Compound corporations: The public law foundations of *lex mercatoria*

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Abstract. In the introductory essay to an edited volume entitled *Global Law Without a State*, Gunther Teubner claims that *lex mercatoria*, the law of TNCs, is the ‘most successful example of global law without a state’. Contrary to Teubner’s claim, as compound corporations, transnational corporations (TNCs) are fundamentally intermingled with and dependent upon states throughout their legal life. The state, far from being a neutral rule-maker, often employs its public law powers to promote certain private commercial interests. In this paper, the author examines this relationship between public and private persons from the perspective of the state’s corporate partner. To indicate the public law nature of the corporate partner, we refer to these nominally-private persons as compound corporations. Such corporations alchemically mix public and private law elements to strengthen their legal power. Compound corporations have existed in various forms throughout history, including during the colonial period.

Keywords: compound corporations, *lex mercatoria*, transnational corporations (RNCs)

In the introductory essay to an edited volume entitled *Global Law Without a State*, Gunther Teubner claims that *lex mercatoria*, the law of TNCs, is the ‘most successful example of global law without a state’.¹ Contrary to Teubner’s claim, as compound corporations, transnational corporations (TNCs) are fundamentally intermingled with and dependent upon states throughout their legal life. The state, far from being a neutral rule-maker, often employs its public law powers to promote certain private commercial interests. In this paper, we examine this relationship between public and private persons from the perspective of the state’s corporate partner.² To indicate the public law nature of the corporate partner, we refer to these nominally-private persons as compound corporations. Such corporations alchemically mix public and private law elements to strengthen their legal power. Compound corporations have existed in various forms throughout history, including during the colonial period.

For instance, from the sixteenth to nineteenth centuries, crowns chartered companies of merchants to undertake overseas commercial enterprises. The

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resultant chartered companies possessed public and private law powers. Symbolising the synergies between states and companies, the Levant Company’s charter indicates that the company merchants can ‘place in the top of their ships and other vessels the arms of England with a red cross in white’. Although chartered companies are no longer in use, compound corporations continue to exist in various forms, including, public corporations, development corporations and transnational corporations (TNCs). This paper explores how these compound corporations are incorporated and change over time. Before doing so, we elaborate a concept of legal compounding.

A. Legal compounding

Effective intermingling depends upon a formal distinction between the state and private corporations. If respective parties did not possess distinct powers, then intermingling would not be noteworthy. The compound corporation concept focuses on intermingling of public and private law elements within a single company. This section elaborates the legal compounding concept, discusses the distinction between public and private corporations, the rules governing control over each species of corporation and the public and private law synergies and transitions of compound corporations charged with undertaking commercial enterprises.

Private corporations have risen in prominence, so private law now treats them as private persons. If they over-reach their rights, then they will be handled like any other overzealous private person. Some concentrate on the dangers of excessively large private companies and call for new ways of dealing with the problems they pose. The state also took on commercial functions during the twentieth century, building roads and railways, making cars and aircraft, and providing electricity. This has ensured that certain public goods are provided. When these companies become too commercially

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4 When public and private corporations are discussed, the distinction means more than simply shares offered to the public.