

HEINONLINE

Citation:

Ileana Porras, Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations, 27 LJIL 641 (2014)

Content downloaded/printed from [HeinOnline](#)

Thu Jun 28 11:07:05 2018

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations

ILEANA PORRAS*

Abstract

This article explores the structural link between international law's long-standing doctrinal commitment to commerce and its inability to act decisively on behalf of the environment. One of the fundamental rights the early authors of *jus gentium* discovered was the right to engage in commerce. Francisco de Vitoria, Alberico Gentili, and Hugo Grotius each drew on and applied a providentialist theory of commerce. The doctrine held that Providence distributed scarcity and plenty across the earth so that peoples could not be self-sufficient, but would need to go in search of one another in order to acquire what they lacked. Commerce imagined in its pure form of reciprocal, mutually beneficial exchange would be the means to bring separated mankind to friendship. The embrace of the providentialist doctrine by these early exponents of the law of nations, carried forward by Emer de Vattel, set the stage for international law's longstanding commitment to international commerce, viewed (despite all the distortions) as a virtuous activity that tends to the common good. The doctrine's additional legacy was the installation of a view of nature as commodity. The providentialist doctrine of commerce, adopted by the early authors of international law, remains embedded in the structure of international law and cannot easily be dislodged. Until this doctrine is dislodged, however, international law will continue to be hobbled in its ability to address the urgent task of protecting the natural environment.

Key words

commerce; common good; environment; nature as commodity; Providence

I. INTRODUCTION

International trade continues to occupy a privileged place in an increasingly globalized and diversified world economy. Despite the economic slowdown triggered by the great recession of 2008, today the global volume of trade is at an all-time high, and international seaborne trade is thriving.¹ Notwithstanding growing attention to scarcity and to the risks posed to the world's critical ecosystems by human productive activity, the exploitation of natural resources has accelerated dramatically, much of it financed by new capital flows in the form of foreign direct investment. Indeed,

* Associate Dean of Academic Affairs; University of Miami School of Law [iporras@law.miami.edu].

¹ Despite expressed concerns that the rate of growth is 'sluggish', the volume of trade continues to grow. See WTO PRESS/688, 10 April 2013. International seaborne trade volumes in 2012 increased by 4.3 per cent, reaching 9.2 billion tons for the first time ever. See UNCTAD Review of Maritime Transport, UN Doc. UNCTAD/RMT/2013.

from 1995 to 2011 commodity exports increased fivefold.² Meanwhile, commodity export dependency, associated with underdevelopment and poverty, rose across the developing world.³

The participants in the pageant of world trade, those variously involved in financing or undertaking the extraction and refining of natural resources, the manufacture and assembly of goods, or in the packaging, transport, and delivery of goods across the supply chain, are mostly private economic actors pursuing private profit, whose connection or allegiance to a home state is often merely a formality. As is well known, international law and institutions today serve as the bulwark of this international trading regime. Under the guise of facilitating, managing, and disciplining inter-sovereign commercial relations, a sophisticated international law has created a series of overlapping spaces responsive to the needs of private economic actors. Yet, so far, international law has proven inadequate to the urgent task of protecting the natural environment. And this, even though all the evidence it has procured and disseminated points to the same troubling conclusion, that without concerted and sustained action, many critical ecosystems are liable to collapse or become non-functional.

There are undoubtedly many ways of approaching the question of international law's inadequacy in the sphere of environmental protection. In this article, however, I take up the challenge of locating nature in international law and pursue the intuition that there is a structural link between international law's long-standing doctrinal commitment to commerce and its inability to act decisively on behalf of the environment. My argument is that nature became visible to the early modern Europeans who contributed to a new tradition of *jus gentium* (the law of nations) only in the moment they articulated it as a material thing subject to appropriation, reducible to property, and capable of entering the stream of commerce. In other words, conceptually transforming nature into what we today would call a natural resource. The idea that nature in distant places might be available for lawful appropriation by European travellers, who had no prior connection or claim to it, should strike us as needing some explanation. The early authors of *jus gentium* overcame any possible misgivings by embracing the providential design doctrine of international commerce.⁴ With this move they ennobled merchants and transformed international commerce into a virtuous activity, approved by God and imbued with providential purpose. In this article, I highlight the importance of the providential distribution of scarcity and plenty as a design element in the doctrine. Scarcity was the driver that would push peoples to go in search of one another, but at the heart of the doctrine

2 Information Note: Facts and Figures on Commodities and Commodities Trade, UN Doc. UNCTAD/Press/IN/2013/2.

3 Ibid.

4 Simply stated, according to this doctrine, international commerce was desired by God (Providence) as a means of bringing separated humanity back into friendship. The classic elements attributed to the providential design included a judicious distribution of different resources and lacks across the nations, so that the peoples would need each other and duly go in search of one another in order to offset their lack. Under this view, the oceans, which seemed to separate the nations, were re-imagined as highways that would bring the peoples together in the reciprocal benefaction of exchange. See J. Viner, *The Role of Divine Providence in the Social Order: An Essay in Intellectual History* (1972), 32 et seq.

was the ideal of commerce as a consensual act of reciprocal, mutually beneficial exchange, which would build amity among separated peoples. For the early authors of international law, I argue, this doctrine served not only to provide legitimacy for international commerce, but provided support for the right to property they were elaborating within the context of a revamped *jus gentium*. If scarcity was part of the divine design then it was necessary to provide the means to offset the scarcity with the plenty that lay elsewhere (especially in distant places). The individual right to property was a necessary corollary to the right to engage in commerce. Only if you had the privilege to appropriate the plentiful natural resources and thereby reduce them to private property could you legitimately place them into the stream of commerce, and take them home to offset the scarcity.

In order to support my argument, I focus on the work of three representative elaborators of a new *jus gentium*: Francisco de Vitoria (c. 1492–1546), Alberico Gentili (1552–1608), and Hugo Grotius (1583–1645).⁵ Having identified the providentialist doctrine as it emerges and is used in their texts, I demonstrate its persistence by locating its traces within the work of the transitional figure, Emer de Vattel (1714–67), whose influential *Law of Nations* (1758) is often cited as the first exposition of classical international law. The embrace of the providentialist doctrine by these early exponents of the law of nations, I argue, set the stage for international law's long-standing and unswerving commitment to international commerce, viewed (despite all the distortions) as a virtuous activity that tends to the common good, engaged in by private economic actors. The doctrine's additional legacy within international law was the installation of a view of nature as commodity, always available to be appropriated, and always at its best when placed in the stream of commerce. The providentialist doctrine of commerce, adopted by the early authors of international law, remains embedded in the structure of international law and cannot easily be dislodged. Until it is, however, international law will continue to be hobbled in its ability to address the urgent task of protecting the natural environment – an objective that should engage both foundational principles of international law: the duty of self-preservation (self-interest) and the duty to others.

2. LOCATING NATURE IN *JUS GENTIUM*: PROPERTY AND THE APPROPRIATION OF NATURAL RESOURCES

Human nature anchors the law of nations that emerged in Europe beginning in the sixteenth century. Whether its attributes are explicitly ascribed to the divine will,

⁵ These three are representative figures in the evolving *jus gentium* tradition. Moreover, their diversity in terms of nationality and religious affiliation (Vitoria was a Spanish Dominican theologian, Gentili, an Italian Protestant exile in England, and Grotius, a Dutch Protestant) is important to this project, because it supports the claim that the attitudes to nature and commerce that I discern in their work on *jus gentium*, and in particular their reliance on a providentialist theory of international commerce, cannot simply be ascribed to a narrow national or doctrinal commitment. Certainly, their adoption of the providentialist doctrine of commerce served to legitimize the ongoing European maritime expansion. But what is interesting here is not just the objective pursued, but the way in which the doctrine became embedded in the more general project of articulating a basis for a universally applicable law of nations, comprised both of public law and private law.

creating man ‘in the image and likeness of God’,⁶ or simply taken as a given without particular reference to source or origin, human nature, characterized as distinctively rational, is the starting point for the early authors of the law of nations. At a time when Europeans could no longer assume that all nations and peoples subscribed to a Judeo-Christian worldview or to a single interpretation of scripture, their rights and duties to one another could not simply be attributed to divine command. Seeking to give coherence to the new reality of cultural and legal pluralism, these authors drew on an earlier Roman tradition of *jus naturale* (natural law) and *jus gentium* (law of peoples), as refashioned for a Christian audience by Thomas Aquinas in his *Secunda Secundae*.⁷ The advantage of the Roman tradition, as refracted through Aquinas, was that it provided a construct of justice/law that, while consistent with Christian teaching, could be deemed to be universally applicable and unchanging. At the heart of the Christian tradition of *jus naturale* were two important ideas that would serve to shape the evolving law of nations: that every human being was endowed with original liberty (born free) and that the whole earth was once held in common. In articulating their distinctive version of a law of nations consistent with the law of nature, each scholar applied himself to the task of accounting for the subsequent separation of mankind into polities (requiring a restraint of natural liberty) and the division of the world into property (*divisio rerum*). The law of nature, derived by various stratagems from an uncontested human nature, thus served as the architecture for a universally applicable law of nations.⁸

While human nature served to anchor the nascent law of nations, nature-as-such is absent. This is hardly surprising. Early modern Europeans held a very different set of ideas about the world they inhabited than is common today. To the extent they considered aspects of what we today might term the natural world, their ideas were shaped by religious instruction in the Judeo-Christian tradition, modified to some extent by a nascent scientific curiosity. According to this worldview, human beings and the world around them were the creations of God, life forms were organized hierarchically in a *chain of being*, and human beings had been granted dominion over the Earth and her creatures⁹. Consequently, the function of the created world was to provide the necessities for man’s physical survival: to feed, clothe, and provide shelter.¹⁰ The scientific spirit, which emerged in the early modern period, and the methods of investigation it spawned, were not inconsistent with this view. Rather, scientific inquiry was justified as a means of giving reverence to God by seeking a better understanding of God’s creation and aimed at extracting useful knowledge

6 The concept of *imago dei*, found in Genesis, was the starting point of all Christian anthropology.

7 For a useful discussion of the various early Christian debates regarding *jus naturale* and addressing the question of whether it amounted to a theory of rights, see R. Tuck, *Natural Rights Theories: Their Origin and Development* (1979), 5–31.

8 For a detailed account of the dialogue that Vitoria engaged with Aquinas on the subject of *dominium*, through which he developed a theory of a universally applicable individual right to property, see M. Koskenniemi, ‘Colonization of the “Indies”. The Origin of International Law’, in *La Idea de América en el Pensamiento Ius Internacionalista del Siglo XXI*, (2010), 43–63 (*Origin of International Law*).

9 Genesis 1:28.

10 A mystical undercurrent, which traversed the Judeo-Christian tradition, held that the created world also gave glory to God, but this perspective did not fundamentally challenge the dominant view.

to enhance man's ability to take advantage of the properties inherent in the created natural world: properties that God had intended for man to discover and put to use.

When seeking to locate the place of nature in the texts of the early international law scholars it is, therefore, crucial to remember that both our terminology and our underlying conceptions have changed radically. Modern notions of the natural world as comprised of habitats and complex ecosystems are of recent vintage. The belief that the human spirit might be fed by specific landscapes, or that we should value (and preserve) wilderness, go back only as far as the Romantics. Conservation, ecosystem management, pollution control, and sustainable use are modern concerns and policy responses, which arise both from a changed sensibility about the non-human environment and from the belated recognition of the significant negative impact that human activity and technologies have had on the natural systems that sustain life on Earth. The idea that human beings and their productive activity were about to usher our world into the Anthropocene¹¹ was, in the early modern period, simply inconceivable. Once we acknowledge the anachronistic character of our quest for nature-as-such, we can begin to discern that nature is not truly absent in the law of nations.

The scholars who, beginning in the sixteenth century, sought to articulate a new law of nations did so in the aftermath of the encounter with the New World¹² and in the face of intra-European competition for the opportunities opened up in distant places by advances in sea-faring and war-making technologies.¹³ When their attention turned to far distant places, places they would never visit, they did not conjure up a natural world. That is, none of them worked with the categories that are familiar to us of a natural world with eco-systems that support life on Earth. There is little or no description of places. Indeed, these distant lands, which played such an important part in Europe's development in this period, are, when present in the texts at all, mere abstractions, for the most part nameless and without shape or substance – merely places discovered or reached by Europeans where natives or local inhabitants have been found. Vitoria's lecture 'On the American Indians' (1537–9)¹⁴ is a case in point. The lecture is an attempt, in the theological scholastic style associated with Aquinas, to settle the question of the justification of Spanish

11 The term Anthropocene is used to describe a new geological epoch, highlighting the scale of the impact of human activity on the natural world since the industrial revolution, an impact that has effected geologic-scale change. See W. Steffen et al., 'A Global Perspective on the Anthropocene', (2011) 334 (Oct.) *Science*, 34–5.

12 Vitoria's work has been described as a response to the Spanish encounter with the New World. See, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law*. However, it is worth remembering that Vitoria's intellectual response came almost half a century after first contact. By the time of Vitoria's Salamanca lectures (1537–9), Spanish conquistadors and encomenderos had devastated Hispaniola and much of the Caribbean, exhausting gold deposits and in the process pillaging and enslaving the local population; Hernán Cortes had defeated the Aztecs at Tenochtitlan in 1521; and Francisco Pizarro had executed Atahualpa Inca in 1533. By 1537, the consolidation of Spanish rule over much of Central and South America was well under way. Furthermore, by this time, disease and large-scale exploitation had contributed to an unprecedented decline in population, leading to the fateful decision to import African slave labour to the New World.

13 I. Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *De Iure Praedae* — The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"', (2006) 31 *Brooklyn J. Int'l L.* 741, 756 et seq. (*Constructing International Law*).

14 F. Vitoria, 'On the American Indians' in A. Pagden and J. Lawrance (eds.), *Francisco de Vitoria, Political Writings* (1991) 231–92, (*De Indis*).

appropriation of new world lands and native labour. The theological discussion ranges widely, beginning with whether or not the Indians were, when discovered, true owners (had *dominium*).¹⁵ It is in this context that Vitoria begins to elaborate a theory of property, for in order to address the nature of property he had first to consider who could be an owner. For Vitoria the answer was obvious. All human beings had *dominium*, for human beings possessed the image of God and this was the source of *dominium*. To be human was to have the capacity to have dominion over yourself and to own property. To the argument that Indians were either natural slaves or not fully human (not rational), Vitoria responded that no man was born a natural slave and that the Indians were clearly rational (even if not strongly so). As human beings, the Indians were true owners of themselves, their land, and their possessions, and remained so unless and until they were lawfully dispossessed.

By the time Vitoria was preparing his lectures, the question of dispossession of the Indians was hardly abstract. Most of the Caribbean, Central Mexico, parts of Central America, and South America had come under Spanish control and the unprecedented flows of gold and silver to Spain, in this early period mostly taken from native accumulation, had already transformed economic relations and practices across Europe. America was, in other words, a concrete place, an immense territory made up of valleys, mountains, swamps, deserts, rivers, lakes, and forests, encompassing rich and diverse ecosystems sustaining a wealth of fauna and flora; whose mineral resources had already contributed disproportionately to the glory and wealth of Spain. None of this is apparent in Vitoria's text.

Vitoria, in this wide-ranging lecture in which he explores the nature of the Indians, whose dispossession must be justified, refers to rivers three times.¹⁶ He does not appear to have any particular river in mind. While the rivers he refers to are, by implication, new world rivers, in the end it hardly matters. It turns out that the geographical location and the actual features of these rivers (their length and breadth, flow variability, the life they sustain, and the human communities to which they are integral) are irrelevant, for the sole characteristic of rivers Vitoria wishes to highlight is the fact that they are, according to natural law, the common property of all and, by the law of nations, open to ships from any country.¹⁷ Vitoria's additional references to rivers represent them as places subject to exploitation. In the first instance, his point is that by virtue of the law of nations, Spaniards must be granted the same access and privilege to appropriate fish or gold from rivers as those accorded to other strangers. In the second instance, he remarks that gold and fish taken from rivers, since they are not already owned, may be freely appropriated by the first taker.

With the exception of the few references to fish, Vitoria makes no mention of any new world flora or fauna. Moreover, as in the case of the rivers, Vitoria is not concerned with any concrete new world fish. Rather, in the text, fish, along with

¹⁵ Ibid., 239 et seq.

¹⁶ All three references to rivers occur in the section in which Vitoria establishes the right of the Spaniards to travel freely and to engage in commerce, see *De Indis supra* note 14 at 279–80.

¹⁷ See *De Indis, supra* note 14, at 279.

pearls and gold, stand in as examples of things (natural resources) that natural law decrees may be freely appropriated by the first taker from the commonly held rivers and oceans where they are found. In other words, in the few instances when something we might consider a reference to the natural world intrudes in the text, it does so as an abstract object of property, common property in the case of rivers and oceans, and individual property, in the case of fish, gold and pearls, in the moment they are appropriated from the common access resource. Vitoria's concern is not with the natural world as such, but with establishing the legal foundations for how things located in distant places might be appropriated, reduced to property, placed in the stream of commerce, and made available for consumption in Spain.

Despite the passage of time and changing contexts, the absence of meaningful attention to the concrete geography, nature, or character of the lands that became the objects of European appropriation, settlement and plunder continued to characterize the works of the early authors of international law. In this respect, Gentili, Grotius, and even Vattel proved no different than Vitoria. The fauna and flora *in situ* remained invisible to international law. The natural world remained opaque. Only when it could be imagined as serving to fulfil the needs of Europeans did the natural world become visible, and then only as property. Thus, while nature-as-such was absent in the law of nations, reduced to property, the material world became visible in the form of nature-as-commodity, ready to enter the stream of commerce. In this way, the early authors of the law of nations participated in the production of a world-view, which subsequently became dominant, of a material world whose value depended on the potentiality of ownership. It is, moreover, the view of nature that continues to prevail in international law. Why this should be so is the subject I take up in the next section.

3. SCARCITY AND ABUNDANCE AND THE PROVIDENTIAL DESIGN OF COMMERCE

The early modern Europeans who took to the sea ready for long distance voyages beginning in the fifteenth century went in search of plenty.¹⁸ Despite a dearth of information about the lands they were sailing towards, their minds were filled with the promise of abundance lying in wait in distant lands. Fitting out to sea, with the prospect of lengthy and perilous journeys of uncertain success, was an expensive proposition. Those who invested their capital were also motivated by the promise of a plenty that could be acquired in unfamiliar and unknown distant places and brought back to market at home. With so much investment at risk, hoped-for returns had to be commensurately significant. Given the many unknowns that the seafaring voyagers were inevitably negotiating, the investments were speculative indeed, and speculation thrives only when the hoped for returns are spectacular.

¹⁸ For an account of European overseas expansion beginning in the fifteenth century, see E. B. Barbier, *Scarcity and Frontiers: How Economies Have Developed through Natural Resource Exploitation* (2011), 225–367. For an overview of the period of maritime expansion from the British perspective, see K. R. Andrews, *Trade, Plunder and Settlement: Maritime Enterprise and the Genesis of the British Empire 1480–1630* (1984) (*Trade, Plunder and Settlement*).

How did this image of plenty and abundance in distant places come to inhabit the imagination of so many early modern Europeans, as opposed to the possible alternative of distant lands as barren unwelcoming deserts suffering from scarcity? And how did it come to be a self-evident proposition that the plenty abroad could be appropriated and brought home? That it was, in other words, available to Europeans? Why did they assume that, despite its geographically distant origin, abundance abroad might serve to fulfill the needs (and desires) of those at home? It is probable that the European belief in an abundance-in-distant-places lying in wait to be appropriated had many origins. In this section I focus on the appearance of a trope of scarcity and abundance in the texts of three important representatives of an early stream of international legal thought,¹⁹ Vitoria, Gentili, and Grotius, and its persistence into the age of classical international law through the influential work of Vattel. My argument is that the trope of scarcity and abundance, elaborated in these texts, in the context of a providentialist theory of international commerce, gained general acceptance in part because of its conjunction with the compelling underlying narrative of an original time when all men were free and all was held in common and scarcity was unknown. This compelling narrative of mankind's original state provided the basis for their theories of property as well as the conditions for the assertion of a right to engage in commerce, for after the separation of mankind into polities and the division of property (*divisio rerum*), scarcity entered the world and only through commerce could man's fundamental lacks be met.

3.1. Francisco de Vitoria (c.1492–1546)

The idea of scarcity and abundance enters Vitoria's *De Indis* (1537–9) at a crucial juncture in the text, when having conclusively argued contra a series of seven unjust titles he turns to address the possible '[j]ust titles by which the barbarians of the New World passed under the rule of the Spaniards'.²⁰ The first and most important just title is labelled 'of natural partnership and communication'. Drawing on the law of nations (*jus gentium*), which he states 'either is or derives from natural law', and invoking an original community of mankind 'in the beginning of the world', when all was held in common and everyone was allowed to visit and travel freely, before the subsequent division into polities and property (*divisio rerum*), Vitoria sketches out a retained and universal right to hospitality.²¹ For Vitoria, the right to hospitality is inseparable from a right to travel freely, for travel is the precondition for human intercourse.²² The fact that rivers, seas, and harbours (the avenues of travel) are still the common property of all (by the law of nature) and open to all shipping (according to the law of nations) is adduced by Vitoria as proof that the original right to travel freely has been retained by all, even in the post-division world, subject only to the proviso that the travellers do no harm. Having established a universal right to travel freely, Vitoria proposes a right to trade as a necessary corollary of the right

19 D. Kennedy, 'Primitive Legal Scholarship', (1986) 27 *Harv. Int'l L.J.* 1.

20 See *De Indis*, supra note 14, at 277. Vitoria also refers to these as 'legitimate and relevant titles', *Ibid.*

21 See *De Indis*, supra note 14, at 278.

22 *Ibid.*

to hospitality. Indeed, according to Vitoria, the right to trade is implicit in the right to travel for travellers have a right to engage in trade.²³ Clearly, in Vitoria's world-view, travellers were likely to be merchants, for why else would they set out on their travels? It is at this point in Vitoria's analysis that the trope of scarcity and abundance is first introduced: '[T]he Spaniards may lawfully trade among the barbarians, . . . they may import the commodities which *they lack*, and export the gold, silver, or other things that *they have in abundance* . . .'²⁴ As we see, Vitoria is unclear on what specific commodities might be imported to the New World, yet he assumes that the New World's inhabitants must have some commodities lacking. At the same time, he is quick to declare that the barbarians have an abundance in gold, silver, and other things, an abundance that is to be exported for the purpose of offsetting the lack of the Spaniards. As he develops this theme, it is evident that Vitoria understands that the commerce he describes is to the advantage of the Spanish, for he also remarks that it is an obligation of natural law that the barbarian princes should love the Spaniards, and concludes from this that they should not prohibit the Spaniards from 'furthering their own interests',²⁵ which in this context must be understood as meaning something like 'from making a profit'.²⁶

Vitoria uses the term 'abundance' only once in reference to the gold and silver of the barbarians, yet their plentifulness and corresponding availability to the Spaniards is implied repeatedly in his discussion of the lawful means whereby gold and other valuable things might be acquired by the Spanish. First, he conjectures that if, in the post-division world, things are held in common by the barbarians and strangers, then Spaniards have an equal privilege to appropriate these things.

For example, if travelers are allowed to dig for gold in common land or in rivers or to fish for pearls in the sea or in rivers, the barbarians may not prohibit Spaniards from doing so [on the same terms].²⁷

Furthermore, he adds, according to the law of nations

a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker . . . therefore, if gold in the ground or pearls in the sea or anything else in the rivers has not been appropriated, they will belong by the law of nations to the first taker, just like the little fishes of the sea.²⁸

In each of these cases, the underlying assumption is that the gold and other valuable things are there in abundance. That the barbarians may continue within their polities to designate land as common, suggests abundance. That gold and pearls might be drawn out of commonly held rivers and the sea calls forth an image of underlying abundance, reinforced by the allusion to the little fishes of the sea, an allusion

23 Ibid., at 279.

24 Ibid., at 279 (emphasis added).

25 Ibid., at 280.

26 For a discussion of Vitoria's relatively relaxed attitude to the ethical questions raised by the new commercial practices that were evolving in this period, see M. Koskenniemi, 'International Law and the Emergence of Mercantile Capitalism: Grotius to Smith', in *The Roots of International Law/Les Fondements du Droit International* (2013), 12–16.

27 See *De Indis*, *supra* note 14, at 280.

28 Ibid.

that for a Christian readership would have called to mind a miracle of abundance. Even the evocation of an original time when the world was held in common and travel was open to all already conjures up a time and place of plenty. Although the right to travel, a right Vitoria finds in the law of nations, is in principle universally applicable, the fact that he discovers it first when he turns his attention to the new world, reinforces both the sense that the new world is in some special sense open and that it is blessed with an almost pre-division, even pre-lapsarian, abundance. The Spanish in the new world can for a moment be imagined as travelling freely and helping themselves to the abundance of this pre-division world. It is a fleeting image, for their purpose is to place what they appropriate into a stream of commerce, and that of course is a post-division activity – for commerce (the exchange of scarcity and plenty) becomes necessary only in the post-division world.

Abundance and scarcity reappear in Vitoria's *OAI* as he draws to a conclusion. Having demolished a series of unjust titles and proposed a series of possible just titles by which the new world barbarians might have come under the subjection of the Spanish, Vitoria concludes with a reassurance that there is no reason to fear that trade would come to a halt even if it were to turn out that none of the just titles was effective:

[T]rade would not have to cease. As I have already explained, the barbarians have a surplus of many things, which the Spaniards might exchange for things they lack. Likewise they have many possessions which they regard as uninhabited, which are open to anyone who wishes to occupy them.²⁹

In other words, beyond any moral or legal justifications lies the bare fact of scarcity and plenty.

3.2. Alberico Gentili (1552–1608)

An Italian Protestant exile, Alberico Gentili, became England's first significant contributor to the law of nations. His major work on the law of nations, *De Jure Belli* (on the laws of war), was published in England in 1588.³⁰ In the course of elaborating his doctrines concerning the laws of war, Gentili touches on the subject of commerce. The context of European commercial expansion in which Gentili wrote was significantly different from that of Vitoria. By 1588, the new world was no longer a novelty. Spanish cities and settlements covered the landscape of the Americas and Spanish administrative and military control was entrenched. The flow of silver from the mines in Potosi (Bolivia) and Zacatecas (Mexico) had overtaken gold as the main export to Spain, and due to severe depopulation, flows of African slave labour to the new world were significant and lucrative. The Portuguese, also present in the Americas, held a quasi-monopoly on the European spice trade with the East Indies. England was not yet a major player in the new world, and despite Drake's successful circumnavigation of the world (on a mission of discovery and plunder), the English were not yet ready to venture on trading missions to the spice islands. Nonetheless,

29 Ibid., at 291.

30 A. Gentili, *De Jure Belli Libri Tres* (Reproduction of the 1612 edition, with a translation by John C. Rolfe (1933)) (1598) (*DIB*).

Gentili wrote at a time of mounting domestic concern with securing commercial access to the lucrative new world trades, including the slave trade, and he must have been sensitive to the growing English interest in new world settlements.³¹

Gentili first mentions commerce in the opening chapter of *DIB* where he states: 'commerce is regulated by the law of nations'.³² Not surprisingly, despite the different context, Gentili too discovered in the law of nations a right to engage in commerce. Like Vitoria, Gentili presented commerce as both a manifestation and an effect of human sociability. And, like Vitoria, his discussion of commerce is embedded in an analysis of the laws of war,³³ for Gentili, in a move parallel to that made by Vitoria half a century earlier, concludes that interference with the natural privilege to engage in trade is an injury sufficient to justify war.

In *DIB*, Gentili seeks to establish not only the practical and legal significance of international commerce but also its moral foundation. To do so, Gentili turns to a variety of classical texts to frame the subject of commerce, in the process evoking the trope of scarcity and abundance, and the uneven distribution of material goods that serves to impel commerce in both its senses of human intercourse and trade:

In harbors, navigation, communication and accommodation is the strongest bond of human society. ... here the crops of grain are richest, there grapes grow best ... Commodities are distributed over different regions, in order that it may be necessary for mortals to have commerce with one another ...³⁴

The trope is carried forward by a lengthy quote of a passage from Seneca which alludes explicitly to the providential function of commerce:

If any one is so greedy that he does not wish the good things of life to be distributed, he will have to take heed that he does not, through ingratitude for the bounty of Providence, establish a law upon the earth, which sanctions every kind of wickedness and does away wholly with all intercourse and commerce. *Everyone must realize that no blessing has been bestowed by divine Providence upon any one for his sole enjoyment. But if nature had given everything equally to all men, the reasons for loving one another would readily be destroyed; for it is through this inequality that we ask and give in turn without ceasing.* This is the law of friendship and its strongest bond. Thus it is an advantage that men journey over the earth and that the rivers extend their long courses into various parts of the land. ... The winds give intercourse to all nations with one another, and unite races separated in location. This is a wonderful gift of nature.³⁵

The distribution of abundance and lack, inequality itself, the passage suggests, is a central design element of providence with the purpose of bringing humanity to friendship through commerce. From this it follows that those gifted with abundance have a duty to enter into commerce, and failure to do so is wickedness, for their abundance was not given for themselves, but so that they could enter into commerce

31 Raleigh's disastrous Roanoake settlement venture was launched just a few years prior to publication of *DIB* and various publicists were actively encouraging further English endeavours in that direction. See *Trade, Plunder and Settlement*, *supra* note 18, at 220 et seq.

32 See *DIB*, *supra* note 30, at 9.

33 The subject of commerce is addressed in Book I, chap. XIX, on the 'natural causes' for war. See *DIB*, *supra* note 30.

34 *Ibid.* (emphasis added).

35 *Ibid.*, Book I, chap. XIX, *supra* note 30, at 89 (emphasis added).

to fulfil the needs of those who lack. Commerce is here placed on a high pedestal, with the consequence that interference with commerce becomes a commensurately grave offence: 'One who takes away such privileges inflicts a wound on human society.'³⁶

3.3. Hugo Grotius (1583–1645)

Hugo Grotius first addressed himself to the subject of commerce in his early unpublished tract, Commentary on the Law of Prize and Booty (*De Jure Praedae*) written between 1603–9,³⁷ an advocacy piece commissioned by the VOC (the Dutch East Indies Company) to justify the taking as prize of a Portuguese carrack in the high seas of the East Indies by an uncommissioned merchant vessel of the company.³⁸ Although, with the exception of one chapter, it remained unpublished in Grotius' lifetime, this lengthy early work is of great interest because it is the context within which Grotius first sketched out his theory of the law of nations, including both his doctrine of the free sea and his doctrine of the law of war. Yet, it can be argued that commerce was at the heart of the Grotian enterprise in *DIP*.³⁹ The subject of commerce is also addressed in Grotius' better-known tract on the Free Sea (*De Mare Liberum*)⁴⁰ published anonymously in Leiden in 1609, but since this short tract was at its origin a chapter extracted from *DIP*, it adds little that is new. Nonetheless, only with its publication did Grotius' views on the subject enter the public domain. Finally, in his most important contribution to the law of nations, The Rights of War and Peace (*De Jure Belli ac Pacis*) (1625),⁴¹ Grotius briefly touches again on the subject of commerce in a manner reminiscent of his earlier work.

The global commercial context within which Grotius wrote had evolved since the time of Gentili. At the turn of the seventeenth century when Grotius penned *De Jure Praedae*, the Dutch (closely followed by the English) had started to penetrate the East Indies spice trade. By 1625 both nations and their merchant trading companies had become significant players (and therefore competitors) in the business of trade, plunder, and settlement in both the new world and the East Indies. In Europe a global economy was emerging as were the public and private regulatory apparatus, including new corporate forms, needed to accommodate the novel forms of financial and investment transactions that supported the increasingly defuse merchant empires. Despite the changing context, Grotius' approach to commerce was cast in a manner already familiar from Vitoria and Gentili. In other words, Grotius

36 Ibid., at 88. But the practical Gentili makes it clear that only the absolute prohibition of commerce can be deemed an injury and that placing restrictions on commerce is a prerogative of sovereigns. Later in the text he reiterates that English restrictions on the rights of foreign traders who seek to supply the Spanish enemy were perfectly reasonable. See *DIB* Book 1. chap. XXI, *supra* note 30, at 101–3.

37 H. Grotius, *Commentary on the Law of Prize and Booty* (M. J. van Ittersum ed. 2006) (Grotius, *DIP*).

38 For details of the background circumstances of Grotius' *De Jure Praedae* see Porras, 'Constructing International Law', *supra* note 13; see also M. J. van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its justification in *De Jure Praedae* (1604–1606)', (2003) 31 *Asian Journal of Social Science* 511.

39 See Porras, *supra* note 13, at 756.

40 H. Grotius, *The Free Sea* (D. Armitage ed., 2004) (Grotius, *Free Sea*).

41 H. Grotius, *The Rights of War and Peace* (R. Tuck ed., 2005) (Grotius, *War and Peace*).

establishes a natural right to engage in commerce,⁴² a right founded on the equivalence he posits between commerce and sociability, and then argues that interference with the right is tantamount to inflicting injury, which may serve as a legitimate cause for just war.

References to abundance and scarcity recur throughout Grotius' texts. Already in *DIP* Grotius uses the trope as he adopts and reinvigorates the doctrine of the providential function of commerce:

*For God has not willed that nature shall supply every region with all the necessities of life; . . . Why are these things so, if not because it was His Will that human friendships should be fostered by natural needs and resources, lest individuals, in deeming themselves self-sufficient, might thereby be rendered unsociable?*⁴³

Making reference to the same passage from Seneca already cited by Gentili he adds:

In Seneca's opinion, the supreme blessing conferred by nature resides in these facts: that by means of the winds she brings together peoples who are scattered in different localities, and that *she distributes the sum of her gifts throughout various regions in such a way as to make a reciprocal commerce a necessity of the members of the human race.*⁴⁴

The implication is clear; commerce is willed by Nature (God, divine Providence) with the intention that human beings return to their original sociability. Under this view, the mechanism devised by Nature to drive commerce is the unequal distribution of gifts, lack and abundance, such that self-sufficiency is rendered impossible. These passages, drawn from *DIP*, later serve as the opening for Grotius' argument supporting the Hollanders' right to travel to and trade in the East Indies in the Free Sea.⁴⁵ The trope recurs in *DIP* towards the end of the polemic where the universal right to engage in trade is again asserted, this time linked to another Grotian theme, the right and duty to make a profit:

[Commerce] was established in order that *one person's lack might be compensated by recourse to the abundance enjoyed by another*, though not without a just profit for all individuals taking upon themselves the labour and peril involved in the process of transfer.⁴⁶

That the right to engage in commerce was of transcendent origin served to underscore the evil of the crime of interfering with commerce. 'Consequently, anyone who abolishes this system of exchange, abolishes also the highly prized fellowship in

42 For the difficulty in pinpointing Grotius' actual source of authority for a right to engage in commerce see Porras, *supra* note 13, at 765–70.

43 Grotius, *DIP* chap. XII, *supra* note 37, at 182 (emphasis added).

44 *Ibid.*

45 'We will lay this certain rule of the law of nations (which they call primary) as the foundation . . . that it is lawful for any nation to go to any other to trade with it. God himself speaketh this in nature, seeing he will not have all those things, whereof the life of man standeth in need, to be sufficiently ministered in nature in all places . . . To what end are these things but that he would maintain human friendship by their mutual wants and plenty, lest everyone thinking themselves sufficient for themselves for this only thing should be made insociable.' Grotius, *Free Sea*, *supra* note 40, at 10 and 'This Seneca thinketh the greatest benefit of nature, that even by the wind she hath so divided all her goods into countries that mortal men must needs traffic among themselves.' *Ibid.*, at 11.

46 Grotius, *DIP* Chap. XII, *supra* note 37, at 216 (emphasis added).

which humanity is united. *He destroys the opportunities for mutual benefactions.* In short, he does violence to nature herself.⁴⁷

In the *Rights of War and Peace* (1625) the theme of commerce plays a less prominent, though by no means unimportant, role. In this work, Grotius' addresses commerce in Book II, which is devoted to a discussion of the just causes for war. The opening chapter of Book II sets out the general proposition that the just causes for war are characterized as defence of persons or defence of property. In chapter II, 'Of Things Which Belong in Common to All Men' Grotius turns to the subject of property and commerce. He begins by alluding to the original state of the world, when all things were held in common, then proceeds to describe the process by which property came to be divided.⁴⁸ Beyond his description of this early moment of division, two points are of particular interest. First, Grotius begins a very dense account of property rights by stating that '[t]here are some Things which are ours by virtue of a Right common to all Men; and others which are so by a particular Right'.⁴⁹ He broadens the category of 'things common to all men', by including both 'corporeal things' and 'certain actions',⁵⁰ and further distinguishes between corporeal things that have no owner (some only of which are not susceptible to ownership) and corporeal things, which belong to some particular persons.⁵¹ The point he is making is that even in the post-division world, human beings may still make property rights claims based on rights common to all, as well as on particular rights. It is in order to explain this fact that he proceeds to trace the origin of property rights from the original creation. Second, is that he treats commerce as a retained 'property' right derived from the original commonality of things, a right that survives the subsequent division into property.⁵²

In the paragraphs Grotius devotes specifically to commerce in *Rights of War and Peace*, the trope of scarcity and abundance and the theme of the providential function of commerce are lightly woven in through classical citations:

Human Life would have been wild and savage, there would have been no Intercourse between Men, were it not for this Element, *which furnishes them with the Means of supplying one another's Wants*; and of forming Acquaintances and Friendships by the Exchanges they make (Plutarch) . . . GOD *has not bestowed all his Gifts on every Part of the Earth, but has distributed them among different Nations*, that Men wanting the Assistance of one another, might maintain and cultivate Society. And to this End has Providence introduced Commerce, *that whatsoever is the Produce of any Nation may be equally enjoyed by all*, (Libanius) . . . What Nature denies to one Country, is supplied from another, by Means of Navigation (Euripides).⁵³

47 Grotius, *DIP*, *supra* note 37, at 182 (emphasis added).

48 Grotius' account of the origin of property in *Rights of War and Peace* differs in some important respects from his account in *DIP*. I reserve to another day a more detailed reading of these interesting narratives and their underlying assumptions.

49 Grotius, *War and Peace*, Vol. II, *supra* note 41, at 420.

50 *Ibid.*

51 *Ibid.*

52 Commerce is one of a series of retained rights described by Grotius that follow from the original commonality of the world. Textually, the right to commerce follows the right of necessity, the right to innocent profit, and the right of free passage; and precedes the right to purchase. See Grotius, *War and Peace*, Book 2, chap. II, *supra* note 41, at 433 et seq.

53 Grotius, *War and Peace*, Book 2, chap. II, *supra* note 41, at 444 (emphasis added).

3.4. Emer de Vattel (1714–67)

The Swiss diplomat, Emer de Vattel, published his extremely influential *The Law of Nations* in 1758,⁵⁴ over a century after Grotius completed *The Rights of War and Peace*. In disciplinary terms, Vattel's text is considered to mark the definitive transition to the classical period, as he clearly demarcates the special province of international law to be that concerning the relations between nation-states. By 1758, the maritime empires of Europe were well entrenched in Asia and the Americas, and the fortunes of Europe depended on them. In North America and the Caribbean, England had established thriving colonies dependent on imported African slave labour and the dislocation of indigenous populations. The great merchant companies of England and Holland ruled over or otherwise controlled much of India and Southeast Asia. Scientific and technological advances had opened up new horizons and productive possibilities and, while the American and French revolutions were some decades away, the Enlightenment was well underway.

Vattel's *Law of Nations* reflected the more systematic and pragmatic approach of his age. Vitoria, Gentili, and Grotius had all quite naturally turned to scripture and shared classical authors as authority for their pronouncements concerning *jus gentium*, and they were as much focused on private rights as on public power.⁵⁵ Vattel eschewed these authorities and focused on public power. Nonetheless, the structure and content of Vattel's thought were shaped by the works of these earlier authors. Thus, while his approach was undoubtedly more modern, his categories more clearly delineated, and his analysis more rigorous, his starting point and his assumptions are in certain respects strikingly similar.

In *The Law of Nations*, Vattel devotes two relatively long chapters to the subject of commerce, the first in Book I, on the internal duties of a state, and the second in Book II, on the duties that states owe one another. That he addresses the subject of commerce from both the perspective of internal governance and that of international relations is itself indicative of the importance Vattel attributes to this subject. Vattel's understanding of the actual mechanics of commerce was in keeping with the period in which he wrote: more sophisticated than that of Vitoria, Gentili, or even Grotius. For instance, he makes a great deal of the distinction between buying and selling, and is clearly attuned to the realities of competition. Yet, the familiar trope of scarcity and abundance is much in evidence. Chapter VIII 'Of Commerce' in Book I (on internal duties), begins: '[I]t is commerce that enables individuals and whole nations to procure those commodities which *they stand in need of, but cannot find at home*'.⁵⁶ This is followed a few sentences later with a special endorsement of foreign trade: '[b]y trading with foreigners, a nation *procures such things as neither nature nor art can furnish in the country it occupies*'.⁵⁷ For this reason, as a matter of the duty of self-preservation, according to Vattel, nations have an obligation to themselves to promote and encourage commerce. Having established the benefits of trade, Vattel

54 E. de Vattel, *The Law of Nations* (B. Kapossy and R. Whitmore eds., 2008) (Vattel, *Law of Nations*).

55 For a thorough and fascinating analysis of Vattel's work in the context of the history of international legal doctrine see E. Jouannet, *Emer de Vattel et L'Émergence Doctrinale du Droit Internationale Classique* (1988).

56 Vattel, *Law of Nations* §83, *supra* note 54, at 131 (emphasis added).

57 *Ibid.*, §85, *supra* note 54, at 131 (emphasis added).

proceeds to outline the foundation of the law of commerce. As he will do again in the chapter devoted to commerce in Book II,⁵⁸ Vattel turns to first principles, specifically to the duty of mutual assistance. This natural law obligation includes, according to Vattel, as a consequence of the initial division of property, the duty to sell at a fair price ‘what the possessor *has no occasion for*’.⁵⁹ From this arises the individual’s, and consequently, the nation’s right to buy:

a nation has a right to procure at an equitable price, whatever articles it wants, by purchasing them of other nations *who have no occasion* for them. This is the foundation of the right of commerce between different nations, and, in particular, of the right of buying.⁶⁰

While Vattel appears to have discovered a right to engage in commerce similar to that established by Vitoria, Gentili, and Grotius, he departs from their analysis in a significant way. The reference to buying holds the key. For, having stated that individuals and nations have a duty to sell and a right to buy at a fair price, Vattel goes on to clarify that there is no corresponding right to sell, for it turns out there is no duty to buy:

Every man and every nation being perfectly at liberty to buy a thing that is to be sold, or not to buy it, and to buy it of one rather than of another, – the law of nature gives to no person whatsoever any kind of right to sell what belongs to him to another who does not wish to buy it; neither has any nation the right of selling her commodities or merchandise to a people who are unwilling to have them.⁶¹

This reasoning goes to the heart of Vattel’s project of reconciling natural law with pragmatism. According to Vattel both the duty of self-preservation and the duty of mutual assistance are first principles of natural law, but when they are in conflict the duty of self-preservation always trumps the duty to render mutual assistance, and it remains up to each nation to make its own determination as to its best course of action based on self-interest. This important distinction allows Vattel to conclude that the right to buy is not a perfect right.⁶² Within the Vattelian scheme this means that a nation’s right to engage in commerce by buying, could not be enforced by compulsion against an unwilling seller (who is unwilling to buy what the first wants to sell in exchange). In other words, the Vattelian right to engage in commerce, unlike the one discovered by Vitoria in the context of the new world, would not serve as a just cause for war against a people who chose to place constraints on or restrict commerce altogether, for such a nation would be exercising its liberty and fulfilling its primary obligation to itself, by making a judgment about its own best interest. Under certain circumstances a rejected buyer might justifiably feel affronted, but it would have to abide by the unwilling seller’s decision. Only by

58 See discussion *infra* at note xx.

59 Vattel, *Law of Nations* §88, *supra* note 54, at 132 (emphasis added).

60 *Ibid.*, at 133 (emphasis added).

61 *Ibid.*, *supra* note 54, at 133.

62 The distinction between perfect and imperfect external obligations and their corresponding rights is set out in Vattel, *Law of Nations*, Preliminaries §17, *supra* note 54, at 74–5.

means of conventional law, by entering into a commercial treaty, could a nation acquire a perfect right to engage in commerce.⁶³

Vattel returns to the subject of commerce in Book II, which he devotes to the duties nations owe to one another. Under this heading, he approaches commerce from the perspective of the fundamental principle of mutual obligation to render assistance,⁶⁴ and again concludes that nations are under an obligation to engage in commerce with one another.⁶⁵ In Book II, Vattel expands on this theme and seeks to ground the obligation. As we might expect, like the others before him, he begins by referencing an original time when man simply took what he needed when he met with it. Interestingly, the passage begins with a normative claim 'All men ought to find on earth the things they stand in need of', which suggests a type of entitlement that man has, by virtue of being human, which was not taken away from him in the post-division world. As he pursues his line of reasoning, Vattel argues that in the post-division world, where men can no longer wander about and help themselves to what they need, a means must be provided to supply the need. The means, of course, is commerce. As the passage unfolds, the logic of the providential doctrine of commerce makes its appearance and the unequal distribution of goods, the trope of scarcity and plenty, provides the key:

All men ought to find on earth the things they stand in need of. In the primitive state of communion, they took them wherever they happened to meet with them, if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right, and consequently it cannot take place without leaving them, in general, some mean of procuring what is useful or necessary to them. This mean is commerce: by it every man may still supply his wants. Things being now become property, there is no obtaining them without the owner's consent; nor are they usually to be had for nothing; but they may be bought, or exchanged for other things of equal value. Men are therefore under an obligation to carry on that commerce with each other, if they wish not to deviate from the views of nature; and this obligation extends also to whole nations or states (Prelim. §5). *It is seldom that nature is seen in one place to produce every thing necessary for the use of man: one country abounds in corn, another in pastures and cattle, a third in timber and metals, &c. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary; and the views of nature, our common mother, will be fulfilled.* Further, one country is fitter for some kind of products than another, as, for instance, fitter for the vine than for tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its land and its industry in the most advantageous manner; and mankind in general prove gainers by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce.⁶⁶

In this passage, Vattel seems to be restating and elaborating on Grotius' presentation of the foundation of commerce in *Rights of War and Peace*. In the beginning, men

63 Vattel, *Law of Nations* §93, *supra* note 54, at 135.

64 This principle is established in the Preliminaries, which relate to the obligations in both Books I and II, see *ibid.*, at 71, 72.

65 He had already stated as much in Book I in the context of internal obligations: 'nations are obliged to trade together for the common benefit of the human race, because mankind stands in need of each other's assistance', see *Ibid.*, at 135.

66 *Ibid.*, at 273–4 (emphasis added).

could help themselves freely to whatever they needed (for self-preservation) from an original commonality. But after the division into polities and property, that privilege was lost. Since in the face of lack men still needed to fulfil their needs, commerce filled the gap. Commerce was, in other words, the means that remained to human beings to fulfill their needs. Vattel, writing in 1758, does not specifically ascribe a divine origin to commerce nor does he go as far as stating that the unequal distribution of scarcity and plenty was the result of a providential design. Yet his assertion that when nations trade with one another none of them will lack ‘such things as are useful and necessary and the views of nature, our common mother, will be fulfilled’ brings to mind earlier claims to divine origin.

Whether or not Vattel shares the vision of commerce as having a providential function, the foundation of his entire system depends on an ascription of a condition of lack to human beings (and by extension to nations), a lack that calls forth their mutual dependence. Indeed, in the Preliminaries, when he is setting out the foundations and principles of the law of nations, Vattel stresses that human beings are by their very nature interdependent – unable to supply their own lack: ‘Man is so formed by nature, that he cannot supply all his own wants, but necessarily stands in need of the intercourse⁶⁷ and assistance of his fellow creatures, whether for his immediate preservation or for the sake of perfecting his nature, and enjoying such life as is suitable for a rational being’.⁶⁸

The subject of commerce is addressed specifically in relatively few pages of the *Law of Nations*, yet commerce permeates much of the work. The reason is that Vattel positions commerce at the juncture of the two great primary obligations of natural law: the duty to self and the duty to others. In a post-division world, the duties of self-preservation and mutual assistance appear at times to stand in tension. The obligation to engage in commerce serves to resolve the tension. Commerce is essential to self-preservation for, in a post-division world, it is the only means to acquire what you are lacking. Commerce is also the means to fulfil the obligation to others (mutual assistance) by providing them with what they lack, yet, without compromising the duty to self-preservation. The underlying assumption is that you are assisting the other (providing what they lack), by trading what you have in surplus in exchange for something that you lack. In its ideal expression, the perfect act of commerce is envisaged as a double arc, in a single elegant transaction fulfilling both the internal and external obligations of each nation. What could be more appealing (and virtuous) than an activity that enables nations to render mutual assistance while promoting the primary duty of self-preservation?

The trope of abundance and scarcity deployed throughout the works of the early authors of *jus gentium* and in the transitional work of Vattel served to bolster not only the logic of commerce, but its moral and hence legal foundation. The authors of *jus gentium* embraced an inchoate doctrine of the providential function of commerce, which they located in classical texts and scriptural allusions and transformed to

67 The term translated here as ‘intercourse’ is ‘commerce’ in the original French, a reminder that the etymology of commerce once embraced a broader range of human relationships than the more limited idea of commercial exchange now associated with it in English.

68 Vattel, *Law of Nations*, Preliminaries §10, *supra* note 54, at 71.

produce a powerful new legal right to engage in international commerce. Embedded in the doctrine was the assumption of an original world-wide community made up of free yet sociable human beings who held all things in common and lacked for nothing. The early authors of *jus gentium* also used this claim of an original world-wide community to found their theories of property rights. These theories, as Koskenniemi has argued, then found their way into domestic theories of rights;⁶⁹ however, it is important to note that these theories were developed by scholars whose gazes were fixed on distant lands and distant natural resources. The early authors of *jus gentium* were engaged in the complex project of articulating the moral–legal foundation on which they could build a universally applicable international law. They were also, however, engaged in a common endeavour to provide the moral–legal justification for the appropriation of the lands, possessions, and labour of the non-European world to serve the markets at home and enrich Europe. International commerce in the hands of these authors became not merely a choice but a duty, and the right to engage in commerce became a fundamental principle. The trope of abundance and scarcity allowed these authors to imagine an idealized commerce whose purpose was to fulfil mutual needs, and it allowed them to avoid engaging with the realities of the actual practices of international commerce that surrounded them. The trope of abundance and scarcity, of commerce at the service of a moral/legal obligation of mutual assistance, freed them from the need to examine whether the peoples in the non-European world were in fact the beneficiaries of this traffic or to put into question the means used by Europeans in pursuance of acquiring the plenty from distant places for use at home, and even liberated them from the need to question whether there was indeed abundance elsewhere.

4. CONCLUSION

In this paper I have sought to demonstrate that while nature-as-such is not present in the texts of the early European authors of *jus gentium*, their works nonetheless contributed to the emergence of a prevalent attitude, still dominant today, that views nature as primarily a commodity, always available for appropriation and exploitation. Borrowing from an earlier Roman tradition refracted through a Christian lens, these scholars sought to provide the basis for a universally applicable law of nations. From a minimalist but universal and unchanging law of nature, they derived and formulated a comprehensive *jus gentium*. Embedded in their understanding of natural law was a narrative of a time ‘in the beginning’ when human beings enjoyed perfect freedom and held everything in common, followed by a moment in which men separated into polities and property was divided. That moment continued into their present and was the reason that a *jus gentium*, congruent but not identical with natural law, was needed. One of the fundamental rights each of the early authors of international law discovered was the right to engage in commerce. The specific details of their analyses differ in a variety of ways, some of them significant, but in each case they drew on and applied a providentialist theory of commerce, which it

69 See, generally, Koskenniemi, *supra* note 8.

turned out fit perfectly with the narrative structure of an original time when all were free and everything was held in common. The providentialist doctrine held that the institution of commerce was God's/Providence's/Nature's response to the division. In effect, Providence had intentionally distributed scarcity and plenty across the earth so that peoples could not be self-sufficient, but would need to go in search of one another in order to acquire what they lacked. Commerce imagined in its pure form of reciprocal, mutually beneficial exchange would be the means to bring separated mankind to friendship. Through the lens of scarcity and plenty, nature was transformed into a thing, a thing that could be appropriated, turned into property, and placed in the stream of commerce. The idea of commerce that these scholars imagined and promoted in their works bore little resemblance to the practices of coercive trade, plunder, and settlement that characterized the age. Nor did it reflect the fact that much of the traffic involved bullion, luxuries, simple manufactured goods, plantation products produced with slave labour, and the slaves themselves. Yet, it took hold and continued to shape international law's attitude to commerce.

The image of commerce developed by the early authors of international law did not directly implicate a particular view of nature in Europe for, despite the implied reciprocity, nothing in the texts suggested that transoceanic foreign travellers might appropriate nature at home. Nonetheless, the notion that nature in distant places could be understood as a thing available for appropriation, complemented the Judeo-Christian belief that God had given dominion over the created Earth to human beings, and reinforced the tendency to assume that the material world, wherever located, was there for human exploitation. Despite repeated experiences of local scarcity or exhaustion of resources elsewhere resulting from over-exploitation, Europeans remained convinced that there was plenty somewhere else for the taking. That was, after all, the promise of the trope of scarcity and abundance. The natural world that was valued was that which was productive, placed under cultivation, or otherwise exploited. Nature in its natural state, unmodified or lightly used by human beings, was viewed as a wasteland in need of an industrious owner. Not until the emergence of the Romantics and the Preservationists in the late eighteenth and late nineteenth centuries, respectively, did the idea that nature could be valued other than as a commodity begin to gain force. Only in the late twentieth century did the idea that human activity could seriously compromise the natural environment on which human life and wellbeing depend gain acceptance. For all that, the twenty-first century remains committed to a view of nature as available to appropriation, commodification, and exchange. Furthermore, like our early modern forbears, we still believe that in the face of scarcity at home there must be plenty elsewhere. The only difference is that the plenty must be obtained through ever more sophisticated, and in some cases, ever more destructive technologies of production, or sought in ever more remote locations. The legal constructs that early modern international lawyers crafted to justify the appropriation of the land and natural resources of non-European peoples continue to shape our legal imagination. The question for today's international lawyers is how to break out of the patterns of associations that continue to inhabit our discipline from its inception in the early modern world.