REV. 47, 47 (2000).

dominium. At the same time, *imperium* or sovereignty is increasingly being subordinated to *dominium*. There are prohibitions on nationalization of private capital or assets.[68] Deregulation is being urged. Pressure is being brought to bear to allow foreign capital to flow readily into (and out of) their territory.[69] That pressure comes through public and mixed public and private means—just as it always has. Sovereignty does not mean for new nations what it used to mean for those in the old European family of nations. While the meanings that we are prepared to give contemporary encounters may be different, the experience by the developing world of the transnational corporation may be very much the same as it has always been.

The formal equality presently enjoyed by new entrants to the family of nations has at its background this colonial history. The power to enter legally enforceable treaties now central to the world order was denied colonized peoples at the most critical point of encounter. Even within the current system of formal equality, the experience of multilateralism by some states continues to be very different from that experienced by others.

For colonized peoples, trading corporations and the state may be interchangeable in terms of their effects if not in the meanings attributed to such encounters and the legal categories concerned. As Alexandrowicz says:

> [T]he cooperation of companies of merchants with governments in the international field offered an early example of the extension of the law of nations from States to non-state entities—a significant anticipation of present day developments in international law which tends to abandon the character of an exclusively inter-State legal system.[70]

Corporations, then as now, were not incidental to international relationships but rather key drivers of such relationships. The public/private distinction has been far from fixed throughout this period. The very "publicness" of corporations once gave them a relative advantage over individualized peoples. Now claims to the very "privateness" of corporations are used to resist the aims of "new" governments.

For most of the rest of us, the narratives that this Article has offered bear little or no relevance to how we currently think about corporations and their relationships to states. For well over a century, we have ceased to regard corporate status as a privilege derived from the state. To achieve corporate identity, all that is required is to meet formal registration requirements—anywhere in the world. How quaint it would be to suggest to a corporate lawyer that she is studying the law of the King! Monopoly status is now recognized as "a" if not "the" main problem with corporations.[71] Rather than exercising sovereign powers, or powers derived from the state, we tend to think of corporations (and even transnational corporations) as

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68. PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 502-14 (1995). *See also* David Schneiderman, *NAFTA's Taking Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 501 (1996) (discussing NAFTA prohibitions on nationalization).

69. *See generally* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

70. C.H. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES 28 (1967).

71. Adam Smith disapproved of the joint company form, and the East India Company in particular, precisely because he associated them with monopoly power. HARRIS, *supra* note 2, at 205. He thought that the monopoly joint stock form *was* suitable in limited areas, for example, in banking, insurance, canals, and water supplies. *Id.* at 210.

having the rights, powers, and duties of natural persons (together, of course, with limited liability).

B. Another Lost Narrative

Why, then, this seeming disjuncture between the narrative and modern corporate law? Transnational corporations such as the British East India Company sometimes rate a mention as progenitors of the modern corporation in the literature, but most contemporary histories of the corporate form tend to ignore or marginalize them for the very reason that they seem to contemporary eyes to have mixed public and private motives—to be some kind of "special case." Most transnational corporations were primarily instruments for private profit and for trade. Their charters also gave them other goals and motives (and the sovereign powers with which to fulfill these). Having these mixed motives almost by definition seems to have taken them out of the narrative of the historical development of the business enterprise. This Article suggests that the mixture of functions was not anomalous but rather central for that period, and one of the reasons for using the corporate legal form in the first instance. Indeed, every corporation was required to make a case to Parliament or the Crown that it fulfilled a "public purpose" in order to receive the privilege of incorporation.[72]

These days, corporations with mixed public and private motives or characteristics enjoy an aberrant and obscure status. State-owned or State-controlled corporations are more abundant than we tend to think—even in the United States.[73] Banks are still in a special category requiring state and federal charters—just as Adam Smith originally recommended. With those special charters come special obligations. Characterizing these mixed business forms as hybrids, or anomalous or special cases has had the effect of enhancing the "private" status of all other business corporates: "real" corporations have no similar connection to states or public purposes. The dominant contemporary view that only the aberrant or suspect corporations are strongly connected to states is ahistorical if nothing else. "Public" and "private" were never fixed categories.

The idea that corporations generally are creations of the state (the concession theory) is largely suppressed today by the more popular explanatory power of law and economics. The scholars of law and economics have tended to regard contract as the basis of the corporation—and the other incidents of incorporation as devices to reduce transaction costs.[74] Economic historians have found evidence that unincorporated associations over time acquired many of the advantages of formal

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72. For the parallel notion of "public purpose" protection in expropriation law, see Michael Taggart, *Expropriation, Public Purpose and the Constitution*, *in* THE GOLDEN METWAND AND THE CROOKED CORD: ESSAYS ON PUBLIC LAW IN HONOUR OF SIR WILLIAM WADE 91-112 (Christopher Forsyth & Ivan Hare eds., 1998).

73. *See* Jack M. Beerman, *The Reach of Administrative Law in the United States*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 171 (Michael Taggart ed., 1997); A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543.

74. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 4-8; Oliver E. Williamson, *Contract Analysis: The Transaction Cost Approach*, *in* THE ECONOMIC APPROACH TO LAW 39 (Paul Burrows & Cento G. Velanovski eds., 1981).

incorporation—partly due (in Britain) to the eventual capitulation by the common law courts to the needs of business enterprise.[75]

These arguments are partial and not entirely convincing. As a legal fiction, the contractual explanation for the corporation is at least as artificial as the idea that the corporation is the creation of states. The notion that a corporation is the aggregation of contractual agreements between each and every one of its members stretches credence—particularly given the number of corporate shareholders that now exist. The "contractual" explanation is particularly blind to an organization's size.

More fundamentally, such contractarian explanations tend to assume that law responds to and reflects economic and political reality. If the law so accurately reflects economic reality, why is it that subsidiaries are conceived as separate legal entities when one would consider them part of a single economic entity if viewed as a purely economic phenomenon? By this fragmentation, economic entities are able to enjoy tax advantages and isolate liabilities. Each group member is responsible for its own debts even if its low level of capitalization is explicable only in terms of its relationship with the parent company. Group members can sometimes even take advantage of their separate personality by gaining priority against other creditors in the event of the insolvency of a subsidiary. This looks quite different from what natural persons or even collections of natural persons can do.

Legal personality, as this narrative has portrayed it, is not a wholly autonomous legal conception but neither is it completely responsive to social or economic factors. It is the product of positive and not natural law—though sometimes natural law arguments have been successfully used to inform its incidents. Ultimately the law decides who gets legal personality and status: there is nothing spontaneous about it. The history of the corporate form in both its public and private incarnations tells a much more complicated story of internal and external resistance to new legal forms, instrumentalism, and exploitation. Not all collectivities that we would regard as existing as a matter of social, political, or economic fact have received legal personality.

In international law too, some peoples have enjoyed legal personality as collectivities, while others have not. Depending on the circumstances, the absence of legal personality can be a marker of both power and relative powerlessness. In fact, some collectivities, which exhibit enormous power, do not enjoy legal status. The WTO, for example, has no legal personality (as protestors found when they attempted to sue it). Lack of legal status can render a group above the law—at least as far as it purports to act as a unified autonomous entity.[76] At the same time, as these new sites of power are emerging, nation states are being required to submit to international fora and rules as they have never had to before. Greater obligations

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75. *See* HARRIS, *supra* note 2; Gary M. Anderson & Robert D. Tollison, *The Myth of the Corporation as a Creation of the State*, 3 INT'L REV. L. & ECON. 107 (1983); Henry N. Butler, *General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Processes*, 6 INT'L REV. L. & ECON. 169 (1986).

76. For an approach of administrative law that does not require a body to have legal personality for it to be held accountable, see *Regina v. Panel on Take-Overs and Mergers*, 1987 Q.B. 815 (C.A.). For a criticism of international law's slowness to recognize the challenges presented by mixed state and non-state actors, see Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L. L. 435 (1997).

towards non-state "persons" and fewer freedoms now attach to a state's international juristic personhood.

The contractual explanation will not do either as an implicit point of distinction between public and private power. We can find political philosophers, such as John Locke, who propose just such a contractual rationale for the state itself. States and corporations have always been rivals—and have always borne uncomfortable similarities to each other. Hobbes famously and pejoratively described the relationship of corporations to states—as "lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a natruall man."[77] The narrative shows that states indeed have made corporations (lesser commonwealths) but in a different sense corporations have very much helped to make or create states. Twiss in 1884 described it thus: "Colonization by private entities has been the predominant form of western expansion since the sixteenth century and for this purpose chartered companies and philanthropic associations had often been vested with sovereign rights."[78] The ascendancy of the corporation did not bring the demise of the European family of nations, but rather their expansion.

Modern day language and concepts attempt to distance the relationship between corporations and states. The public/private distinction, understood in its modern sense, effects this distance, as do the basic units of international law, and the contractual explanation for business enterprise. We have not, however, completely banished the connection between states and corporations. We still talk about corporations being British, New Zealand or American—though it is not clear what we mean by this. Are we referring to natural persons shareholders? That cannot be completely the case because capital moves so freely that shareholders may be anywhere. Are we talking about the place of incorporation? Again sometimes, but often the place of incorporation is little more than happenstance. Are we talking about communities of interests and national influence? If we are, it is not clear whether the "problem" is that corporations are too partial to certain nations or interests or not partial enough. Even though the contractual explanation for the corporation is dominant we still seem to understand elements of the concession theory even if we cannot fully articulate them. The natural persons and the artificial persons are often very hard to tell apart.

CONCLUSION

None of this gives us any direct assistance on the question of how transnational corporations should be regulated today. The hope is that the telling of this history will remind us all how important our starting points are. If we start with a contractual explanation for the corporation then we will tend to analogize a company's rights and, more importantly its obligations, to those of a natural person. If we start with the notion that corporations are created by states or by the operation of law, that they are abstract persons, then we will be more likely to find a space at least to talk about what a corporation's obligations should be.

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77. THOMAS HOBBES, THE LEVIATHAN 177 (Prometheus Books 1988) (1651).

78. KOSKENNIEMI, *supra* note 29, at 143.