

Public-Private Concord through Divided Sovereignty: Reframing *societas* for International Law

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Abstract

Grotius is the father of modern international law. The indivisibility of sovereignty was the *sine qua non* of early-modern conceptual innovation in law. Both statements are axiomatic in the mainstream literature of the last two centuries. Both are profoundly and interestingly wrong. This article shows that Grotius' systematisation of public and international law involved defining corporations as potentially (and the VOC actually) integral to reason of state, and able to bear and exercise marks of sovereignty under certain conditions. For Grotius, some corporations were not subsumed under the state's legal authority, nor were they hybrid 'company-states'. Instead, states and such corporations, able and forced to cooperate, fell under dovetailing natural, international, and municipal systems of law. The article reexamines Grotius' notion of international trade, public debt, private corporation, and public and private war through the reassembled prism of these dovetailing laws and the category of *societas* that underpins Grotian associations. It is argued that although formulated around the new East India trade, the actual reality of legal pluralism was available to Grotius in the Dutch trade experience of the sixteenth century.

Keywords

Hugo Grotius – sovereignty – reason of state – international trade – *societas*

1 Introduction

This article aims to trace and explain a misunderstanding about the historical significance of the legal writings of Hugo Grotius that follows on the otherwise correct observation that he is not the father of modern international law. We undertake this by signaling the importance of divided sovereignty in his understanding of global order. We also wish to provide an explanation for this element in Grotius' attempts to come to grips with the legal pluralism of his time.¹ In this explanation the 1604–5 text *De jure praedae commentarius* [hereafter *IPC*] plays an important role, because it constitutes a clear-cut case of legal pluralism. Yet, in trying to explain the conceptual innovations in that text, it is important to also look at the European world Grotius was more familiar with than the one he only knew from hearsay, i.e. that of East Asia. Grotius was familiar with trade and trading in Western Europe as it had developed out of the Hansa system,² in which legal order and enforcement has allowed trade patterns to develop that thrived on the understanding that *pacta sunt servanda* applied across borders and in foreign jurisdictions, but also that where justice is not served, reprisal is justified. With the caveat of course: whose justice?

The article has four parts. First, we briefly survey Grotius' status in the history of international law. In section 2 the various actors in international law are introduced, both private and public, and the inter-polity law that applies to them. In section 3 we look more closely at the interplay of private and public, while in the concluding section we provide a detailed comparison of chapter XII of *IPC* with *Mare liberum*, and with *De iure belli ac pacis* [hereafter *IBP*].

1 Cf. Benton, Lauren. 'Historical Perspectives on Legal Pluralism'. *Hague Journal on the Rule of Law* 3(1) (2011), 57–69.

2 'Most historians still consider the Baltic trade in bulk commodities, among which grain figures prominently, to have been the mainspring or at least an essential condition for the fact that the Dutch were able to acquire hegemony in world trade in the seventeenth century'. Tielhof, Milja van. *The 'Mother of All Trades': The Baltic Grain Trade in Amsterdam from the Late 16th to the Early 19th Century* (Leiden: Brill, 2002), 3.

There are several reasons why Grotius is commonly called the father of modern international law (the mother's identity is unknown).³ They include his systematisation of doctrine, secularisation of legal foundations, iconic formulation of the right to free trade, and the institutional heritage from the first chair in public international law, created in Heidelberg to expound Grotius, through international organisations after both world wars republishing Grotius with extensive commentaries to signal a new order, to current invocations of his authority in discussions concerning the juridification of space, subatomic entities, emerging practices in maritime law, and the function of international and public law in the anthropocene, when human activity structured by modern states is the chief variable in environmental change.⁴ There are many

3 See i. m. a. Madison, James. *An Examination of the British Doctrine, a Neutral Trade Not Open in Time of Peace* (London: Ellerton & Byworth, 1806), 7; Carnegie, Andrew. *A Rectorial Address Delivered to the Students in the University of St. Andrews, 17th October 1905* (St. Andrews: Editing Committee of the Students' Representative Council of St. Andrews University, 1905), 17–18; Boutros-Ghali, Boutros. 'A Grotian Moment'. *Fordham International Law Journal* 18(59) (1994), 1609–1616.

4 One such moment came in 1906, when James Scott Brown proposed that the Carnegie Institution, later the Carnegie Endowment for International Peace, launch an ambitious series of editions of the classic works of international law. See Appendix C to Grotius, *The Freedom of the Seas: Or, the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (Oxford: Oxford University Press, 1916). After the First World War broke out, a Grotius Society was formed in London in 1915 'to afford facilities for discussion of the Laws of War and Peace, and for interchange of opinions regarding their operation, and to make suggestions for their reform, and generally to advance the study of international law.' A foundation with similar aims operated in Leiden from 1916 to 1947. It has a few personal ties to the current Grotiana Foundation, running since 1980, which also blends historical interest in Grotius with international law advocacy. Another such moment was the end of the Second World War. Hersch Lauterpacht's famous 1946 article, 'The Grotian Tradition in International Law,' begins with the observation that the tercentenary of Grotius' death in August 1945 has 'passed almost unnoticed' (a bit unfair, as he must have known that the London-based Grotius Society, now part of the British Institute of International and Comparative Law, published a set of commemorative essays.) Lauterpacht's explanation is the failure of international law to stop the war, or to serve as the foundation of a plausible new international system. A very strange Grotius Stiftung operated in Munich from 1922 to 1985.

To our knowledge, no comprehensive outline of Grotius' influence exists. Cf. Kempe, Michael. 'Der Anfang eines Mythos. Zum grotianischen Natur- und Völkerrecht in der europäischen Aufklärung,' in *Staat bei Hugo Grotius*, eds. Norbert Konegen and Peter Nitschke (Baden-Baden: Nomos, 2005), 139–157. Critical reviews tend to ignore the early, defining periods, starting with the decision to create the Heidelberg chair. See, e.g., Martine Julia Van Ittersum seeking to debunk 'the Grotius Delusion' by focusing on the 1899 Hague Peace Conference, Van Ittersum, Martine Julia. 'Hugo Grotius: The Making of a Founding Father of International Law,' in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 82–100. More focused historical studies can examine early intellectual reception while ignoring the institutionalisation

reasons and ways to dispute Grotius' meaning, originality and impact, but his iconic status remains unquestionably embedded in legal history and practice.

Symbols like Grotius emerge and endure for a reason. They capture and simplify the essence of a thing. Yet the simplification required to form symbols often involves a loss of understanding. Grotius' *De iure belli ac pacis* (IBP) is commonly regarded as the beginning of modern public international law, while *Mare liberum* has come to be known as a landmark in genealogies of capitalism, liberalism, imperialism, and a few -isms besides.⁵ Grotius is also said to have formulated both the modern notion of state sovereignty, which has an irreducible economic element, and 'individual sovereignty', from which not only the state's authority, but also the principles of international law follow.⁶

and professionalisation of his reputation as the father of modern international law. Cf. Grunert, Frank. 'The Reception of Hugo Grotius's *De iure belli ac pacis* in the Early German Enlightenment', in *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment*, eds. Timothy Hochstrasser and Peter Schröder (Berlin: Springer, 2003), 89–105; Aure, Andreas H. *The Right to Wage War (Jus ad Bellum): The German Reception of Grotius 50 Years after De Iure Belli ac Pacis* (Berlin: Berliner Wissenschafts-Verlag, 2015).

Regarding maritime law, Mr. Lefeber, Deputy Legal Adviser to the Dutch Ministry of Foreign Affairs, invoked Grotius' authority at the International Tribunal for the Law of the Sea in the *Arctic Sunrise* case in a manner consistent with this paper's historical thesis that the right to free trade and navigation has been a self-contradictory and nonetheless effective rhetorical device ever since Grotius published *Mare liberum*: 'From the time its native son, Hugo Grotius, first declared that the freedom of the seas was the right of all, the Netherlands has defended the freedom of navigation and other freedoms of the seas, as well as uses related to these freedoms. It does so today.' 6 Nov. 2013. Cf. De Brabandere, Eric. 'OAO Neftyanaya Kompaniya Yukos v. Russia (Eur. Ct. H.R.)'. *International Legal Materials* 55(3) (2016), 474–495.

- 5 For a survey of Grotius' place in genealogies of liberalism up to around 2006 see Parry, John T. 'What is the Grotian Tradition in International Law?'. *University of Pennsylvania Journal of International Law* 35(2) (2014), 299–377. For further iterations see, e.g., Miéville, China. *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill, 2005); Wilson, Eric. *The Savage Republic* (Leiden: Martinus Nijhoff, 2008); Van Ittersum, Martine Julia. 'Dating the Manuscript of *De Jure Praedae* (1604–1608): What Watermarks, Foliation and Quire Divisions Can Tell Us about Hugo Grotius' Development as a Natural Rights and Natural Law Theorist'. *History of European Ideas* 35(2) (2009), 125–193, 142–43; Haskell, John D. 'Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial'. *Emory International Law Review* 25(1) (2011), 269–298; Koskenniemi, Martti. 'International Law and the Emergence of Mercantile Capitalism: Grotius to Smith', in *The Roots of International Law*, eds. Pierre-Marie Dupuy and Vincent Chetail (Leiden: Martinus Nijhoff, 2014), 1–37, esp. 21–22; Rossi, Christopher R. *Sovereignty and Territorial Temptation: The Grotian Tendency* (Cambridge: Cambridge University Press, 2017), 15 and *passim*.
- 6 Remec, Peter P. *The Position of the Individual in International Law According to Grotius and Vattel* (Leiden: Martinus Nijhoff, 1960); Geddert, Jeremy S. 'Natural Rights and History: Hugo Grotius's Modern Translation of Aristotle', in *Concepts of Nature: Ancient and Modern*, eds. R. J. Snell and Steven F. McGuire (Lanham: Lexington Books, 2016), 71–90.

Despite his undeniable impact on modern international law, it is seldom noted that Grotius often and emphatically denied that sovereignty was indivisible. His theory accommodated a modular and adjustable division of sovereignty among individuals with inalienable natural rights, private corporations serving the public interest, and the government. The modern-world problems arising from insufficiently understood economic aspects of sovereignty can be fruitfully reexamined in a Grotian model of divisible sovereignty, especially since it exerted a now forgotten influence throughout the evolution of international and constitutional law.

2 Commercial Imperialism and Exceptionalism

We have to begin with Grotius' criteria for a legally recognisable state. Justice consists of protecting individual property, broadly conceived as a concomitant of liberty.⁷ The state is a social unit smaller than the community of humankind, and it is tied to a particular location, sufficient for collective self-defense, and established by an explicit or tacit pact that manifests the wills of its individual members. The state has no superior, therefore it must judge in its own cases, including disputes with citizens and other states. States are thus distinguished from other entities by their juridical self-sufficiency.⁸ In terms of administering justice, Grotius presents republics and the universal society of humankind as both analogous and complementary. However, states are not self-sufficient in any material sense: they are providentially designed to be interdependent, and to pacify and civilise one another through necessary reiterated interaction.⁹ Their survival depends on exchanging goods through international trade – in fact commerce is possible without property, and states are coeval not with property, as most legal traditions suggest, but with commerce.¹⁰ Though less

7 While Grotius does not state the common law principle that individual liberty is predicated on the legal possession of one's body, he cites Vazquez and Aristotle's *Art of Rhetoric* to equate ownership and liberty. Et quod *Libertas* in actionibus idem est *Dominium* in rebus (Hamaker 18). Grotius, like Fortescue, Locke, Blackstone and others, also holds that individuals have an inalienable natural right to their body because the use of one's body is inseparable from self-defense (e.g. IPC VI.92). However, unlike in common law, self-defense is a natural right distinct from property in Grotius, and he attributes dominion over human bodies to God (e.g. IPC VIII.154). This allows Grotius to argue that self-defense historically and conceptually precedes property, see IBP I.II.1.3.184.

8 Grotius, IPC Prolegomena 43, 47. In *De imperio*, Grotius cites Vitoria as the authority for this position. *De imperio* 1.14.181.

9 Grotius, *Mare liberum* I.10, VIII.49–50. IBP II.II.xviii.450.

10 Grotius, IPC XII.319.

outspoken in *De jure praedae commentarius* (IPC), in IBP Grotius adds that every state also needs military alliances from time to time.

Under some circumstances, a private corporation, such as the VOC, becomes the third element of the analogy between states and the universal society of humankind. Collective interests take precedence over individual interests partly because the former encompass the latter, and partly because groups are more effective, if only for the simple reason that without political obligation social decision-making is a fiction. The cargo can only be saved if the ship is saved and, from the perspective of international law, the private cannot be separated from the public.¹¹ Grotius argues that this is a particular application of the principle that the general category trumps the particular.¹² While in IPC Grotius recommends the policy of rewarding private parties that capture prizes on the state's behalf, in IBP this becomes a matter of justice, in line with the notion that the *societas perfecta* is the just society.¹³

Given the strong connection Grotius draws between individual property and the justice that self-sufficient states administer and guarantee, it is unsurprising that in IPC and *Mare liberum* he justifies the capture of the Santa Catarina on the basis that the Iberian powers wage war on the Dutch, and the agreement to surrender property when losing to one's opponent is implied in every war. More puzzlingly, Grotius presents this principle of warfare as analogous to a litigant seeking to recover a debt *and* legal costs, with debt resembling reparations and legal costs being the costs of war, perhaps as an echo of the idea, long held in international law, that since the outcome of war must reflect God's judgement, victors are not only able but right to seize property. In addition to rightfully collecting reparations for damages suffered, the cost of war that the Dutch can recover include the opportunity cost of profits they would have earned from peaceful trade.

With regard to the public law regulating the relationship between private individuals and corporations on the one hand, and the state on the other, states are entitled to a share of enemy spoils because they incur great and ongoing expenses while they administer and guarantee justice.¹⁴ According

11 Grotius, IPC Prolegomena 35–7. On state above individual interests see also IPC VI.93. Conversely, Holland's independence and right to launch public wars is shown by its self-sufficiency even when it was nominally under a prince, see IPC XIII.392–3. IBP I.I.vi.140–1 also explains that the needs of the state take precedence, but the formulation is that citizens owe the state above all creditors, instead of IPC's formula that state interests contain individual interests.

12 Grotius, IPC Prolegomena 38–9.

13 Grotius, IBP III.VI.xxiv.1352–4, III.XVIII.ii.1530.

14 Grotius, IPC IV.75–7.

to Grotius, the entire civil and canon law traditions that describe a two-step process, whereby the private agent who captures enemy property becomes its owner, and is then in turn obliged to share spoils with the state, are mistaken. The 'state should be given preference over other claimants' both because it extends unceasing protection, and because by public law the treasury always has priority in cases of high treason – which, Grotius claims, is the international law analogy for an attack by another state, which thereby commits high treason against the universal society of humankind.¹⁵

By public law, private individuals or groups that conduct or prepare for war without public permission are guilty of high treason.¹⁶ The possibility of just private war is therefore narrow – but Grotius emphatically resists those who ascribe to the state an exclusive power to punish.¹⁷ To explain why, he develops a theory of the state of nature in which the right to punish is a natural right, while civil laws are artificial; and humankind – singular individuals as much as the universal society of humankind in general – is the natural unit God created, while states depend on human pacts. Grotius concludes that private wars are just 'in so far as judicial recourse is lacking'. By contrast, public wars can be just in the same situation, or as the result of exhausting judicial processes, with the obligation to resume obedience to international laws as soon as possible.¹⁸ Given that just private wars must be permitted by the state (otherwise they are treason) and can only take place when municipal and international law fail, it now becomes possible to conceptualise private corporations as the state's agent in extending the domain of international law. According to Grotius, the Dutch are exceptionally well-suited to expand the sphere of international law

15 Grotius, *IPC* X.207. Citizens may not even recover compensation if the state's claim exhausts the spoils, see *IPC* X.230. For historical evidence that spoils are necessarily public business, see *IPC* X.223–6.

16 Grotius, *IPC* VIII.128.

17 Grotius, *IPC* VIII.133.

18 Grotius, *IPC* VIII.133–143, X.197–8. It is precisely their self-sufficient judicial authority that makes states capable of justly enforcing international law. *IBP* II.XX.xi.1.1021 the sovereign has 'a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, which at first, as we have said, was in every particular Person, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have an Authority over others, but as they are in Subjection to none. For, as for others, their Subjection has taken from them this Right. Nay, it is so much more honourable, to revenge other Peoples Injuries rather than their own, by as much as it is more to be feared, lest out of a Sense of their own Sufferings, they either exceed the just Measure of Punishment, or, at least, prosecute their Revenge with Malice.'

through trade 'from which no one suffers a loss'.¹⁹ For this reason and more in general, the Dutch are also exceptional because as champions of international law they embody the interest of all humanity.²⁰ Unlike Grotius' account of Iberian imperialism, it is this state-sanctioned corporate mission to spread the rule of international law, and not the extension of the domain of municipal law, that defines Grotian imperialism.

This commercial exceptionalism has its basis in the very idea of *societas* that Grotius had developed in the *Parallellon*: any form of human association that expresses shared interests and effective co-ordination (*concordia*) is a *societas*. If the universal society of humankind is anything, it is justice, and violations of justice produce injustice to be corrected by the perpetrator, most likely on the demand of the victim of the injustice. If that does not happen, the cause for a just war is at hand. Small *societates* are cases of successful patterns of human interaction – institutions – in which justice is served, so to say. This is no heaven on earth, but justice in a certain respect: the ectype of God's justice (the archetype).

Despite limiting private just wars by subsuming them under state interests, Grotius, unlike Hobbes, preserves the formal right to initiate and wage war for individuals even after they joined a state. Yet this is not to say that private and public wars are separate. Only states can wage public war, though private wars can become public through a domestic judicial process.²¹ Even though he retains the international law category of private just war, in order to condemn Iberian corporate and state actions and to justify their Dutch counterparts, Grotius gradually modifies the separation of private and public wars to a point where private wars inevitably become a public affair, and private agents can pursue just wars only as representatives of the state (and conversely, every private agent bears responsibility for their compatriots' and state's actions).²²

Grotius prepares the ground for this crucial move by introducing the criterion that for a war to be just, it must be initiated by the rational will of an efficient agent that may use subordinate agents as instruments of its will. Obedience to this will does not excuse the subordinate agent from responsibility, since it is under a moral and legal obligation to refuse obedience if its own reason rebels against a command. However, magistrates are experts in politics,

19 Grotius, IPC XI.247–8, 293.

20 Grotius, IPC VI.93–4, XI.247–8, XV.483. *Mare liberum* XII.55, XIII.58. Cf. *Arctic Sunrise* statement, note 4 above.

21 Grotius, IPC VI.96–7.

22 Grotius' argumentative and rhetorical strategy in narrowing the scope of private war is instructively compared with Hobbes's both in how the two strategies unfold, and where their end-points differ.

and given individual fallibility, the correct stance of private citizens and corporations is epistemic humility and the strongest possible presumption in favour of the magistrates' judgment, without relinquishing collective and individual responsibility for implementing magisterial commands.²³

3 Reconceptualising Sovereignty around Trade

A salient feature that emerges from the above is that unlike for instance regimes of armed neutrality, Grotian international law at its core refuses to distinguish between economic activity directly engaged in war, and activity that does not. States benefit from their citizens' peaceful private economic activity as much as from privateering, international trade competition, or manufacturing and trading goods that are traditionally associated with war, such as timber, hemp, tar, gunpowder, and similar strategic items. Subjects, 'even those who do not themselves serve as soldiers, impede our efforts by means of their resources, when they supply the revenue used in the procurement of those things which imperil our lives ...', and 'there is no individual among the enemy who does not harm us with his possessions, even though he may be most unwilling to do so.' The license to target all private economic activity during war dovetails with the principle that there are no innocents in war, since individuals can withhold consent from their magistrates if their conscience tells them to, and not doing so constitutes authorisation and grounds for joint responsibility.²⁴

23 Grotius, *IPC* VII.114–22, VIII.155–6, 174, 181, XII.377–9. This is particularly the case from the perspective of international law, which cares less about the relationship between private and public parties of the same state than about relationship between states. Hostile acts by private parties become interstate injuries if the offending private party's state fails to make swift reparations. See *IPC* VIII.158.

24 Grotius, *IPC* VIII.165–171, quotations from 165–6; also *IPC* XI.249, XV.492. Also *IPC* IV.70: 'Thus all enemy possessions are so many instruments prepared for our destruction; that is to say, through them weapons are provided, armies are maintained, the innocent are stricken down. It is no less necessary to take away these possessions, wresting them from the enemy, than it is to wrest the sword from a madman.' For the same reason, citizens' obligation to share the burden of public debt outweighs their natural right to join another state: *IBP* II.V.xxiv.2.553–4. In *IBP* III.II, however, this turns out to be due to customary international law, not primary international law or natural law; while in *IBP* III.XIV.viii.2.1496, we learn that this obligation does not extend to children yet unborn, and that the state must reimburse citizens whose property had to be sacrificed to attain peace (*IBP* III.XX.vii.1556). Public debt even survives a change in constitution: *IBP* II.IX.viii.3.673. So do interstate treaties: *IBP* II.XVI.xvi.i.865.

This is also why the distinction between soldiers and sailors disappears in international law.²⁵

Grotius thus establishes the unity of private and public interest and responsibility especially in international law. In this sense, war restores primary international law and obliterates distinctions between public and private property, which were introduced through the variable and evolving custom of nations.²⁶ Trade is an integral part of modern reason of state, and a lawful instrument of war. Accordingly, even though monopolies in general violate natural law, reason of state justifies granting commercial monopolies to select corporations, such as the VOC, that can serve as the state's instrument.²⁷ Moreover, the Dutch should not merely trade with Iberian powers but must seek to render them dependent on Dutch trade, while the Dutch government should treat Iberian private merchants as agents of their state.²⁸

A special case under this concord of public and private interest is when the state, which always has the right to punish private and public injuries inflicted by other states and/or their citizens, delegates the right to administer punishment to a private corporation. At maximum, the state and private entities join their resources and agency in administering punishment.²⁹ At minimum, the juridically self-sufficient state creates the conditions in which private citizens and corporations can function, and delegates to them the right to administer punishment for injury that was originally committed against the same private citizens or corporations – or even against different ones. When a Spanish or Portuguese private or public entity injures a Dutch private entity, *any other* Dutch private entity can exact punishment in compliance with international law because the right to punish accrues to the Dutch public authority, which can decide to delegate its exercise in turn.

One might see these considerations of the right of punishment as a reformulation of the long-standing practices established among the trading cities of the Hansa, where all the merchants of one city were considered good prize

25 Grotius, IPC XIII.428–9.

26 Grotius, IPC XII.315–6. Property arose from war: IPC XV.486, IBP III.VI.ii.4.1319.

27 Grotius, IPC XV.466, IBP II.XII.xvi.749–50. To argue that the VOC can exact punishment in the name of the Dutch republic because it was explicitly commissioned to do so is not to say that they could not attack Portuguese ships without such a commission. IBP II.XVII.xx.1.894 points out that in times of war, the license to take enemy ships as prizes can be implied.

28 Grotius, IPC XV.489–91.

29 The VOC expands Dutch interests at its private expense, see IPC XV.478, 48–5. Grotius' 4 March, 1606 petition on behalf of the VOC for Dutch state support, see IPC 548–52. Note that in this petition, and in the proposed scheme for an imperial public-private partnership, expenses for war and trade are to be kept strictly separate.

in case one of them had failed to perform his obligations, *provided* the city of origin of the offended merchant supported such actions by issuing a letter of marque.³⁰ The most intriguing aspect of this practice is that such support would only be given if the city of the offending merchant refused to bring this merchant to court and also otherwise the two cities could not come to an arrangement. That is to say: cities were using their own and their opponent's legal system to navigate a route through the litigation between two merchants, *in extremis* leading to a merchant war along the trade routes. The presumption of all this of course was a basic agreement on the right of trade. And it is also an illustration of the principle that where justice can not be found, war enters; or, conversely, as long as the law courts admit a case, war should not be waged. In this connection it is not irrelevant to point out that the Admiralty of Amsterdam was established in 1586 when Amsterdam started to claim a central position within the Hansa trade system (and eventually this Admiralty was to be the court that dealt with the Santa Catarina case twenty years later).³¹ A poignant illustration of the principle is in the letter that the Hanseatic cities of Deventer, Kampen and Zwolle sent to the master of the Teutonic Order of Livonia who had taken up a case of one of his knights, Casper van Munster, announcing his intention to allow a letter of marque to the said knight against the three cities. They replied that if this Casper believes to have a remedy against them, they are perfectly willing to submit themselves in this case to the court of justice of their lord, but that von Brüggeneu 'should not allow Casper the right of confiscation, as one should not allow reprisals, unless in case of justice refused'³² Rather than inventing a new theory from a new reality,

30 For the context, see Baur, Kilian. 'Eigeninitiative und Diplomatie: Die Vertretung individueller Interessen und die "hansischen Außenbeziehungen" im Spätmittelalter', in *Grenzüberschreitende institutionalisierte Zusammenarbeit von der Antike bis zum Gegenwart*, eds. Christian Henrich-Franke, Claudia Hiepel, Guido Thiemeyer and Henning Türk (Baden-Baden: Nomos, 2019), 243–266; Gelderblom, Oscar. *Cities of Commerce. The Institutional Foundations of International Trade in the Low Countries, 1250–1650* (Princeton: Princeton University Press, 2013).

31 See, i. a., Lesger, Clé. *The Rise of the Amsterdam Market and Information Exchange. Merchants, Commercial Expansion and Change in the Spatial Economy of the Low Countries, c.1550–1630* (Aldershot: Ashgate, 2006).

32 'Casperghiene arrestkummer behoerent gestaiden, soe men doch ghiene represalia behoirt tgestaiden, dan jn saicke van geweygerde justicie' ('Antwoert der drier steden an den heermeester van Lyfflant op die clachte heren Jaspers van Munster vant huys ter Kinckhorst'), (Letter by the magistrates of the cities of Deventer, Kampen and Zwolle to Hermann Hasenkamp von Brüggeneu, master of the Teutonic Order in Livonia. 18 May, 1538), in *Kamper Kronijken. Deel 2. Kronijk van Johan van Breda* (original from 16th century. Deventer: J. de Lange, 1864), 129.

Grotius was relying on established practice while looking for direction in unknown territories.³³

Thus Iberian offenses against Dutch sailors, merchants and companies can be revenged justly by other Dutch sailors, merchants and corporations as long as the Dutch state's right to punishment, and to spoils, continue to be acknowledged as superior to those of private Dutch entities. It is extraordinary that Grotius mediates all private injuries, even those committed outside domestic jurisdiction, through the state which, when its resources render it incapable of practically administering punishment, has to farm out the legal right to do so.³⁴ However, a private corporation ceases to represent state interests when it begins to pursue profit alone, without regard to the state's interests.³⁵ In this reading, *Mare liberum* is not an inchoate manifesto for corporations' right to protect and enforce free trade but a declaration of states' economic autonomy, for the realisation and expansion of which the VOC was one of the strongest instruments that the Dutch had developed.³⁶

Historically, the personal union of city magistrates and VOC board members did a lot to coordinate the corporation and the state, and certainly helped to procure the policy mix that articulates this coordination. As a matter of fact, the management of the VOC was in many cases hampered by politically motivated interventions, for instance by maintaining monopoly regulations that excluded private merchants from the VOC infrastructure. If it were not a totally

33 Just as the VOC did, see Gelderblom, Oscar, Abe de Jong and Joost Jonker. 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602–1623.' *Journal of Economic History* 73(4) (2013), 1050–1076.

34 Grotius, IPC X.241–2: '[T]he state has the power to take for itself or to allot to others by way of recompense, a certain portion even of those spoils which are captured at private expense and with no payment for soldiers involved, as if a kind of partnership had been established with respect to the said spoils in that the state furnishes the cause while the subject [who bears the expense] furnishes all the other elements required.' Also IPC XIII.409, 422–5; *De imperio* 10.15.479.

35 Grotius, IPC XIV.448.

36 It might be helpful to see this analysis of Grotius as a prefiguration of the jealousy of trade topos that is the subject matter of Hont, Istvan. *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, ed. Michael Ignatieff (Cambridge: Cambridge University Press, 1983); Hont, Istvan. *Jealousy of Trade. International Competition and the Nation-State in Historical Perspective* (Cambridge: Belknap Press of Harvard University Press, 2005); the synthetic presentation in Hont, Istvan. *Politics in Commercial Society. Jean-Jacques Rousseau and Adam Smith*, eds. Bela Kapossy and Michael Sonenscher (Cambridge: Harvard University Press, 2015). See also Kapossy, Béla, Isaac Nakimovsky, Sophus A. Reinert and Richard Whatmore, eds. *Markets, Morals, Politics. Jealousy of Trade and the History of Political Thought* (Cambridge: Harvard University Press, 2018), in particular John G. A. Pocock's chapter on 'Commerce, Credit, and Sovereignty: The Nation-State as Historical Critique', 265–284.

misplaced anachronism, one might term this situation the collectivisation of private free market behaviour, a canalisation of economic creativity within the boundaries of the acceptable group interests of the established class. This was how the VOC had come into being in the first place, as an instrument to discipline the newly arrived 'Portuguese' merchants from Antwerp, with their vast African and Indian trade networks. As a stockholders company, the VOC allowed ordinary citizens to join in the bounty without having a say in the corporate strategy.³⁷

The modern equivalent might be the likes of Facebook, which – not by shares, but by free usage of the service provided – produce an inherent legitimation among the general public, and at the same time strike deals with the data consumers among the political and economic ruling class. According to some contemporary analysts, these two classes are also highly coordinated in our societies, partly through personal union. Since neither the VOC nor the modern corporation is much bothered by national boundaries, intriguing patterns of linkage politics develop.

This interpretation is in keeping with both Grotius' own text and the arguments that the VOC gave him in preparation for writing IPC. Grotius' instructions were to claim the Santa Catarina for the VOC; demonstrate the profitability of VOC adventures for the whole country and its government; and to convince the government to subsidise and facilitate the VOC's operations, both commercial and military.³⁸ Together, these instructions leave little room for exploring potential tensions between states and corporations, which may be why Grotius seldom addresses and consistently downplays them. That said, as early as the 1601–2 'De fide et perfidia', chapter VI of his *Parallelon*, he already posited a full concord of public and private interests as part of Dutch exceptionalism.³⁹

Similarly, in *Commentarius in Theses XI* (1603–1608?) Grotius argues that the distinction between public and private just wars is misleading when an agent, whether public or private, is authorised to defend the public good. While the agent does so, it holds the relevant marks of sovereignty.⁴⁰ By contrast, in

37 See Lesger, *The Rise of the Amsterdam Market* 2006 (n. 31), chapter 1; Gelderblom/Jong/Jonker, 'The Formative Years' 2013 (n. 33).

38 Grotius' draft of VOC petition presented to the Estates General on 4 March, 1606. IPC Appendix II, Text VII, 549.

39 '[N]owhere in the world the commercial societies are so prominent and firmly established as with us. Everywhere else, the public interest is undermined by the quest for private profit, whereas with us harmony prevails through never ending loyalty', Eyffinger, Arthur, ed. 'On Trust and Treachery'. *Grotiana* 36 (2015), 79–171, 171.

40 Grotius, Commentary to Thesis 8.

IPC Grotius notes that a company may involve a state in an unjust war out of greed,⁴¹ but he adapts the broad point about Dutch concord in 'De fide' to the capture of the Santa Catarina and emphasizes that the rights and interests of the VOC and the United Provinces are inextricably aligned.⁴² Dutch individuals, corporations and the state must seize Spanish and Portuguese property the same way they would wrest swords from madmen, since property enables unjust Iberian attacks on the Dutch.⁴³ The VOC is effectively the state's arm to create wealth and protect its allies, including Johore.⁴⁴ The VOC owns the Santa Catarina because it invested in Heemskerck's venture, and revenged offenses against both the country and the corporation.⁴⁵ However, it is morally obliged to transfer the authority over allocating the prize, and part of the prize itself, to the state. Elsewhere, Grotius argues that the VOC owes its existence to the state, therefore the state can claim at least part of the captured prize, even though the expedition was privately financed and executed.⁴⁶

In support of this reasoning and noting the originality of his claim, Grotius proposes that contrary to conventional interpretations, the Romans never enjoyed dominion over the high seas. Instead, they enforced international laws not through an extension of their private rights but through 'the common maritime right possessed by other free nations also.'⁴⁷ The Dutch can do likewise, without claiming to inherit a specifically Roman right or a new title to high seas. In defending the commercial rights of humankind, not even a declaration of war is needed, since the violator has already declared a war against all.⁴⁸

41 Grotius, IPC IX.186.

42 Grotius, IPC XIII.428–31, XIV.452.

43 Grotius, IPC IV.70, based on Cicero, *De officiis* (Loeb 1913), 372. See also IPC VIII.165–6.

44 Grotius, IPC XIII.430: 'Nor will anyone imagine that, in the present case, either the East India Company or the men who commanded the ships as representatives of the Company, were inspired by any purpose other than that of lending their services and their allegiance to the States General, which was in its turn desirous of providing both for public vengeance and for the rights of the Company itself.' It is state interest to have wealthy citizens, IPC XV.464. The VOC's creation is in the public interest and divinely favoured, IPC XV.466. The VOC can help make the Spanish depend on Dutch trade, IPC XV.489.

45 Grotius, IPC XIII.436.

46 Grotius, IPC X.241.

47 Grotius, IPC XII.329.

48 Grotius, IPC XIII.404.

4 Linking Concord to Divided Sovereignty

This is where the detailed comparison of IPC XII with *Mare liberum* becomes important. Most scholars hold simply that IPC XII and *Mare liberum* are identical.⁴⁹ A few scholars add that Grotius slightly rewrote chapter XII to turn it into a free-standing work. The conventional range of views misses considerable structural and substantive differences between IPC XII and *Mare liberum*. One could even argue that the reader is better served by regarding IPC as having only a bit more in common with *Mare liberum* than with IBP.

According to Grotius, the main message of IPC XII is that the war against Iberians and the capture of the Santa Catarina would be just even if it were a private war of the VOC, 'something apart from the public cause of the Dutch nation'. To test the extreme or pure case, and perhaps to tempt James VI/I and his advisors to merge or otherwise align the English East India Company with the VOC, he invites us to imagine that the VOC that captured the Sta Catarina was composed of English, German or French individuals.⁵⁰ As individuals, as members of a private company, and as citizens of the free nations entitled to exercise and protect humankind's 'common maritime rights', the hypothetical English, German or French citizens, just as the actual Dutch sailors, have a natural right to wage war. Next, Grotius proposes to examine whether the Portuguese claim to limit these individuals' and this group's natural right to free trade can be justified. These crucial framing pages that begin IPC XII are missing from *Mare liberum*, which starts with IPC's Thesis I, according to which the Portuguese claim violates divine and natural law.

In IPC XII Grotius layers the public-private distinction on top of the individual – corporation – state balancing act. He insists that the VOC's attack on Portuguese ships and forts is just even as a private war partly because the Portuguese have inflicted damage on the VOC's private property, and partly because the VOC alone bore the costs of the colonial enterprise that made capturing the Santa Catarina possible.⁵¹ Moreover, it is Portuguese assault on the Zeeland VOC, not on the United Provinces, that justifies the private war. According to Grotius, the provincial government and the VOC of Holland had come to share the right to punish Portuguese injuries by virtue of the 1602 unification of numerous colonial enterprises as the new VOC, with a

49 See, e.g., Straumann, Benjamin. *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge: Cambridge University Press, 2015), 54.

50 Grotius, IPC XII.301.

51 Grotius, IPC XII.388. xv.484–5.

state-sanctioned monopoly over the Asian trade and rights to maintain armies, build forts, and sign treaties. At the end of IPC XII, in a section omitted from *Mare liberum*, Grotius explains that these corporate rights, in turn, make the VOC's business a public affair, which thereby transforms its just private war into a just public war.⁵² VOC attacks on the Portuguese are just irrespective of whether we consider them as public or private wars, since private wars inevitably involve public rights. This is particularly so in this case, since through the VOC the Dutch have entered alliances with 'East Indian princes or peoples',⁵³ and the States General commissioned the VOC to act on its behalf.⁵⁴ Punishing foreign states, corporations and individuals, and entering binding treaties with foreign states, are among the hallmarks of sovereignty that the Dutch state can delegate to a specifically designed private corporation. Much of the original IPC XII treatment of the dynamic between just private and public war is missing from *Mare liberum*, but remains essential to understanding both *Mare liberum* and IBP.

What are the relevant changes in IBP? First of all, no state is self-sufficient. While Grotius also noted in IPC that God providentially made states dependent on each other, he still maintained that states are self-sufficient not only juridically but also in material terms of self-defense. By contrast, IBP begins from the principle that sometimes every state needs military and commercial allies.⁵⁵

Second, to the distinction between public and private wars Grotius adds the category of mixed wars, in which a private entity opposes a public authority.⁵⁶ He also puts more emphasis on the notion that sovereignty does not always belong to the people; and when the people create the state, they can decide

52 Grotius, IPC XII.389, XIII.392–3, 432. It is a great habit for a state to authorise private corporations to attack pirates for the public good, IBP II.XX.xiv.989. Not doing so is to condone piracy, IBP II.XXI.ii.1060. Grotius is clear that the VOC can enter international treaties, not simply pass local legislation, which any corporation can do (but only in secular matters and pending approval by the sovereign). *De imperio* VI.xi.317. The early circulation of *De imperio* requires more work. Selden recalled receiving copies in 1613. Even if van Dam is right, and Selden was mistaken, it is interesting that Selden's memory placed the reception so early, partly because Selden's work took an anti-clerical turn around then. Van Dam, Harm-Jan. *Introduction to Grotius, De imperio summarum potestatum circa sacra* (Leiden: Brill, 2001), 59n4. Pufendorf owned a copy, as well. To our knowledge, no study of annotations or other physical marks in these manuscripts exists.

53 Grotius, IPC XII.388–9, XIV.452. By IPC XIII.432, Grotius assumes that he established that the VOC's attacks are part of a just public war.

54 Grotius, IPC XIII.436.

55 Grotius, IBP Prolegomena xxiii.97.

56 Grotius, IBP I.III.i.240.

how much of their natural rights to transfer to it.⁵⁷ One corollary, however, is that when a sovereign prince protects or extends his personal possessions (which in patrimonial monarchies and newly conquered republics include the whole state), he is effectively fighting a private war against another prince.⁵⁸ That means: an owner does not as such represent the *societas*, and thus is not a public entity *qua* owner.⁵⁹ This is important for the discussion of the place of the corporation in present-day international law, and to figuring out the difference between owner-driven international corporations, from Shell through Amazon to Facebook, and community-organised entities such as Airbnb and Uber.⁶⁰ Of course, the difference is gradual as a *societas* of stockholders also expresses a certain *concordia*. Can a Grotian ask greater scrutiny of very powerful market players as to their impact on the rights of the rest of humankind, precisely because their *concordia*-base is so small? A necessary assumption in this line of argumentation is the *concordia* is always ‘in a certain respect’, because humans differ, therefore *concordia* is an achievement, not a given.

Another departure in IBP is Grotius’ explicit treatment of the many ways in which sovereignty can be divided. A people can limit their sovereign’s authority not only in their contract with the sovereign, but also via contracts with foreign states, such as treaties that promise allies that the people would refuse to fight them if so ordered.⁶¹ Furthermore, whenever the sovereign ruler makes a promise to the people, he effectively acknowledges ‘an Equality, and consequently a Division of the sovereign Power’. Those who deny this due to presuming “a great Number of Inconveniencies, to which the State is exposed by this Partition of Sovereignty” misunderstand the nature of sovereignty.⁶² Sovereignty can also be divided when it changes hands: a king or the people can seize it from each other, from other nations and kings, and agree to divide

57 Grotius, IBP I.III.viii.i.260–2, followed by an account of absolute or patrimonial monarchies. Grotius’ ferocious rejection of all arguments in favour of popular sovereignty continues until the end of I.III, and he returns to this theme often.

58 Grotius, IBP I.IV.i.336. On rightful sovereignty through conquest, see IBP III.VIII.i.3.1376–7.

59 The importance of property relations is underestimated in the analyses of Grotian sovereignty in both Tuck, Richard. *The Sleeping Sovereign. The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016); and Brett, Annabel. ‘The Subject of Sovereignty: Law, Politics and Moral Reasoning in Hugo Grotius’. *Modern Intellectual History* 17(3) (2020), 619–645.

60 The suggested community-based revival of democracy: Kemp, Brechtje. ‘International Institute for Democracy and Electoral Assistance: After the Shared Economy, a Shared Democracy?’ (17 July 2018), available at: <https://www.idea.int/news-media/news/after-shared-economy-shared-democracy> (last accessed on 21 October 2020).

61 Grotius, IBP I.III.xvi.305.

62 Grotius, IBP I.III.xvii.306.

it in the process, without destroying the state.⁶³ When a state conquers others, it may choose to follow the Roman model of creating dependent allies (*socii*) or provinces that retain certain marks of sovereignty.⁶⁴ Sovereignty is also limited by the fundamentally corporate nature of the state. While sovereignty is an attribute of states alone, the state consists of parts such as provinces, cities, and corporations, which cannot be cut off from the state without their own consent – and the authority to grant or withhold such consent makes their sovereignty equal to the whole state's in the narrow but important respect of their self-determination. Conversely, in cases of extreme necessity, such parts may continue to be viable even when the state as a whole fails.⁶⁵ Among such corporate parts capable of bearing partial sovereignty is the association of private ships united for self-defense.⁶⁶

In a conscious disagreement with Bodin and others, Grotius formulated various ways to divide sovereignty in order to facilitate concord between the Dutch state, which alone held or mediated the right to punish, and the VOC, which had the resources to expand trade and administer punishment to those who objected. While IPC described humanity as the natural and divine unit, and the state as artificial, IBP narrows the gap by arguing that states are artificial bodies that work like natural ones. They create sovereignty as soon as they are established. Their components might change, but if their spirit or constitution remains the same, they endure.⁶⁷ Curiously, although this passage relates to states, it played an important role in establishing the legal personhood of US banks. The Michigan Act of 1837 removed the need to obtain state legislatures' consent for creating banks, and inaugurated the so-called Free Banking Era, which saw the proliferation of new and failed banks, and wild fluctuations in inflation and money supply, contributing significantly to tensions that led to the Civil War. In the 1840 *Thomas v. Dakin*, the New York legislature was asked to decide whether the new Bank of Central New York was legitimate. Chief Justice Samuel Nelson wrote a remarkable opinion upholding the Michigan

63 Grotius, IBP II.IV.xi.499–500.

64 Grotius, IBP III.XV.viii.1506–xi.1509.

65 Grotius, IBP II.VI.iv.568–9.

66 Grotius, IBP II.XII.iv.735. Natural law covers the operation of such associations: IBP II.XII.xv.762–3. And the question can be asked again: what is the status of the merchant ships run by English, German or French individuals: do they represent some form of (divided) sovereignty? Is it absurd to say that they partake in the sovereignty of the universal society of humankind in defending justice? But why is it so difficult to really judge 'humanitarian intervention' and to prevent mischief committed under its lofty title? See also Nifterik, Guus van. 'A Reply to Grotius's Critics: On Constitutional Law'. *Grotiana* 39 (2018), 77–95, on sovereignty belonging to the natural order and natural law, whereas its execution belongs to the civil order.

67 Grotius, IBP II.IX.iii.i.665–7.

Act, analysing this IBP passage and Grotius' use of *consociatio* at length to show that private corporations can be immortal legal personalities, like states, without state approval.⁶⁸

Yet not all natural bodies exhibit this kind of sovereignty, according to Grotius. In the state of nature the family is a natural institution – for procreation, survival and self-defence. And in the natural family the *patria potestas* of the *pater familias* is a natural given: an absolute power, not based on a harmony of interests, but on an absolute responsibility of the *pater familias* for the interests-as-perceived of the members of his household. In that sense the household is not a *societas*. For Grotius, it is only the co-operation between several households that brings about a *societas* and thence sovereignty in a political sense. This does not exclude allotting rights to children by way of public institution, nor is it an argument against the equality of men and women in the family. Such rights, however, are a product of civilisation, just as institutional articulations of *concordia* are, for instance in corporate governance in any of its many forms and levels of sincerity.

5 Conclusion

The law schools resound with the disputation *which parts of authority may be committed to others by the supreme power?*

De imperio 12.1.609

Recovering the link between divisible sovereignty and private corporations helps to clarify ongoing discussion and reduce clutter in several fields. Among Grotius scholars, Tuck is right that the 'fact that one of the principal actors in international politics at the beginning of the seventeenth century was not a state but a private corporation was to be of enormous significance in the formation of Grotius' political thought.'⁶⁹ However, it was also important for the history of international law; and Tuck not only ignores the doctrine of divisible sovereignty that went with it, but also suggests that Grotian sovereignty was indivisible.⁷⁰ Critical legal scholars buy into the simplicity noted in the

68 Documents of the Assembly of the State of New-York, Sixty-Third Session (Albany, 1840), No. 65, 1–43. Nelson cited Grotius from Kyd, Stewart. *A Treatise on the Law of Corporations*, vol. 1 (London: J. Butterworth, 1793), 117–118, but the interpretation was his own.

69 Grotius, IBP xiii.

70 Grotius, IBP xxxii–xxxiii. Tuck, *Sleeping Sovereign* 2016 (n. 59), 84, qualifies this position by the claim that although government can be divided (the proper subject of sovereignty), the common subject of sovereignty cannot. According to Brett, 'The Subject

introduction regarding Grotius' iconic role as the 'father of modern international law', except not to perpetuate but to simplistically disagree with the maxim. Instead of portraying the VOC as a straightforward predatory organ of the Dutch republic, and Grotius as its hired shill, a clearer and more accurate view of the link between divisible sovereignty and the relationship between state and corporation should assist in forming better critical perspectives both on Grotius, and on his formidable legacy in international law.⁷¹ In international law, among others Carmen Pavel argues in *Divided Sovereignty* that the principle of indivisible sovereignty has introduced a risk of states abusing their citizens, which should be countered through international institutions. She structures her explanation of the current, unsatisfactory paradigm of sovereignty around Hobbes, shows the inadequacy of Locke's response, and suggests ostensibly new ways of dividing sovereignty – but does not once mention Grotius.⁷²

In November 2017 the Friedrich Ebert Stiftung invited the University of Maryland law professor Frank Pasquale to speak at their Digitaler Kapitalismus event. Pasquale reviewed recent scholarship and formulated a shift from territorial to functional sovereignty to explain how Amazon and other corporations use their internal dispute resolution platforms (e.g. between buyer and seller) and data asymmetries to claim traditional and new powers that we normally associate with sovereign states. Pasquale's summary, originally published on the Law and Political Economy blog, was republished in numerous outlets including CNBC, expanded into an article in

of Sovereignty' 2019 (n. 59), 25, Grotius 'was addressing a very messy, from the "modern" point of view, state of Europe (but not only of Europe), with all sorts of bits and pieces of jurisdictions subject to an infinity of historical legal arrangements. Where we see fragmentation, however, Grotius saw instead the positive political phenomenon of division', but that misses the economic aspect of Grotian divided sovereignty.

71 See, e.g., Miévielle, *Marxist Theory* 2005 (n. 5); Wilson, *The Savage Republic* 2008 (n. 5) (Leiden: Martinus Nijhoff, 2008); Van Ittersum, 'The Making of a Founding Father' 2016 (n. 4), 82–100. On Grotius's 'forked silver tongue' see Borschberg, Peter. *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (Singapore: National University of Singapore Press, 2011), 105. The more plausible trope that Grotius was not simply a VOC shill, but his self-contradictions and casuistry are par for the course for humanists, see i.m.a. what does this mean? Feenstra, Robert, ed. *Hugo Grotius, Mare Liberum, 1609–2009* (Leiden: Brill, 2009), xxvii–xxviii, and references in Nellen, *Grotius*, 495n50. That said, several instances of this trope in the secondary literature also needs to be corrected, once the link between divisible sovereignty and the VOC becomes clear.

72 Pavel, Carmen. *Divided Sovereignty: International Institutions and the Limits of State Authority* (Oxford: Oxford University Press, 2015).

American Affairs, and remains widely read and discussed.⁷³ There was not a single mention of Grotius, and both the original paper and every comment we have seen accepts the premise that the functional sovereignty of a corporation is a new phenomenon and challenge in public and international law.

Yet, building on the distinction between Iberian (territorial) and Grotian (commercial) imperialism, conceptually very different but not necessarily so different in their actual practical consequences, one might surmise that it has become a matter of (disciplinary) perspective whether and to what extent the Grotian conceptualisation of the society of nations and of humankind was received up and into the present day. In the eighteenth century, economists including Adam Smith criticised the mercantilist ideologues who claimed that what is good for the merchant class is good for the UK. Smith proposed a balanced account of the interests of all the participants in the economy, including those abroad! Basing himself on Grotian natural justice and a Grotian sensitivity to the ambiguity of the private and the public driven by the human propensity to truck, barter and exchange, Smith's political economy put forward the most radical linkage politics to date. At the same time, international law was gathering around the new Vattelien orthodoxy that reinvigorated the state-centered Westphalian sovereignty concept which, we argued, Grotius had actually deconstructed. *Societas* cannot thrive beyond states if it cannot take root in negotiated fault lines of divisible state sovereignty.

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73 Pasquale, Frank. 'Tech Platforms and the Knowledge Problem'. *American Affairs* 2(2) (2018), 3–16.

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