Prologue

This draft essay (which needs more work) is a small part of a bigger project directed toward rethinking the place of the corporation in international law. In that overall project, three questions recur, which present themselves in the thinking, as nested inside each other, like Matryoshka dolls. The first question is; how should we understand the relationship between company and state in historical context ? The second question is; what account of international law would be adequate to the task of understanding the company-state relation ? The third question is; what approach to history and international law would allow one to come up with an account of international law adequate to the task of understanding the company-state relation ?

One can immediately see that the order of the dolls is not clear. Is the 'method' doll the outside, or the inside doll? Is the company-state relation the biggest, or smallest doll ? Is the sequence of the dolls the same as the order of thought? And is the order of thought like putting the dolls together, from smallest to largest, or opening them, from largest to smallest ? Even thinking about why any of these questions matter (or the 'so what' question) does not resolve the issue, because each question has its own significance, [depending upon the audience]. The first (company state) question has a 'practical' implication, while the second (what account of international law) has a disciplinary implication, and third (what methodological orientation should one adopt to see things differently) has a political implication.

In broad terms, through work I have done so far (some published and some unpublished), I have come up with the beginnings of an answer to each of my three questions. Baldly stated:

1) The Company and the State can be understood historically as rival forms of associational life with rival forms of law and rival adjudicatory practices. They are '**jurisdictional rivals'**. Once we understand the company as a rival form of associational life, we can see that what is typically described as the 'power' of the multinational, can helpfully be critically redescribed through the lens of authority. Authority should be understood as a practical question rather than a normative one. Not a question of legitimacy (cf Weber), but as being connected to authoring, and

practices of authorization. Thus our question centres on **how** things are authorized (not why or whether they should be). This is a matter of practices of authoring, and practices through which what is authored is actualized. It comes close to work on world making (Goodman, Douglas, Gieryn), and even co-production (Jasanoff) in which the normative and analytical are understood to be 'co-produced'.

2) 'International Law' as we know it today is the descendant of the Public Law of Europe (*jus publicum Europeum*). Historically, it is only one '**law of encounter'**, (law governing how peoples meet) and can be parochialised through understanding it in relation to other laws of encounter (such as those of the Mughals, Ottomans, many indigenous peoples, the Middle Kingdom, Tokugawa (Japan)). Redescribing international law as a law of encounter, and noticing that it was not historically the only such law, has analytical purchase when thinking about those laws of encounter it has displaced and continues to displace (including indigenous laws of encounter, which has a specific ethical valency). However, it also has an analytical valency for the present as as we can see that despite the idea that the company is not a 'subject' of international law, there are many ways in which international law structures the way company and state 'meet' and travel.

3) The theoretical idiom[1]I am trying to develop is called '**historically inflected jurisprudence**'. I contrast this with 'jurisprudentially inflected history' whose quest is to discover the origins and evolution of specific forms, practices and categories considered 'legal' today. Giving a jurisprudential inflection to history has various effects I can say more about when we meet.

'Historically inflected jurisprudence'[2] on the other hand, invites us to trace the processes through which laws emerge and are stabilised as authoritative, and the practices through which laws are both formed and give form to life, including the practices of legal knowledge making, and the conduct and prudence of laws, or 'jurisprudence'.

[1] It is an idiom rather than theory or methodology. Jasanoff, states of knowledge
[2] I first heard this term in conversation with Shaun McVeigh, though I am not sure if the way I am using it is exactly what he meant by it.

In this idiom, I am agnostic to the normative/definitional claim of positive (state based) law rightfully to be 'law', and instead I treat that law, both domestic and international, as a parochial rather than universal practice of authorization, specific to places, practices and people. In the idiom of Historically inflected jurisprudence, I treat the present as history, insofar as the meaning of 'law' today is still 'historical', in the sense of comprising practices over time that must both declare, or speak, the law, whilst at the same time declaring what 'Law' is.[1] The key is to treat legal forms as always (and still) in formation, and the dominant 'Law' as still one law among many despite the claim of that law for itself, that it is 'Law' properly so called. Part of law's historicity is precisely the assertion and actualisation of law's authority in the present. Historically inflected jurisprudence invites us to see the ways in which 'dominance' still entails domination in an ongoing way, but also to see how worlds may be authored and authorised through practices, and in vernaculars which gain efficacy, precisely through their non-identification as Law. [first eg is indigenous law. The second is corporate 'power'.]

4) There is a fourth question, not raised so far above which is also circulating in the project, and that is about **how to understand the multinational corporation.** So far, the question is emerging in the work as how the company/corporate form has been understood over time and in different circumstances, and to what effect.

A simplified rendition would be to say that there is a divide in European thought between two theories of the corporation. The first is a 'fiction theory' of the corporation which we can trace back to Von Savigny (something like, the corporation is a creation of the state (1840, system of modern roman law), or exists because of a concession from the state ('concession theory'). The second is the 'realist theory' (or organicist theory) of Otto von Gierke, which essentially says that corporations have an existence prior to the 'recognition' by the state. (includes municipalities, guilds, religious orders, church, universities, not just commercial companies)

In the organisicist theory, it is fairly clear that companies are a rival form of associational life to the state, and that that have rival forms of law. This latter view is historically more accurate – state and corporations co-emerged, question of when commercial entities took up the corporate form later question.

Gierke was made popular in English by Maitland who translated him. Maitland, the 'father of english legal history' – can be thought of as having a pre and post gierke understanding of the corporation. In this *History of english law before the time of edward the first* which he wrote with Pollock, there is a change between editions, during which time Maitland translated Gierke. Between the version first published in 1895, and the second edition 1898 (in between translated Gierke), Maitland and Pollock changed 'ficitious persons' in the first edition, to 'Corporations and Churches' in the second.

But von Savigny's thesis has become more prevalent. (concession theory in some places). There is also another theory coming from C19th American liberalism – (economics/economists rather than jurisprudence/lawyers) related to a project to sharpen distinctions (emerging/being created) between 'public' and 'private' spheres – divide the social world between them. Business corporations placed on 'private' side. Ironically – Attempt to downgrade them. Assimilated to private persons, and presented as nothing more than a 'nexus of contracts'.

Leaving those 4 questions hanging, here is the draft of the essay:

Public Debt, the Peace of Utrecht and the Rivalry between Company and State

Sundhya Pahuja[3]

I. Introduction

From the disciplinary perspective of international law, one way of approaching the Peace of Utrecht would be to locate it within a progressivist account of international law in which each successive Treaty of Peace over the last several hundred years may be understood as a step in the ongoing forward march of international law, and a peg in the map of its territorial expansion. Were we to tell the story that way, the Peace of Utrecht would be a bookend to the Peace of Westphalia, a secondary foundational moment in the formation of the modern international order. In that story, particular significance would reside in the way the Peace of Utrecht could be said to have

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consolidated the religious settlement of 1648 and to have translated it into state territorial form.

In methodological terms, such an account would tend to rehearse what Barkawi and Laffey have called 'the archetypal gesture of Eurocentrism in the social sciences', which is to identify a transition from the medieval to the modern state, and make it consciously or unconsciously, more or less a teleology for everywhere else.[4] This is a gesture often rehearsed in disciplinary uses of history in international law which rely, either implicitly or explicitly, on a myth of origin and a narrative of progress in order to ground international law's authority.[5] This gesture was likely inaugurated in the late 19th century when self-conscious 'histories of international law' emerged,[6] along with notions of progress and universal history, particularly 'the use of the idea of singular historical time to reorganise the dispersed geographies of modernity into stages of Europe's past.'[7] In jurisprudential terms, it is a move that tends to erase the law-full quality of a plurality of encounters and replace them with a story of sociality - whether subordinated or dominant - and the emergence of (positive) legality, narrowly understood.[8]

[4] See generally Tarak Barkawi and Mark Laffey, "The Postcolonial Moment in Security Studies," *Review of International Studies* 32 (2006): 329–352.
[5] See for example Antonio Cassesse, *International Law* (Oxford: Oxford University Press, 2001), 19 - 45; and James Crawford (ed.) *Brownlie's Principles of International Law* (Oxford: Oxford University Press, 8th ed, 2012), 2 – 6. For a critical account of this gesture in relation to human rights, see Samuel Moyn, *The Last Utopia: Human Rights in History* (USA: Presidents and Fellows of Harvard College, 2010). On alternative forms of historiography, see 'Introduction' in David Owen, *Nietzsche's Genealogy of Morality* (Montreal: McGill Queens University Press, 2007).
[6] Matthew Craven, "The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law" in *Constructing International Law: The Birth of a Discipline,* ed. L. Nuzzo and M. Vec, (Frankfurt am Main: Klosterman, 2012), 363-403.
[7] For masterful account of the emergence of a singular historical time and its relationship to space, see Timothy Mitchell, "The Stage of Modernity" in *Questions of Modernity,* ed. Timothy Mitchell, (Minneapolis: University of Minnesota Press, 2000), 1 - 34, especially 9.
[8] J. Fisch, "Law as a Means and as an End. Some Remarks on the Function of European and Non-European Law in the Process of European Expansion" in *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia,* ed. WJ Mommsen and JA de Moor (Oxford: Berg, 1991). Also Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400 - 1900* (Cambridge: Cambridge University Press, 2002). Both texts cited in Koen Stapelbroek, "Trade, Chartered Companies and Mercantile Associations" in *The Oxford Handbook on the History of International Law,* ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 338 – 358. Also Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Delft: Eburon, 2007); Sundhya Pahuja, "Laws of Encounter: a Jurisdictional Account of International Law," *London Review of International Law* 1(1) (2013): 63 - 98; and Rose Parfitt, "The Spectre of Sources," *European Journal of International Law* 25(1) (2014): 297 – 306.

But offering an account of the Peace of Utrecht in the terms of a Eurocentric historiography of origins, in fact underplays its proper importance, and obscures its legacy for international law. In a slightly different register, the Peace of Utrecht may be understood as a key moment of encounter, not so much between rival monarchs vying for the Spanish crown and the global trading routes for which it was an avatar, but between what we may describe as the rival 'jurisdictional forms' of Company and State and a contest between them over the bases of a movement 'Southward', a rivalry which continues in some senses, to the present day. Looking at the Peace of Utrecht in this way draws it out of the shadow of Westphalia and offers a different kind of story about the work international law does in the world. It also invites us to reflect on the implications of the way we tell histories of international law for how we understand our inheritance as international lawyers.[9]

In this chapter, I will draw on the idiom of jurisdictional thinking to re-describe the Peace of Utrecht, and the events leading up to it, in terms of the rivalry in the late 17th and early 18th centuries in England, between the sovereign-territorial arrangements we now call the state, and commercial-political groupings of merchants associated in the juridical form of the joint-stock company. This rivalry is more complicated than one between two pre-existing entities called 'company' and 'state', or between an anachronistic designation of 'public' and 'private'. Indeed, it may be understood as a rivalry in terms of the exercise of public authority.[10] I will suggest that in the context of this rivalry over public authority, the Peace of Utrecht marks a moment in which the practices of contest and relation between those rival actors, and their rival forms of associational life, can be seen to have been shaped and conducted through the new instrumentality of public debt. More precisely, I will suggest that the particular treaties of the Peace of Utrecht were, at least in one dimension, instruments by which borrower and creditor were brought together, or joined,[11] and which shaped the way

[9] On the question of the inheritance in the context of international law, see Adil Khan, "The Task of Inheritance in International Law" (paper presented at the Harvard Institute for Global Law and Policy Workshop, Doha, Qatar, January 2014, copy on file with author).
[10] Shaunnagh Dorsett and Shaun McVeigh, 'Matters of Public Consequence: Jurisdiction and Forms of Authority' (paper presented at "Law As… III" Legal History Symposium, UC Irvine, February 2014, copy on file with the author).
[11] To paraphrase Braddick, in the story of state formation in early modern England, the fate of government was closely connected with the development of private finance, in both the instruments of public credit and the institutional means for bringing borrower and creditor together. Michael J.

that relation - and contest - travelled, and particularly moved 'Southward' for both Company and State.

II. Orienting ourselves by Jurisdiction[12]

'Jurisdictional thinking' is an orientation toward jurisprudence which invites us to attend to the question of authority and its exercise as a matter of practice, rather than as a question of legitimacy. Etymologically, 'authority' invokes invention, origination and authorship, as well as power, expertise and right. In approaching authority as a practical matter, we need to pay attention to the speaking of the law, *juris-dictio,* not only as the articulation of authoritative pronouncements, or statements of 'law', but as a practice which simultaneously implies, invokes or relies on a right to decide what the basis of that authority - or 'law' - is.

Thus, although 'juris-diction' does idiomatically suggest speaking the law, '…it is not so much a discourse, not so much a statement of the law, but a site or space of enunciation. It refers first and foremost to the power and authority to speak in the name of law and only subsequently to the fact that the law is stated - and stated to be something or someone.'[13] As Goodrich succinctly puts it, '(j)urisdiction precedes the law'[14]. To orient oneself through jurisdiction is therefore to give primacy to how the authorisation of lawful relations takes place. The 'how' directs our attention to what people do, or in other words, to the practices, or practical question of authority.

In approaching the Peace of Utrecht in this way, the story is slowed down to invite us to linger in the 'site or space of enunciation' in which authority takes shape and is set into motion. In moving slowly, we can pay attention to how lawful relations take place: or put more formally, to the manner and mode of the authorisation of lawful or legal relations, and to the technical forms, idioms and institutions through which

Braddick, *State Formation in Early Modern England c. 1550 - 1700* (Cambridge: Cambridge University Press, 2000), 268.

[12] This section is based on an earlier piece which also tries to orient itself by thinking jurisdictionally, in relation to a conflict between local communities, mining companies and the state in north-eastern India. See Pahuja, "Laws of Encounter", 63 – 98.

[13] Peter Rush, "An Altered Jurisdiction: Corporeal Traces of Law," *Griffith Law Review* 6 (1998): 150.

[14] Peter Goodrich, "Visive Powers: Colours, Trees and Genres of Jurisdiction," *Law and Humanities* 2 (2008): 227.

something is produced[15] (such as the company, currency, or the state) and through which relations in particular terms are both created and conducted.

For international lawyers, jurisdictional thinking alters the usual way of thinking about law. In the technical idiom of international law, jurisdiction is an exercise of sovereignty, and sovereignty is an attribute of the state.[16] In doctrinal terms, territory comes first in the form of the state, then comes sovereignty, which is said to flow from statehood,[17] and then comes jurisdiction, understood as the rightful authority to speak the law. For most international lawyers, jurisdiction is therefore a technical question concerned with whether a particular sovereign-state, or any judicial or quasi-judicial body constituted according to international law, can exercise legal authority over a territory, dispute, person or issue. In this kind of approach, jurisdiction comes after sovereignty, and both territory and population are givens.

But from another point of view, sovereignty is a practice of jurisdiction. In this way of thinking, jurisdiction comes before sovereignty. Sovereignty is demystified, and understood as an historically specific collection of practices through which authority is exercised, and in which the categories of 'territory' and 'population' are particular forms into which life is shaped through techniques of administration. In both ways of thinking, jurisdiction is concerned with law's enunciation—or the authority to speak the law. But thinking which places sovereignty first is concerned with *rightful* or legitimate authority, whereas jurisdictional thinking allows us to be agnostic about the normative basis on which the claim to authority rests. Its primary concern is with *how*—the ways in which, the practices by which, and the technical means by which—that authority is exercised and lawful relations are conducted. These include the practices of authorisation and assertion themselves, or the ways in which authority is claimed. It also includes the idioms of law, the forms through which things are organised and the way relations are shaped or instituted in terrains that are usually uneven, already full of other people's claims of belonging, ownership, authority and law.

[15] Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Oxford: Routledge, 2012), 4-6.
[16] James Crawford, "Uses of 'Sovereignty' in the Law" in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (with Surabhi Ranganathan) (Cambridge: Cambridge University Press, 2012), 117; also James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 2nd ed., 2006), 32.
[17] James Crawford, "Uses of 'Sovereignty' in the Law", 118.

Practice is of primary importance in this formulation. Because, 'although we have become used to the representation of the authority of the sovereign, and of law, as abstract and virtual, […] as a matter of right represented as rule or principle',[18] that authority requires actualisation in material form. A seemingly abstract sovereignty is materialised through the craft of law and the practices of jurisdiction which—'through institutions, actively work to produce something'.[19] Seeing sovereignty in this light invites us to ask questions about how state is actualised, and how rival forms and accounts of political authority and ways of belonging to law are enacted and performed over the same people and the same places at the same time. In historical terms, in order to look back without presupposing legal forms, such as statehood or sovereignty, we need to hold onto such questions, of practice, technique and the way life is given shape, or authored, through such practices.

The question of practices of authority allows us to be agnostic about the claim of one law rightfully to be 'law', attending to the writing of law and the writing of history at the same time and to the encounters between rival traditions of law and lawfulness. In contrast, approaching authority as a question of legitimacy confines us to the normativity of one tradition or family of traditions, inviting a consideration of the history of a 'law' whose meaning is assured. To paraphrase Benton and Ross, the study of jurisdictional practices does not depend on a general definition of law. Nor does it demand delineations in terms of state and non-state law. The jurisdictional claims of a wide range of authorities can be studied, 'without their being defined neatly as public or private.' This is an approach which 'invites historical analysis because it becomes possible to analyze structural shifts propelled' by the practices of authority and authorization of jurisdictional rivals, as well as of 'parties to jurisdictional conflicts.'[20] The Peace of Utrecht is a moment which repays such analysis.

III. The Peace of Utrecht

The 'Peace of Utrecht' refers to a series of agreements that concluded the Spanish Wars of Succession: twenty-three treaties in all, signed between January 1713 and

[18] Dorsett and McVeigh, *Jurisdiction*, 5.
[19] Dorsett and McVeigh, *Jurisdiction*, 5. See also Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601.
[20] Lauren Benton and Richard J. Ross (eds.) *Legal Pluralism and Empires, 1500 – 1850* (New York and London: New York University Press, 2013), 6.

February 1715, as well as the treaty between Austria and Spain in 1725.[21] Their complexity was succinctly encapsulated by Charles Mordaunt, earl of Peterborough, who remarked at the time that the Peace of Utrecht was 'like the Peace of God, beyond human understanding.'[22] The treaties were concluded between multiple rulers, and include treaties of Peace and Friendship and Navigation and Commerce, as well as the Barrier treaty,[23] treaties of Alliance and 'Peace' treaties *tout court*.[24] The twenty-three treaties usually included in the list are not the only treaties made during the relevant period which related to the issues at play, and there are many overlapping treaties of commerce for example, both between the parties to the Peace (in relation to specific goods for instance), as well as between, for example, Spain and the East India Company.[25]

At the time of the Peace of Utrecht, the state was not well formed. It was one of several forms of associational life each of which linked authority, community and place in different ways. Other forms of associational life (and law) included city-leagues and city states, the Church, Pirates, Companies of Merchants, Borough Corporations like the City of London, Guilds, Communities of Belief, Guilds and so on.[26] It is clear that the state was a body of people united in some way, or a 'corporate form', and one which came later than many others. Collinson has described these self-governing political cultures in early modern England as 'republics', though 'always in quotes'; the village republics, the gentry republics, and the Borough corporations for example.[27] Among these forms were also 'joint stock' companies, entities owned by shareholders.

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[21] See the annotated index of archival and secondary sources at Oxford University Press Bibliographies, available at http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0101.xml.

[22] Charles Mordaunt, third Earl of Peterborough, quoted in A. D. Machlachan, "The Road to Peace" in *Britain after the Glorious Revolution, 1689 – 1714*, ed. Geoffrey Holmes (London: Macmillan, 1969), as cited in Linda Frey and Marsha Frey, *Treaties of the War of the Spanish Succession: An Historical and Critical Dictionary* (USA: Greenwood Press, 1995), xiii.

[23] The Barrier treaty between Great Britain, the Holy Roman Empire and the Netherlands was signed in Antwerp on 15 November 1715 and, like previous versions, was an ultimately ineffectual attempt to provide Holland with a defensible barrier against France. See John Earl I Russell, *Memoirs of the Affairs of Europe from the Peace of Utrecht* (London: John Murray, 1826), 457.

[24] Frey and Frey, *Treaties of the War of the Spanish Succession*, 501 - 508.

[25] Frey and Frey, *Treaties of the War of the Spanish Succession*, 506.

[26] Hendrick Spruyt, *The Sovereign State and its Competitors* (Princeton: Princeton University Press, 1994), especially 153 - 154.

[27] Patrick Collinson, *De Republica Anglorum; or, History with the Politics Put Back* (Cambridge: Cambridge University Press, 1990) as quoted in Phil Withington, "Public Discourse, Corporate Citizenship, and State Formation in Early Modern England," *The American Historical Review* 112(4)

From an English perspective, the Peace of Utrecht and the wars which preceded it had a special relationship to the three most important joint-stock companies of early 18th century England: the (English) East India Company, the South Sea Company and the Bank of England, as well as with the Hudson Bay Company, which governed 'Rupert's Land', a territory which comprises part of present day Canada and some of the United States.[28] Although it is common to assume from the vantage point of the present day, that early modern companies were creatures of state law, that assumption would be difficult to sustain. Far from being children of the state, companies of various kinds pre-date the state.[29] As forms of associational life,[30] they were commercial, political and personal[31] and overlapped with other self-governing communities. Although almost invariably read retrospectively as describing either fact or extant law, contemporary theorists of the period as well as those coming later who asserted that companies were creatures of positive law, were engaged in a polemical project conducted in the context of a rivalrous engagement. Essentially they were writing normative theory to justify, or retrospectively explain state authority.[32] As the state emerged, various techniques were engaged to explain its authority as resting above that of its progenitors, even when the historical facts revealed otherwise. Examples include the doctrine of 'tacit' consent, by which the king could be said to have 'consented' to customs and laws about which he knew nothing, in order to preserve the fiction that custom gained force from the authority of the Prince.[33] These devices approached and managed the historical fact of a plurality of

(2007): 1025. See also Catherine Patterson, "*Quo Warranto* and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts," *English Historical Review* 120(488) (2005): 879 - 906.

[28] Rupert's Land covered what we now call Manitoba (all of it), most of Saskatchewan, southern Alberta, southern Nunavut, and northern parts of Ontario and Quebec (all in Canada), as well as parts of Minnesota and North Dakota and very small parts of Montana and South Dakota (in the US).

[29] '(E)ven Bodin recognized that different forms of corporation predated the state and was never quite clear on how or why the sovereign came to be superior to them.' From Phillip J. Stern, "'Bundles of Hyphens': Corporations as Legal Communities in the Early Modern British Empire" in Benton and Ross, *Legal Pluralism and Empires,* 24.

[30] See generally David Runciman and Magnus Ryan (eds.), *Maitland: State, Trust and Corporation* (Cambridge: Cambridge University Press, 2003).

[31] See generally Antony Black (ed.), *Otto von Gierke: Community in Historical Perspective* (Cambridge: Cambridge University Press, 1990).

[32] Stern, "'Bundles of Hyphens'", 115. Also Black, *Otto von Gierke*, cf Johannes Althusius, *Politica,* trans. Frederick S. Carney (Indianapolis: Liberty Fund, 2010).

[33] See discussion of Francisco Suárez in Stern, "'Bundles of Hyphens'", 117 - 118.

jurisdictions through a posture of plural*ism*, a normative orientation toward that plurality.[34]

Of the various kinds of company, the joint-stock company likely descended from the Medieval Guilds.[35] 'Joint-stock' meant that investors had grouped together and contributed capital to the ventures of the company in varying proportions, which proportions were reflected in their 'share' of the ownership of the company and which were discrete economic assets.[36] Company shares could be traded freely on the early 'stock' exchanges.[37] Although merchants could, and did, band together as a company without external authorization, in order to be 'incorporated', the company needed a charter. At the time, there were no general laws of incorporation, so in order to be 'incorporated', a company needed a distinct political act performed in its favour by either the monarch or legislature. Chartered companies enjoyed special rights and powers, and in return, provided loans and other kinds of support - including political support - to the nascent state.[38] Contrary to accounts which describe charters as bringing companies into being, or creating them it would probably be more accurate to describe the Charters as a way of joining existent associations of merchants to monarch and state through the grant of status, and certain protections, or 'rights'. These included monopoly rights which purported to keep out 'poorer, badly connected traders so as to restrict the numbers participating in the trade; it was, especially, to prevent entry into the overseas commerce by the City's shopkeepers, small producers and ships captains, whatever their wealth.' Depending on the Crown in this way 'united the generality of company merchants in defense of privilege, and, all else being equal, in support of the royal government, which was, of course, the guarantor of their protected status.'[39] Such grants of status, and of rights such as monopoly rights, were not uncontroversial. Indeed, they were heavily contested including contestation around whether it was in the King's prerogative to grant a

[34] A similar observation about plurality and pluralism is made by Paul D. Halliday in "Laws' Histories: Pluralisms, Pluralities, Diversity" in Benton and Ross, *Legal Pluralism and Empires,* 262 – 263.
[35] Stern, "'Bundles of Hyphens'", 23.
[36] Bruce G. Carruthers, *City of Capital: Political and Markets in the English Financial Revolution* (Princeton: Princeton University Press, 1996), 138; and K. N. Chaudhuri, *Trade and Civilization in the Indian Ocean* (Cambridge: Cambridge University Press, 1985), 95.
[37] Carruthers, *City of Capital*, 137.
[38] See generally, Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict, and London's Overseas Traders, 1550-1653* (Cambridge: Cambridge University Press, 1993).
[39] Brenner, *Merchants and Revolution*, 83.

trading monopoly, whether it should rather be King and Parliament, or indeed, whether such purported grants were valid at all.[40]

The time of the Peace of Utrecht was also the time of the emergence in England of the political party.[41] Since the "glorious revolution" of 1688, the King had shared power with a Parliament and by the end of the 1670's, two groupings of members - or political 'parties' - had emerged, the 'Whigs' and the 'Tories'. The Whigs and the Tories were generally allied respectively with two different branches of the English elite. The Tories were the traditional 'landed' elite, while the Whigs were the new and growing 'monied' elite.[42] Competition between the Whigs and the Tories accordingly mirrored the conflict between the landed and Mercantile elites.[43] In the context of the wars of Spanish Succession, William of Orange was struggling to bring this relatively new institution of Parliament around to his views on something like what we would now think of as 'Foreign Policy', and in particular the need to contain the French threat. The landed elites especially, had been taxed heavily on their lands to fund the Nine Years War from 1688-97. After the Treaty of Ryswick in 1698, they insisted on disbanding the standing army,[44] and the appetite for another conflict was low.

Thus, because expenditures exceeded the tax revenues which could be generated by the King, borrowing was needed to fill the breach.[45] The old style of short term

[40] See for example the case of *East India Company v Sandys* (1682), which became known as the 'Great Case of Monopolies'. The East India Company brought a case against Thomas Sandys, an independent trader who had prepared a ship for commercial trade in the East Indies. The Company argued that its monopoly on East Indies trade as granted by royal prerogative was necessary for reasons of state to effectively manage the risks posed by long distance maritime commerce. Sandys argued against the Company's monopoly citing, *inter alia*, the 'high seas principle' of liberty to trade – a principle the Company itself had previously used against the Dutch and the Portuguese, and that the Parliament had endorsed in various anti-monopoly statutes. The King's Bench decided in favour of the East India Company. See also Thomas Poole, "Reason of State: Whose Reason? Which Reason?", LSE Law, Society and Economy Working Papers 1/2013, available at http://www.lse.ac.uk/collections/law/wps/WPS2013-01_Poole.pdf.

[41] See Brendan Simms, *Three Victories and a Defeat: The Rise and Fall of the First British Empire* (London: Penguin, 2007) especially 44 – 76.

[42] Carruthers, *City of Capital,* 10.

[43] Carruthers, *City of Capital*, 10. There is obviously a religious layer to this story, and most of the people in the companies were dissenters and non-conformists (meaning protestant but not supportive of the Church of England). This is a dimension of the story not dealt with in this chapter.

[44] The landed elites also believed that a large military on a permanent footing posed the danger of accentuating the tendency of despotism of the executive.

[45] As Braudel indicates, expenditure exceeded tax revenue because of ongoing military adventure, the changing nature of warfare and the increasing activity of the state around pre-existing social structures.

lending from the goldsmith-bankers (for example) was not sufficient to satisfy the government's growing need for money, and on a bigger scale and longer term, which became particularly evident in the conduct of the Nine Years War (which ended in 1697).[46] The landed elites were increasingly hostile to further (land based) taxation to fund the prosecution of wars, the merits of which they were not always convinced. And so in around 1694, a group of wealthy merchants got together and proposed a joint-stock company which would attract subscriptions from the public and lend the money raised to the government for a longish term, at a reasonable rate of interest. The two principal innovations of the structure of the arrangement were first, that the debt was to be owed by the state, and not personally by the King, and secondly, that it was to be secured against certain tax revenues.[47] These innovations mark what we may call the birth of 'public finance', a moment which scholars have described as the birth of finance itself, in that the invention of finance is the invention of public finance. This company was called The Bank of England.

The merchants who formed this company were distinctly 'Whiggish' and although the Bank was established by Parliamentary Act in 1694[48] it was surrounded by controversy on all sides. Because Parliament feared what might happen if the King could access a separate source of money, the Act was amended in the Commons to prevent the new Bank from lending money to the Crown without parliamentary consent. The Tories opposed it on the grounds that banks 'were only suitable for republics', and would undermine royal authority.[49] The land-owning elites were also worried that the establishment of a bank would monopolize capital and make it harder to obtain mortgages for landowners.

Fernand Braudel, *Civilisation and Commerce in the 15th – 18th Century, Volume 2: The Wheels of Commerce* (New York, Harper & Row, 1983), 519. As Spruyt cautions, the significance of warfare as an historiographical variable can be overstated, noting that changes in institutional and administrative structure also played a determinative role during this period of European history. See Spruyt, *The Sovereign State and its Competitors*, 155 - 158.

[46] Carruthers, *City of Capital,* 68 – 70; also John Clapham, *The Bank of England: A History, Volume I 1694 – 1797* (Cambridge: Cambridge University Press, 1970), 210 – 213; and Richard Roberts and David Kynaston (eds.), *The Bank of England: Money Power and Influence 1694 – 1994* (Oxford: Clarendon Press, 1995), 9 – 11.

[47] Michael J. Braddick (2000) *State Formation in Early Modern England c. 1550 - 1700* (Cambridge: Cambridge University Press), 266 - 267.

[48] *Bank of England Act 1694*, 5 & 6 Will and Mar, c 20.

[49] Carruthers, *City of Capital*, 140.

The controversy surrounding the establishment of the Bank also included earlier rivalry between the nascent Bank, and the (English) East India Company, which had itself tried to lend six hundred thousand pounds to the government - free of interest - in order to obtain a parliamentary charter, which it hoped would put an end to challenges to the authoritativeness of the chartered monopoly it had received from the King.[50] But that offer was rejected by the Commons because the East India Company's opponents said they could raise even more money – through the Bank of England.

The initial offering of the Bank stock sold well, and the Bank was successfully established in 1694. And yet opposition - and rivalry - continued. The Goldsmith bankers tried to undermine the bank, first by refusing to accept its notes, and then by organizing a run, and the Tories tried - unsuccessfully - to set up a rival 'Land Bank', which although it did receive an enabling act, failed, for various reasons, to attract subscriptions from the public. By 1697, the Bank of England had absorbed a number of short-term government obligations in exchange for monopoly privileges.[51] Its old Tory rival, the (Old) EIC also organized a run on the Bank in 1701, which the Bank successfully defended.

And so even by the time of the War of Spanish Succession, which began in 1702 (by which time Queen Anne was on the throne) the distinctly Whiggish Bank of England was still under attack from its rivals. The contest came to something of a head when Queen Anne reconfigured her ministry from Whigs to Tories in 1710, while the war was still going on.[52] The attitude to the conduct of the war and the perception of its proper purposes shifted from the Whiggish strategy focused on Europe and centred on limiting the French pretensions to Universal Monarchy, to the Tory strategy of overseas expansion, naval activism, and securing the North American colonies.

But a Tory ministry did not sit comfortably with a Whiggish bank, and in 1711, a rival financial company was created to raise funds for what we now think of as 'public debt.' Created by promoting the exchange of the once again proliferating

[50] See *East India Company v Sandys* (1682), as discussed in Thomas Poole, "Reason of State", 11-13.
[51] Carruthers, *City of Capital*, 142.
[52] Simms, *Three Victories and a Defeat*, 58.

short term debts for shares in the company (effectively a debt for equity swap), the South Sea Company, and its banker, the misleadingly named Hollow Blade Sword Company, became the rival financier to the government. Because it was described as a trading company, and set up to be a finance company, the South Sea Company was the target of objection from both the East India Company and the Bank of England. Both companies successfully fought for limitation clauses to be inserted into the charter of the South Sea company, (which were granted to avoid antagonizing the 'monied interest'), but the Charter specified that the directors of the company were to be appointed by the Queen (in effect, her ministry) to make sure that the Whigs could not take control of the new company. When the Peace of Utrecht gave to Britain the *Asiento* - including the monopoly right to provide slaves to the Spanish colonies in South America - it was awarded by Queen Anne to the South Sea Company.

But despite this monopoly right, the conversion of the national debt, and the legislation initiated by the South Sea Company and introduced into the House of Commons to limit alternative outlets for investment[53] the South Sea Company was ultimately unprofitable and could not wrest from the Bank of England, the capacity to finance public debt, nor defeat the Whiggish dominance of finance. What remains interesting from the point of view of practices of jurisdiction - practices which both state the law and claim the authority to decide what 'law' is – is the way in which the treaties of the Peace of Utrecht may be seen to have functioned as the technical means by which Company and State were brought into a particular kind of relation. The treaty is therefore a complementary technology to debt 'at home', which together crafted and authorized the manner in which Company and State travelled 'Southward' together. A similar phenomenon can be observed, and characterization offered, in relation to the Hudson Bay Company which was also the subject of treaties at the Peace of Utrecht.[54]

[53] This last was the purpose of the often misunderstood Bubble Act of 1720. Often explained in terms of a cautionary, but too late reaction to the investment bubble created by South Sea company shares, the Act was in fact passed before the bubble and initiated by the Company itself to limit the possibilities for others to form joint stock companies. See Ron Harris, "The Bubble Act: Its Passage and Its Effects on Business Organisation," *The Journal of Economic History* 54(3) (1994): 610 – 627.
[54] See generally E.E. Rich, "The Hudson's Bay Company and the Treaty of Utrecht," *The Cambridge Historical Journal* 11(2) (1954): 183 – 203. Also Edward Cavanagh, "A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company 1670 – 1763," *Canadian Journal of Law and Society* 26(1) (2011): 25-50.

So, when we revisit The Peace of Utrecht and its preceding wars, what emerges according to one way of looking at things is part of a progressivist account of state formation, albeit a corrective to the standard story. What we see in particular is the possibility that the market of financial capital was key to the emergence and consolidation of the state because of the way it bound elites - and rivalrous elites at that - to the emerging entity of the state through the mutually vested interest of creditor and debtor. In other words, it starts to look as though (not only does the market need the state (as Marx and Polanyi knew well, and the institutional economists discovered again some while later), but that historically, the financial capital market and the state were mutually constitutive. In this story, the British state which 'emerged' from the Peace and its preceding wars was 'the state ready for commerce and war' as Britain at the beginning of the 18th century is often described. According to this story, both before, but increasingly after the Battle of Plassey in 1757 when the East India Company took over from the Mughal empire, the *Diwani*, or right to collect taxes, companies abroad were 'sovereign agents' of the emerging state. When the company exercised political authority, they were said to be exercising something like 'sovereignty'. Together, company and state are seen as united in an ever intensifying project of imperialism, and the movement South of the sovereign territorial state, a form which then becomes absolutely dominant in the story of both imperialism, and its twentieth century heir, development. But at another level, that story doesn't tell us enough about authority, the way authorization happens, and the world that is both authored and authorized in the name of law, because it looks back and presupposes legal form.

Another way of understanding the story is to see rivalries of authority, including practices of public authority, in which the forms of contest are created and conducted by and through indebtedness and shaped through instruments of public debt. These are rivalries which in important senses, have never really settled down, or ended. If we look at the story with this slightly different emphasis - an emphasis on legal form and practices of authorization in the name of law - things may be highlighted which are missed by seeing the story simply as one of state formation. In terms of the imperialism which follows, for example, what we see is not so much the inexorable movement of the sovereign territorial state, and its legal extraversion, public international law, but different groups of people moving South in different ways, for

different reasons, and with different justifications for their own authority. In *this* movement, questions of legal and juridical form are engaged at all points. In this way, the South is not one place, and nor is the North. And international law may be experienced not only a particular law with universal pretensions, but as an honorable law of encounter, obviously from a particular tradition, but by which different people can lawfully meet.

IV. Conclusion: Reflections on Reading Slowly

At least since the declaration of the 'End of History',[55] it has become a commonplace that understanding international law requires an appreciation of its history, and both legal scholars and historians have developed a welcome appetite for critically rethinking the history of international law.[56] In keeping with disciplinary developments (in history more than law), work at the vanguard is not the usual 'transitional' history which describes a linear progression toward an ever more perfect future, but the critical or unofficial history which is attentive to power, as well as to the production of historical knowledge as it tries to understand the past.[57]

But those at the critical vanguard of scholarship on international law and history are yet divided along at least one methodological line of significance. The division lies in how the category of 'law', international or otherwise, is understood and treated in methodological terms. One approach works within the inheritance of occidental modernity, and modern law, and accepts a definition for law that relies broadly on traditions of (legal) positivism. Although from the perspective of legal theory positivism is highly variegated, such conceptions of law implicitly accept for law and legality a particular meaning, defined by validity and traceable back to the state in some way.

[55] I refer here of course to the thesis popularised by Fukuyama, that the West 'won' the Cold War, and that the dissolution of the Soviet Union and the putative victory of liberal capitalism brought an end to 'history' in the (rough) sense of the dialectical struggle between competing ideologies. See Francis Fukuyama, *The End of History and the Last Man* (London: Penguin, 1993). It is a question as yet unexplored, as to whether it is just a matter of coincidence that the end of the Cold War coincided with a marked turn to (critical) history in the discipline of international law.

[56] For just one survey of the literature, though characteristically masterful, see Martti Koskeniemmi "Histories of International Law: Significance and Problems for a Critical Review," *Temple International and Comparative Law Journal* 27(2) (2013), 215 - 240.

[57] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000).

Another approach starts from a position agnostic to the normative claim of positive (state based) law rightfully to be 'law', and instead treats that law, both domestic and international, as a parochial rather than universal practice of authorization, specific to places, practices and people. This practice of authorization may be called 'jurisdiction' because it claims not only to speak the law, but also to decide what 'law' is.[58]

There are various reasons, conscious or unconscious, as to why a person would take as given, a positivist account of law. It is the necessary posture of the doctrinal lawyer, policy maker, practitioner, and a common one for legal theorists. This often remains true even when 'law' is the subject of critique, or is 'pluralised' by being depicted as rubbing shoulders with other normative regimes.[59] But in the context of histories of (international) law, the 'given-ness', or non-problematisation of a particular definition for law means either that its normativity is accepted as a matter of choice, or is understood implicitly as having been formed or 'fixed' at some point outside the time or place of the history being told. Once the question of the rightful meaning of law is fixed outside the time-space of the particular 'legal history' being told, and that rightful law is state law (in its internal or external aspect), the normative and descriptive aspects of occidental legality collapse into one, and a progressivist historiography is smuggled into jurisprudence.[60] In this way, international law appears as the law of humanity, and the history of state formation tends to become a teleology for the rest of the world.

On the other hand, approaches to law and history which we may think of as 'jurisdictional', regard modern law as a set of practices of authorization which are not fixed, final or settled, but ongoing, and always encountering other - often rival - practices of authorization.[61] Paying attention to legal or juridical form - or to what we should properly call 'jurisdictional' form to denote practices of authority which both

[58] Rush, "An Altered Jurisdiction", 150; and generally Dorsett and McVeigh, *Jurisdiction*.
[59] I am drawing a distinction here between pluralism and plurality, which was mentioned above. For an essay which engages with the question of the difference between critical histories which are yet implicitly positivistic and critical histories which are agnostic to the normative claims of positive law, see Halliday, "Laws' Histories", 261 – 277. See also a meditation to this effect in 'Introduction' to Benton and Ross, from 4.
[60] See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011), especially 176 – 185.
[61] Pahuja, "Laws of Encounter", 63 – 98.

speak the law and claim to decide what law 'is' - allows us to take up a position agnostic to the normative claim of positive (state based) law *rightfully* to be 'law', and treats that law (both domestic and international) instead as a parochial (rather than universal) practice of authorization, specific to places, practices and people. Such approaches 'allow the possibility for lawfulness to exist independently from legality narrowly understood.'[62] Putting a wedge between lawfulness in general, and 'legality', or state law in particular, enables us to see state formation as an ongoing and contested project, and better to resist its tendency to become a teleology for the rest of the world.[63] We may need to continue to think in this second way if we seek to avoid historically anachronistic understandings of law and lawfulness which work within the inheritance of occidental modernity, and modern law, and accept a definition for law that relies broadly on traditions of positivism, which although highly variegated, always takes us back to the state in some way. A jurisdictional orientation also allows us to 'provincialise' international law,[64] and to see it not as a 'universal' law fixed forever, either at the moment of Empire or its end, but instead as a particular or parochial law of encounter, which displaces other laws of encounter and relation as it moves.[65]

The practices of contest, relation and movement made visible when we slow down our reading of the Peace of Utrecht, are an important part of the story of the ongoing encounters that we tend now to subsume under the blanket of international law, and that we fold into the political/moral categories of North and South. Gaining a sense of those rival forms of authority, the techniques by which they were arranged, the means by which Company and State were joined together as creditor and debtor in the exercise of public authority, and the way in which the treaties of the Peace of Utrecht shaped a movement of that relation Southward, may encourage us to slow down our understandings of certain aspects of international law in the present day. Re-describing the Peace of Utrecht in this way invites us to reflect upon treaties, for example, as neither contractual agreements between sovereign equals, nor constitutions for a universal humanity. By paying close attention to legal form, we

[62] Maiolo, *Medieval Sovereignty*, 36. This is a different move to the acknowledgment of international law's 'Eurocentrism' which can sometimes reveal yet repeat it through an acceptance of international law's claim to legality.
[63] Barkawi and Laffey, "The Postcolonial Turn in Security Studies".
[64] Chakrabarty, *Provincializing Europe*.
[65] See generally Pahuja, "Laws of Encounter", 63 – 98; and Dorsett and McVeigh, *Jurisdiction*.

may perhaps make visible, their quality as instruments through which people (including associations of people like corporations and states) are joined in particular ways, and through which particular kinds of conduct are initiated and authorized both to take place, and to travel (as 'foreign investment', for example).

Slowing down our thinking in this regard seems to have implications for three distinctly pressing questions today. Those questions include how we are to understand the modern corporation and its troubled relationship to state authority, how we are to think of investment treaties and the rights accorded to foreign corporations *vis à vis* something we call 'sovereignty', and what work debt may do in shaping international relations. My point has not been to suggest that there are any unbroken lines of continuity between early modern practices and the present day, nor in this chapter to offer a genealogy of public debt, foreign investment or the history of the Company in international law.[66] Instead, my goal here has been simply to consider what we may understand differently when we pay close attention to how people lawfully meet, the techniques by which they are joined or brought into relation, and the practices through which things are initiated, authorized, shaped and travel.

[66] David Owen, 'Genealogy' in *Encyclopaedia of Political Theory*, ed. Mark Bevir (London: Sage, 2010), 549 – 551.

(Partial and incomplete)

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