Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2012
Convened by Professors Benedict Kingsbury and Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown, unless otherwise noted

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

January 25 Harlan Grant Cohen, *University of Georgia*
"Finding International Law, Part II: Our Fragmenting Legal Community"

February 1 Anthea Roberts, *London School of Economics / Visiting Professor at Harvard University*
"Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System"

February 8 Odette Lienau, *Cornell University*
"Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century"

February 29 Nico Krisch, *Hertie School of Governance (Berlin) / Visiting Professor at Harvard University*
"From Consent to Consultation: International Law in an Age of Global Public Goods"

March 21 Doreen Lustig, *New York University*
"The Business of International Law: International Legal Attitudes Toward the Business Enterprise, 1870-1954"

April 3 Jean d'Aspremont, *University of Amsterdam*
"Formalism and the Sources of International Law" (*excerpts*)

April 4 Martti Koskenniemi, *University of Helsinki / New York University / Visiting Professor at Columbia University*
"International Law and the Emergence of Mercantile Capitalism: Grotius to Smith"

April 17 Horatia Muir Watt, *Sciences Po*
"Private International Law: Beyond the Schism, from Closet to Planet"
[to be held, exceptionally, on a Tuesday at 4pm; FH 118]

April 18 Armin von Bogdandy & Matthias Goldmann, *Max Planck Institut, University of Heidelberg / New York University*
"Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law"

Private International Law: Beyond the Schism, from Closet to Planet

By Horatia Muir Watt, Sciences-po Law School, Paris

The aim of this project is to explore the ways in which, in the absence of traditional forms of government in a global setting, the law can discipline the transnational exercice of private power by a variety of market actors (from rating agencies, technical standard-setters, multi-national agribusinesses to vulture funds). Traditionally, the transnational economic activities of non-state actors fall within the remit of an area of the law know as 'private international law'. However, despite the contemporary juridification of international politics, private international law has contributed very little to the global governance debate, remaining remarkably silent before the increasingly unequal distribution of wealth and authority in the world. By abandoning such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, environmental protection, sovereign debt, the bartering (or confiscation) of natural resources and land, the use (and misuse) of development aid, (unequal) access to food, the status of migrant populations, and many more. This incapacity to rise to the private challenges of economic globalisation is all the more curious that public international law itself, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. According to the genealogy of private international law depicted here, the discipline has developed, under the aegis of the liberal divides between law and politics and between the public and the private spheres, a form of epistemological tunnel-vision, actively providing immunity and impunity to abusers of private sovereignty. It is now more than time to de-closet private international law and excavate the means with which, in its own right, it may impact upon the balance of informal power in the global economy. This means both quarrying the new potential of human rights in the transnational sphere, and rediscovering the savoir-faire acquired over many centuries in the recognition of alterity and the responsible management of pluralism. In short, adopting a planetary perspective means reaching beyond the schism between the public and private sphères and connecting up with the politics of international law.

* The author expresses gratitude to the participants in the PILAGG workshop both at Harvard Law School (IGLP) and Sciences–po Law School for their helpful comments, to Columbia Law School for the welcome it extended to me as visiting faculty during the Spring Semester 2011. Particular thanks to David Kennedy, Robert Wai, Ralf Michaels, Diego Fernandez Arroyo, Alexandrer Panayatou, Geoffrey Samuel and Mikhail Xifaras.

Increasing juridification of international politics[1] has situated public international lawyers as self-styled prime-movers in the design of a new normative ordering beyond the state[2]. The breaking of geo-political frames accompanying globalization heralds new de-territorialized forms of « fragmented sovereignty »[3], points to alternative scenarios of global ordering, draws attention to the rise of functional regimes, points to hybrid actors and private rule-making, and breathes new life into the recurring debate on the real nature of international law as « law »[4]. Beyond international law's traditional « subjects »[5], it conquers territories as

[1] The much heralded contemporary turn to law in the international arena, and its corollaries, the rise of international courts (and their rôle as « tipping point » actors, Karen J. Alter, « Tipping the Balance : International Courts and the Construction of International and Domestic Politics », *Cambridge Yearbook of European Legal Studies*, 2010-2011, vol. 13, p. 1), or the multiplication of new supra-national law-makers (on which, see José Alvarez, *International Organizations as Law-Makers,* OUP, 2006), can also be formulated as a scathing critique, to the extent that the turn to law is perceived to be taking place at the expense of the political (see Martty Koskenniemi, *The Politics of International Law*, Hart publishing, Oxford, 2011, p. 359 : « what we see now is an international realm where law is everywhere – the law of this or that regime – but no politics at all »…). As will be shown below, such depoliticisation is partly due to the multiplication of autonomous legal regimes each vying for supremacy; partly to the distinct trend towards the privatization of trade and investment ; partly to the primacy of finance and technical expertise rather than the real economy and deliberative democracy; partly to the involvement of the supranational courts in discrete dispute resolution rather than in global governance.

[2] On the reasons for this turn from a perspective within the discipline, see Christine Schwöbel, « The Appeal of the Project of Global Constitutionalism to Public International Lawyers", *German Law Journal* 2012, vol.13. The rise of comparative constitutionalism and international federalism within the field are also emblematic of its turn towards grand global institutional design: see, for example, on the perceived « demand for international constitutionalization », Jeffrey L. Dunod & Joel P. Trachtmann (ed), *Ruling the World ? Constitutionalism, International law and Global Goverance*, CUP 2009, p. 5 et s. ; comp. Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* 4 (2009). This turn is however not always perceived as convincing, either because it consists frequently in projecting familiar domestic forms to the global arena (see David Kennedy, « The Mystery of Global Governance », in *Ruling the World*, p.37), or because the attainment of global justice may be seen to require alternative schemes, such as a « new global law » (see Rafael Domingo, *The New Global Law*, CUP 2010) or the exploration of spaces for contestation and recognition (see Emmanuelle Jouannet, *Qu'est-ce qu'une société internationale juste? Le droit international entre développement et reconnaissance, Paris,PedonePublishing, 2011*).

[3] See Hent Kalmo & Quentin Skinner (eds), *Sovereignty in Fragments*, CUP 2010.

[4] The core doctrines of legality and morality which underpin customary international law are currently threatened by the claims of rational choice theory to provide more plausible explanations for the compliance of sovereign actors (see Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law*, OUP, 2005). On the other hand, attempts have been made to present « outcasting » as enforcement, the lack of which has long been perceived as the strongest argument against public international law's claim to be law (see Oona Hathaway & Scott Shapiro, « Outcasting : Enforcement in Domestic and International Law », 121 *Yale LJ* 2011). In turn, however, the intellectual viability of social sciences approaches are challenged (Robert Howse & Ruti Teitel, « Beyond Compliance: Rethinking Why International Law Really Matters », *Global Policy* (Online), Vol. 1, No. 2, 2010; *NYU School of Law, Public Law Research Paper No. 10-08*). It is not of course the aim of this article to engage with public international law's internal doctrinal debate ; it suffices to point out that similar moves to emphasise « unofficial » reputational sanctions in order to consolidate the claims of various forms of infra- or trans-national law, which are a core feature of social theory, have also long been at the heart of the arguments for the status of *lex mercatoria* as transnational legal order (see B. Goldman, « Frontières du droit et lex mercatoria », *Archives de Philosophie du Droit* 1964, p.177 ; for a dismissal of such arguments as sociology, not law, see P. Lagarde, « Approche critique de la *lex mercatoria* », *Le droit des relations économiques internationales, Etudes offertes à B. Goldman*, Litec 1982, p. 125). On the comparative dimension to the debate about the legal nature of law-without-enforcement, see Nils Jansen & Ralf Michaels, « Private Law Beyond the State ? Europeanisation, Globalization, Privatisation » (2008) 54 *Am Journ Comp Law* 843, explaining (p.852) how law is more easily perceived in the European tradition independantly of enforcement – which may explain why modern international law, with its European origins, had little difficulty in defining itself as law.

varied as ecology and energy, economic inequality, displaced populations, financial markets, foreign investment, gender or religious diversity - many of which fall plausibly within the province of « private » international law insofar as they involve individual rights, transnational corporate actors and conflicting legal regimes[6]. Indeed, the « informal empire » that is currently unfolding in the shadow of global state-led politics, is the realm of the private[7]. Both « public » and « private » governance[8] of private economic authority currently focus intense pluri-disciplinary attention from politists, traditional, institutional and

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[5] The entities which qualify as « subjects » having rights and duties under international law (traditionally the sovereign States), represent a fast expanding category – now comprising individuals and certain sub-groups of civil society - as international law conquers new subject-fields, largely in response to the faith placed in its « providential » ability to solve the welfare problems of humanity (see E. Jouannet, *Le droit international libéral-Providence. Une histoire du droit international*, Bruylant, 2011). Of course, the pre-Westphalian era witnessed similar competition between different forms of territorial organization which brought about the emergence of the modern state (see Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change,* Princeton Univ. Press, 1996 ; comp. on complete statehood as historical anomaly, see Thomas Risse, *Governance Without a State? : Policies and Politics in Areas of Limited Statehood*, Columbia Univ Press 2011).

[6] See M. Koskennemi, *The Politics of International Law*, p.329, observing that public international law is invoked when multinational corporations reak havoc on the environment, when States engage in religious wars, or when globalisation dislocates communities. These situations also involve typical « private » international law issues, such as conflicts of law in tort, the status of private armies in the context of the privatization of war, or immigration and citizenship issues.

[7] On the concept of informal empire, see the seminal article by Ronald Robinson & John Gallagher, « The Imperialism of Free Trade », *The Economic History Review,* vol. VI, 2nd Series, n°1 1953) ; comp. for the connection to (private) international law, v. M. Koskennemi, « Empire and International Law : The Real Spanish Contribution », 61 *University of Toronto Law Journal* 1 (2011).

[8] The suggestion here is that private international law has global governance implications, which need to be addressed as such. Governance is famously defined by James Rosenau as « a more encompassing phenomen than government. It embraces governemental insitutions, but also subsumes informal non-governmental mechanisms wherby those persons and organisations within its purview move ahead, satisfy their needs, and fulfill their wants » (in Rosenau & Czempiel (eds) *Governance without Government. Order and Change in World Politics*, CUP 1992). Comp. Hent Kalmo & Quentin Skinner, « Introduction : A concept in fragments », *Sovereignty in Fragments*, p 22. On the « governance turn » see Julia Black, « Constructing and contesting legitimacy and accountability in polycetric regulatory regimes », 2 *Regulation and Governance* 137 (2008). The term « governance » has been criticized as signaling the invasion of politial science vocabulary and managerialism (Martty Koskenniemi, *The Politics of International Law,* p. 358), or, alternatively, as carrying too many « top-down » implications (whereas private international law can better be seen as an alternative form of regulatory strategy in which private actors can contest private power : Robert Wai, "Transnational Private Litigation and Transnational Governance", in P. Mueller & M. Lederer, eds., *Criticizing Global Governance*, London: Palgrave Macmillan, 2005, p.243 and « Conflicts and Comity in Transnational Governance : Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes », in Christian Joerges & Ernst-Ulrich Petersmann, *Constitutionalism, Multilevel Trade Governance and Inernational Economic Law,* Hart Publishing, Oxford, 2011, p.240 ; however, for a very convincing use of the concept see Craig Scott & Robert Wai, " "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation" in C Joerges, P Sand and G Teubner, eds., *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 287-319). Both these arguments carry weight, and it is certainly not intended here either to convey a managerial stance, or to neglect the importance of private contestation. However, the term « governance » shall be used in connection with the political implications of private international law discussed in this paper, not only in order to facilitate interdisciplinary dialogue through the use of a common vocabulary, but also because it allows for the disengagement of state and law and the constitution of private authority. It does not suppose the centrality of the state or a distinction between government and the governed (see Harm Shepel, *The Constitution of Private Governance*, Hart Publishing 2005, p.28).

development economists, sociologists, historians, philosophers, linguists and critical theorists of many ilks and horizons. Regime and systems theory, political economy, political theories of pluralism all draw attention to power structures[9] and legal change in a postnational context[10], contributing novel ways of thinking about interdependence[11].

Yet private international law remains by and large, if not entirely absent from the whole global governance scene, at least reluctant to offer any systemic vision, or sense of meaning, to the changes affecting law and authority in global environment[12]. As sovereign authority migrates to new sites in the informal global economy[13], it appears to have succumbed to some form of « post-national trauma »[14], as if unable to survive the demise of the Westphalian[15] model[16] ? Despite the fact that the sovereign State's « loss of control »[17] is

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[9] See the very recent attempt at a legal theory of power structures by Calixto Salimao Filho, *A Legal Theory of Economic Power. Implications for Social and Economic Development*, Edward Elgar, 2011.

[10] See Claire A Cutler, *Private Power and Global Authority, Transnational Merchant Law in the Global Ecnomy,* Cambridge Studies in International relatins, 2003 ; Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in Global Governance,* CUP 2002 ; and among subsequent, varied and growing literature on this point, see Harm Shepel, *The Constitution of Private Governance,* cited above; Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code*, Hart Publishing, Oxford, 2010 ; T. Buthe & W. Mattli, *The New Global Rulers : Privatization of Regulation in the World Economy,* Princeton 2011. On regime theory, see too below p. 40 & 55.

[11] For a particularly convincing « integrated » approach to system change which accounts for interdependence, see Katarina Pistor, « Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change", (2011) *Global Jurist:* Vol. 11: Iss. 2 (Frontiers), Article 6. Available at: http://www.bepress.com/gj/vol11/iss2/art6.

[12] There are notable exceptions, both implicit and explicit: Christian Joerges, « The Idea of a Three-Dimensional Conflicts Law as Constitutional Form », in Christian Joerges & Ernst-Ulrich Petersmann (ed), *Constitutionalism, Multilevel Trade Governance and International Economic Law,* Hart Publishing, Oxford, 2011 p.413 ; Christian Joerges, Poul F Kjaer and Tommi Ralli, " A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation", (2011) 2(2) *Transnational Legal Theory* 153–165; Christopher A. Whytock, « Domestic Courts and Global Governance », 84 *Tulane Law Review* 67, 2009 ; Hannah Buxbaum, « Transnational Regulatory Litigation », 46 *Virginia JIL* 251 ; Andrew Guzmann, « Choice of Law : New Foundations », 90 Geo LJ 883 (2002); Karen Knop, Ralph Michaels, Annelise Riles, « Forward », in *Interdisciplinary Conflict of Laws*, 71 *Law and Contemporary Problems*, 1 (2008) ; Jacco Bomhoff, « The Reach of Rights », *Interdisciplinary Conflict of Laws*, 71 *Law and Contemorary Problems*, p.73 ; Robert Wai, « The Interlegality of Transnational Private Law », *Interdisciplinary Conflict of Laws*, 71 *Law and Contemporary Problems*, p.107 ; Ralf Michaels, « The Re-State-ment of Non-State Law : the State, Choice of Law and the Challenge of Legal Pluralism », 51 *Wayne L Rev* 1209 (2005) ; Agustín José Menéndez, "United They Diverge? From Conflicts of Law to Constitutional Theory", (2011) 2(2) *Transnational Legal Theory* 167–192; Florian Rödl, "Democratic Juridification Without Statisation: Law of Conflict of Laws Instead of a World State", (2011) 2(2) *Transnational Legal Theory* 193–213; Poul F Kjaer, "The Political Foundations of Conflicts Law" (2011) 2(2) *Transnational Legal Theory* 227–242; Martin Herberg, "Global Governance and Conflict of Laws from a Foucauldian Perspective: The Power/Knowledge Nexus Revisited", (2011) 2(2) *Transnational Legal Theory* 243–269 (on the latter see the book review, *Rev crit DIP* 2012.forthcoming

[13] See A. Claire Culter, *Private Power and Global Authority*, p. 36.

[14] David Kennedy, The Methods and the Politics », in Pierre Legrand & Roderick Munday, *Comparative Legal Studies : Traditions and Transitions*, CUP 2003, p. 345.

[15] The historical reality of the peace of Westphalia (1648), which put an end to the Thirty Years' War on the basis of mutual religious tolerance, is no doubt far from the mythical liberal-positivist model of sovereignty which it has come to represent in international legal doctrine. See on this point, Chris Thornhill, « Comparative State Formation », in Kurian, Alt, Chambers & Garrett (eds), *International Encyclopedia of Political Science,* Washington DC, QC Press, showing that while the Treaty of Westphalia may have heralded the articulation of power as detached from private status and recognized the exclusive

largely driven by private factors – unleashed flows of capital; alliances of non-state entrepreneurs of change ; competition in the law-making market - private international law has little to say, and remains apparently unperturbed by the decline of territory, the reconfiguring of sovereign authority, the rise of functional regimes – weathering paradigm-change as if the global had succeeded to the inter-national[18] with no further ado[19]. There appears to be relatively little dissatisfaction with the way things are, and indeed a shared conviction that business can go on as usual since the nation-state has not, in the end, disappeared[20]. This flattening of the significance of globalization throughout the disciplinary field, and the correlative refusal to engage in a reconsideration of the traditional methodological and epistemological premisses of legal categories developed within the

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sovereignty of the prince over his territory, nevertheless, pluralistic sources of authority remained until the late 18th century, which witnessed the congruence between law and state. See too, on the mythology which has grown up around the concept of Westphalian legal order, presented as the result of a historical progression towards the assertion of territorial sovereignty, see Chris Thornhill, « The Future of the State », in Poul Kjaer, Gunther Teubner, Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation*, Hart, 2011, p. 357, esp. p.358, explaining that the gradual emergence of the concept of state as an agreggation of institutions that could assume a particular density of political authority in one distinct region was not actually about protecting the integrity of state territory from the inroads of other states, but articulated power as a resource detached from *private* status. Comp. for an excellent account of the historical contingency of the nation state, see Paul Schiff Bermann, « The Globalization of Jurisdiction », 151 *U Penn Law Rev* 311 (2002), p.444 et s, emphasising that only with the Enlightenement did a specific concept of the nation emerge, accompanied by rise of the professional historian as a contributing greatly to imagined community (p.461), tradition itself being as an invention of modernity (p.462). A critical account of the Westphalian myth of sovereignty and statehood can be also found in Stephen Krasner, « The durability of organised hypocrisy », Kalmo & Skinner, *Sovereignty in Fragments*, p.96. Reference here to the Westphalian doctrine is to the dominant representation of state sovereignty and the interstate legal order and does not prejudge whether or not the Peace of Westphalia was actually based on any such doctrine.

[16] Jacco Bomhoff & Anne Meuwese come to this conclusion, dismissing any meta-regulatory role for private international law, in « The Meta-Regulation of Transnational Private Regulation », 38 *Journ. Law & Society* 138 (2011).

[17] Saskia Sassen, *Losing Control ? Sovereignty in an Age of Globalization*, Columbia Univ. Press, 1996. The loss of control of sovereignty does not necessarily mean that the sovereign state may not continue to be a significant actor on the international scene; much depends however on the meaning given to the elusive concept of sovereignty, which fulfills diverse functions in diverse contexts: see the various contributions in Kalmo & Skinner, *Sovereignty in Fragments,* cited above. Similar observations can of course made on the concept of statehood *(*on the historical anomaly of which, see Thomas Risse, *Governance Without a State? : Policies and Politics in Areas of Limited Statehood*, Columbia Univ Press 2011; Partel Piirimae, "The Westphalian Myth and the idea of external sovereignty", in Kalmo & Skinner, *Sovereignty in Fragments*, p64). The point here is that there is nevertheless, on the one hand, an evident decline of the monopoly of state in the production of transnational normativity, and on the other an increased dependency of any one state on institutions and policies created or decided outside of its own sphere of sovereignty.

[18] On the successive historical paradigms of the universal, the international and the global, see Antoine Garapon, « Le global et l'universel », *Centre Perelman, Université Libre de Bruxelles, Séminaire de philosophie du Droit,* March 2010.

[19] In the European context, attention tends to focus on the new brand of European Union federalism and its impact on private international rules, whose increasing technicality encourages a new form of scholasticism. In the United States, the promising area of global regulatory litigation (see Hannah Buxbaum, « Transnational Regulatory Litigation », 46 *Virginia JIL* 251), appears to be retreating to the protection of territoriality (see below XXX).

[20] For a prognostic from political science on the future of the nation-state, see J. Sgard, E. Brousseau, Y. Schemeil, « Sovereignty without Borders : On Individual Rights, the Delegation to Rule and Globalization », Working paper Sciences po CERI, 2010.

Westphalian conceptual framework[21] is all the more surprising that the greatest challenges for the public architects of the global ordering involved in the construction of an overarching constitutionalism[22], are the appearance of new sources of authority and normativity « beyond the state » : sovereign newcomers which are not subjects of international law, and the correlative emergence of post-national « private » regimes which do not count as « law » within the meaning of article 38 of the Statute of the International Court of Justice and its complex system of validation. Indeed, in the eyes of some acute observors of society, a radical change in the relationship between political regulation and private governance has pushed the once-central « official » or state law to the global edge, reducing it to « impulse-generating » periphery of autonomous private normativities[23]. Moreover, it has been suggested that the local « background rules » of property and contract, operating according to traditional conflict-of-law principles, may well be of more considerable import in the global economy, in terms of distributional effects, than ordinarily meets the eye[24]. Has it not been observed, on the other hand, that in a fragmented legal order, the politics of international (public) law are now a politics of redefinition, which transform political conflicts into issues of jurisdiction and applicable law[25] : such a reading of the international legal order is precisely that of private international law, which might seem then to come into its own. And is this not a time in which the gradual recognition of individuals as subjects of international rights gives new pull to a cosmopolitan humanist perspective, where familiar private law considerations of community and harmony[26] might come to the fore ?

One might then have expected private international law – which deals traditionally with legal diversity in the transnational arena and is characterised by its systemic vision of « conflicts » justice[27] - to step in at this point, focussing its energy on « polycentric regimes », which are at the heart of contemporary political science and social theory[28]. It might have made an essential contribution on those substantive issues which carry evident implications for global governance – issues as varied as citizenship and immigration ; cyberspace ; judicial

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[21] For an emblematic attachment to the Continental private law model, see Pierre Mayer, « Le phénomène de la coordination des ordres juridiques étatiques en droit privé », RCADI vol. 217, (2007), p.9, spec. p. 111 et s.

[22] See the various contributions in Jeffrey Dunoff and Joel Trachman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge, 2009), presented as the joint work of leading scholars "to create a comprehensive and integrated framework for understanding global constitutionalization".

[23] G. Teubner, « The Two Faces of Janus : Rethinking Legal Pluralism », (1992) 13 *Cardozo L Rev* 1443 .

[24] Robert Wai, « Conflicts and Comity in Transnational Governance », p.234, on the regulatory significance of background rules for supporting venue for contract enforcement, property protection and dispute resolution ; Martty *Koskenniemi*, « Empire and International Law », p. 16 et s ., showing how the Spanish Scholastics used the *ius gentium* and its private law concept of *dominium* to create a universal system of private exchange and finance.

[25] Martty Koskenniemi, *The Politics of International Law*, p. 352 observing that what appears to be at stake now in global governance arrangements is who (what institution, what regime) gets to decide.

[26] For a contemporary rehabilitation of such values as constitutive of « conflicts justice » (as opposed to substantive justice »), see Alex Mills, *The confluence of public and private international law : justice, pluralism and subsidiarity in the international constitutional ordering of private law* (Cambridge University Press. 2009), spec. p. 16 et s.. For a critical reflection, see P. Picone, « Les méthodes de coordination entre ordres juridiques en droit international privé, RCADI, 2000, t.276, spec. p. 211.

[27] See preceding footnote.

[28] For approaches to polycentricity from sociology and systems theory, addressing directly the issues which are at the core of private international law, see Julia Black, « Constructing and contesting legitimacy and accountability in polycetric regulatory regimes », 2 *Regulation and Governance* 137 (2008) ; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25 *Michigan Journal of International Law* 999 (2004).

use of secrecy in provisional injunctive relief ; the accountability of multinational corporate groups, in fields such as environmental destruction, land-grabbing, or abuse of power in the food supply chain ; the impact of crossborder litigation (and the role of the courts) on the functioning of the global labour market; cyberspace ; regulation of daily life in occupied territories ; the political foundations of private international law in a federal system ; the responsibility of rating agencies and other financial gate-keeper institutions in interconnected market crises; the restructuring of sovereign debt, and so on.

It would seem naturally concerned with rising to the epistemologial challenges linked to the transnational expressions of private power[29]. It might therefore be expected to adapt its methodology so as to articulate the procedural standing of collective interests of civil society; to link state action requirements with issues of extraterritorality; to make sense of « private » legal transfers or the multiplication of transnational functional regimes ; to address the transnational dimensions of human rights violations ; to question the extraordinary autonomy of international commercial and investment arbitration ; to worry about the spread of shadow finance outside regulated institutional frameworks.

Yet in the main – and of course with notable individual exceptions - the field appears to be directing its attention to much narrower, and indeed highly technical, issues, with little awareness or interest for their governance implications[30]. Moreover, private international law seems to lack any overarching world-vision through which to give meaning to any of the changes wrought by the decline of state sovereignty and territory. Significantly, a recent search for a meta-regulatory tool in the new configuration of transnational legalities has disqualified the field as too state-centered to be able to usefully contribute to the new needs of good governance on a global scale[31]. Above all, it does not appear to have any ambition to check and discipline private power in the global economy, allowing it instead to soar high

[29] No attempt will be made here to address the issue of the definition of power (on which it can be referred to Stephen Lukes' three-dimensional approach in *Power, A Radical View*, 2nd ed, 2005). References in this paper to power in connection with private actors will frequently imply domination or imbalance (as in Claire Culter, *Private Power and Global Authority*, cited above), which it is the law's role to moderate or rectify. The point being made here, therefore, is that as long as private power is not recognized as such, it is not made subject to adequate treatment in law. Reciprocally, law cannot apprehend it, because no attention is given to the processes of domination and subordination through which compliance is obtained. The term private « authority » is sometimes used to denote a claim to legitimacy by private or non-state rule makers. Private power is, on the other hand, very often camouflaged.

[30] Such as those which motivate the « new global lawyers » (on whom see Raphael Domingo, *The New Global Law*, cited above). This is not to say that there are not some oustanding monographies and articles on some of these topics: see non exhaustively, in the recent literature, F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne*, Bruylant, 2007 ; M. Audit, « Aspects internationaux de la responsabilité des agences de notation », *Rev crit DIP* 2011.581; C. Kleiner, *La monnaie dans les relations privées internationales*, LGDJ 2009 ; Michael Karayanni, « Choice of Law under Occupation : How Israeli Law Came to Serve Palestinain Plaintiffs », 5 *Journ PIL* 2009.1 ; Jérémy Heymann, *Le droit international privé à l'épreuve du fédéralisme européen*, Economica 2010. See too, linking up the conflict of laws and Kantism, J.P. Romano, « Le droit international privé à l'épreuve de la théorie kantienne de la justice", *Festschrift für Ivo Schwander, Zurich /St Gallen*, 2011. The contributions to the "Joerges project" in (2011) 2(2) *Transnational Legal Theory*, cited above, which appeared when this project was already launched, are of course of particular import here.

[31] See, again, Jacco Bomhoff & Anne Meuwese « The Meta-Regulation of Transnational Private Regulation », cited above.

above local contraints and defy the claims of the global commons. Human rights theories and methods, however imperfect, appear to be the only contenders to fill these gaps.

This article aims to offer an explication as to why private international law has remained closeted[32] from concerns of global private power, and attempts to suggest ways in which it could return to the scene in order to contribute usefully to the governance of informal empire. More specifically, the claim here is that private international law might be better able than its public counterpart has been so far, for all its constitutional turn, to articulate a political project for the global governance of private power with a horizon of transcendance[33]. The aim, however, is not to pit one discipline against another, or to wage a battle of academic expertise. It is on the contrary to raise awareness of the deleterious consequences of the dogmatic separation between public and private international law, to the extent that the legal premisses upon which such distinction rests work precisely to disarm some of the potentially powerful legal tools and arguments which each of these fields could provide to address some of the severest forms of hardship and inequality in the world today.

It is suggested that, to a large extent, raising awareness of the implications of private international law for global governance relies upon a double paradox. One the one hand, de-closeting private international law in order to allow it to assert its own politics of global governance means not only « publicising » private international law by harnessing the resources of fundamental rights but also by taking the « private » seriously on its own terms: it implies addressing the expressions of private power through those very means of « private law » which governs the mechanics of the global economy within and beyond the state[34]. On the other hand, while it is thus to assert its planetary dimension, in the sense of being harnassed to a horizon of global good, it must not leave the local behind ; governance should remain embedded in its social context, so as to leave the variousn political communities communities as « masters of their own fate »[35].

This paper begins with a genealogy, under which it will first be argued that the public/private divide has « domesticated » the body of private international law, confining it to a purely ancillary function[36] beyond (or beneath) the international political sphere and

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[32] The reference here is to Eve Kosofsky Sedgewick's « Epistemology of the Closet ». While the use of Queer theory might seem unorthodox as applied to a « body of law », there are excellent precedents for its use in international law to highlight situations of domination : see, notably, Teemu Ruskola, « Raping Like a State », 57 *UCLA Law Review* 1477 (2010). For other useful psychanalytical metaphors in the field of global governance, see Gunther Teubner's account of law's compulsions and addictions in « A Constitutional Moment : The Logics of « Hitting the Bottom », in Poul Kjaer, Gunther Teubner & Alberto Febbrajo, *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation*, Hart, 2011, p.3 et s. It is to be hoped that the « travelling » of theory (on which, see Edward Said, *The World, the Text and the Critic*, Harv. Univ. Press, 1983) will suffer no loss of power in its translation to other fields. The point here is to understand the relationship between the two « bodies » of international law and to identify the symptoms of the inhibition of private international law's governance potential, showing it up as the result of a division of labour between the political and economic spheres, which liberalism keeps carefully distinct while ostensibly subordinating the private to the public, the market to government.

[33] On the loss of such a horizon – or of « secular faith » - in public international law, Martty Koskenniemi, « Informal Empire », cited above. See too for a previous, similar, observation on the state of private international law, Joel Paul, « The Isolation of Private International Law », 7 *Wisc. Int'l L Journ*. 149 (1988).

[34] On the meaning of the « private » in private law, see below p.30.

[35] Marty Koskenniemi, « Conclusion : vocabularies of sovereignty – powers of a paradox », in Kalmo & Skinner, *Sovereignty in Fragments*, p.242.

[36] From the Latin, *ancilla*, female servant. Geoffrey Samuel has pointed out, in response to this paper, that the closeting effect described here is visible in many other areas of 'private' law (PILAGG launching

leaving it blind to, or complicit in, the spread of informal empire in the unregulated normative space beyond the state (I). Hampered by the constraints inherent in the Westphalian doctrine of sovereignty[37], it has not been able to tether unleashed private interests, protect collective goods of planetary concern, nor grapple with the myriad black holes opened by the confiscation of transnational adjudication and regulation by private entities. The second aprt of this paper looks at the ways in which the domestication of private international law led it to develop its own private, closeted epistemology - a form of tunnel-vision which actively contributed to consolidate the legal foundations of informal empire (II). This does not mean, however, that private international law is condemned to the closet forever and that it cannot rise up to its global governance implications ; it has, in this sense, its own « private » history, which may help point to its emancipatory potential[38]. The third, and normative dimension of this paper attempts to understand the changes which need to be brought about in legal thinking in this field in order for such potential usefully to be enhanced. Only then can its governance potential be properly enhanced, so as to enable it to reconnect with a planetary horizon (III).

I. SCHISM : International Law and Global Private Power.

Who (or what form of govermmentality ?) ensures the transnational regulation of rating agencies, prevents vulture funds from syphoning off development aid, prohibits the marketing of products manufactured abroad with child slavery, provides status to displaced populations, or repairs pollution resulting from multinational oil and gas extractive activities? From industrial disasters as in *Bhopal* to financial scandals as in *Vivendi or Alsthom*, from the toxic trajectory of the *Probo Koala* to torture and murder as in the *Kiobel case*[39], an autopsy of the recurrent humanitarian scandals and financial crises associated with late capitalism[40] show up the « gaping holes of global governance »[41] as cases which fall between public and

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session, Sciences-po, 21 November 2011). This is of course entirely true. However, the particulary worry in respect of private international law is that the stakes are the global governance gaps described above. Arguably, the closeting of tort law can be compensated in the domestic scene by other regulatory mechanisms designed to pursue the public good, whereas the difficulty of the public/private divide beyond the state is that there is not much else out there – meaning no higher regulatory authority to ensure the protection of the global commons.

[37] See above footnote 14

[38] Alex Mills, *The confluence of public and private international law,* spec. Chapter 2, p.26 et s..

[39] All these cases are sadly familiar to students of private international law, which deals traditionally with cases relating to « private law relationships » with « international elements ». From this perspective, they raise a variety of issues relating to jurisdiction (*forum non conveniens*, secret injunctive relief, the scope of universal civil jurisdiction) and choice of law (the extraterritorial reach of public economic regulation, the applicability of public international law to private actors, the availability of a regime of compensation beyond the *lex loci delicti*). They will all be discussed in due course below.

[40] On crisis as the dark side of modernity, see Karl Polyani, *The Great Transformation : The Political and Economic Origins of Our Time*, Boston, Beacon Press, 1944, reedit. 2001, stigmatising the consequences of « disembeddeness » ; comp. Christian Joerges & Joseph Falke, « Introduction » in Christian Joerges & Joseph Falke (eds), Karl Polyani. Globalisation and the Potential of Law in Transnational Markets, Hart, 2011, p.1 et s.); on crisis the dark side of functional differentiation of social systems or steering mechanisms, see Gunther Teubner, « A Constitutional Moment : The Logics of « Hitting the Bottom », in Poul Kjaer, Gunther Teubner & Alberto Febbrajo, *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differntiation*, Hart, 2011, p.3 et s.

[41] This term was used by Anne Krueger, *International Financial Architecture for 2002 : A New Approach to Sovereign Debt Restructuring*, cited and discussed by Eric Helleiner, « Filling a Hole in Global Financial

private sources of legal discipline[42]. Athough the very concept of a global governance gap has been challenged, in view of the plethora of potentially relevant rules and norms[43], the gaping holes are not necessarily the result of inaction on the part of of states, nor indeed of the lack of specialised private regimes in various areas[44]. Rather, they often cover instances of abuse of power by non-state actors whose claim to private authority goes unchecked[45], or the structural bias of international legislation whose content supports alliances of strong private interests[46]. They illustrate the migration of sovereignty to new private sites beyond the state and, equally significantly, beyond the ambit of existing sources of governance - all of which appear to be curiously tame, or indeed apologetic, when it comes to preventing and sanctioning abuse in the name of collective values. What appears deeply problematic, therefore, is not that regulation is unavailable, nor indeed that it flows from sources beyond the sovereign state, but that whatever rules there are appear to lack a transcendant horizon of the global good, and any sense of connectedness in terms of causal linkages and systemic risks. However much formal and informal law exists, it does little to rein in the private interests which, behind the language of inevitability of globalisation or under its glossy veneer, work to the detriment of the planet both physically and metaphorically, in terms of the adequate distribution and protection of ecological and economic resources.

With its focus on the « private », its traditional function in dealing with diverse claims to authority in the international arena, its methodological attention to linkages and inter-legalities, and its ethos of pluralism[47], private international law might have been expected to

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Governance ? The Politics of Regulating Sovereign Debt Restructuring », in Walter Mattli & Ngaire Woods, *The Politics of Global Regulation*, Princeton Univ. Press, 2009, p. 89.

[42] For a methodology based on autopsy of disasters, see K. Pistor & K. Millhaupt, *Law & Capitalism : What Corporate Crises Reveal about Legal Systems and Economic development around the World*, Chicago Univ. Press, 2008.

[43] See the challenge by Tim Bartley, « Transnational Governance as the Layering of Rules : Intersections of Public and Private Standards », *Theoretical Inquiries in Law* 12(2) p.25 et s.. However, a governance void may exist despite (and perhaps precisely because of ?) a plethora of rules of all sorts: see below, p.34

[44] See Harm Shepels' description of « thousands upon thousands » of private standards, in *The Constitution of Private Governance*, cited above FN 7, p. 404.

[45] To a certain extent, of course, an abuse of power by private actors may be seen to be the result of an abuse of sovereignty by nation-states. The question may now be whether international law imposes upon states a duty of responsible regulation in all or certain fields of common interest : see on the topical question of human rights violations by multinational corporations, Olivier de Schutter, « La responsabilité des Etats dans le contrôle des sociétés transantionales : vers une convention internationale sur la lutte contre les atteintes aux droits de l'homme commises par les sociétés transnationales », in Isabelle Daugareilh (ed), *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, Bruylant 2010, p.707 et s. More generally, the concept of abuse of sovereignty by self-seeking governments needs further elaboration : see, in the context of land-grabbing, Tomaso Ferrando, « Private Legal Transplants » (Paper presented on 15th December 2011, available at *blogs.sciences-po.fr/pilagg).*

[46] In the field of private international law, the example of international maritime conventions on the allocation of responsability as among the cargo and the carriers, behind the equally conflicting intersts of developing countries versus the great seafaring Western nations, is telling : see Chester D. Hooper, « Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or the Defintion of Fora Conveniens Set Forth in the Rotterdam Rules », 44 *Tex Int'l L J* 417 (2009). More widely, on the impact of private lobbies on intergovernmental negotiations, see Diego Fernandez Arroyo, « Normativité et légitimté dans la gouvernance globale : le rôle et les mécanismes des acteurs non-étatiques dans les organisations internationales productrices de droit », Doctoral seminar, Paris, Sciences po 2011 (publication forthcoming).

[47] For an influential account of the values and methods of modern private international law in continental Europe, in which this field is seen to focus on justice for individuals through appropriate coordination of legal systems, see H. Batiffol, *Aspects philosophiques du droit international privé*, 1957. For an account of private international law as devoted to the management of pluralism, see Ph. Francescakis, Preface to the

contribute some of the tools needed in this « global disorder of normative orders »[48] to ensure that expansion of informal empire is accompanied by appropriate safeguards, counterweights and responsibilities in the name of the global good. Yet its governance potentiel is clearly inhibited, and indeed, rarely articulated in contemporary accounts of private international law. The explanation seems to lie in the separation which occurred when modern public international law emerged as a specific disciplinary field devoted to the interactions between sovereign public actors, while the governance of the informal economy - private international law – was relegated to the domestic sphere, to be managed distinctly by each national polity. At this point, when politics of the global legal order were constructed as separate from the transnational market[49], and framed as the relationships between sovereign states, private international law was simultaneously disqualified and disarmed[50]. The conceptual divide between international politics and global market led to the immunity of cross-border private economic expansion from the moral and legal constraints previously carried by the *ius gentium*[51]. By the time 19th century liberal ideals had taken a neo-liberal turn into 20th century global finance, the relationship between public autority and private power beyond the pale of the nation-state had reversed[52].

The abuses equated with informal empire therefore result to a large extent from the schism which took place within international law and the subsequent inhibitions affecting the sole source of governance which was fitted to apply to private, or non-state, power[53]. Private international law became curtained-off from the political scene, and the only international site of the political was the interaction between sovereign states. Developing thereafter within a subordinate and supposedly apolitical framework, the methodological content of private international law gradually interiorised its own domestication[54]. It enthusiastically asserted its

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French translation, Santi Romano, *L'ordre juridique*, (par P. François et P Gothot, Dalloz, 1975). For a critical analysis of the supposedly coordinating function of private international law, see P. Picone, « Les méthodes de coordination entre ordres juridiques en droit international privé, RCADI, 2000, t.276, spéc. p. 211.

[48] Neil Walker, « Beyond boundary disputes and basic grids : Mapping the global disorder of normative orders », *Int'l Journ Constitutional Law* (2008) 6, 373

[49] In this representation, the market itself is of course framed as a natural phenomenon (as opposed to being a social construct), in the same way as economics is presented as distinct from politics.

[50] On the « liberal art of separation » of the political from the economic, see Michael Walzer, « Liberalism and the Art of Separation », Political Theory 12 (3), 1984, p.315 ; Claire A Cutler, *Private Power and Global Authority,* cited above, p.16. The revelation of the power structures under the surface of the law is of course one of the great war horses of legal realism (see for example, the clear account in Joseph Singer, Review Essay, 76 *Cal. L. Rev* 465, 1988). This is a point which may be useful to emphasise, as Europeans are not necessarily « all legal realists now » (for the reasons why they are not, see the excellent account of the domestication of legal space in France in the first half of the 20th Century, by Phlippe Jestaz & Christophe Jamin, *La Doctrine*, Dalloz, 2004, p. 120 et s.).

[51] Martty Koskenniemi, « Empire and International Law » cited above.

[52] On the mechanics of this reversal, see below XXX

[53] Unsurprisingly, the schism left in place considerable similarities between the two areas, notably in the structure of legal argument, similarly constrained between the two opposite poles of « utopia » (divorced from reality) and « apology » (aligned on existing allocations of power in the international arena). In the same way, the « four specific European biases » which founded international law - geographic Europe as the center, Christianity, mercantile economics and political imperialism – (according to Makkau Mutua, « Savages, Victims and Saviors : The Metaphor of Human Rights», 42 *Harv. Int LJ* 201, p.214), apply equally well to private international law.

[54] The same can of course be said for domestic private law in general, in respect of public law, at the same period in Continental European legal thinking (see D. de Béchillon, « L'imaginaire d'un code », *Droits* t 27, 1998, p. 173 ; H. Muir Watt, « Le discours du Code. Regard comparatiste", *Droits*, vol. 42, 2005, p.49). A similar rhetoric designed to dissolve politics in science or technique can now be found in the area of global

own independance from politics and its correlative impotence to tether the private interests which gradually soared over the reach of national regulation. Circumscribing its own object and scope so as to exclude the protection of public goods or collective values, turning a blind eye to the « dismal sites » of production, and ignoring the exercise of private power, private international law thereby made its own contribution to the chaos of the globe[55]. It is proposed here to look at the genesis of the schism[56] within international law (A), in order to understand the deep-seated denials which have now undermined the theory of sovereignty (B).

A. Genesis of the Schism : When the International Legal Order Became Severed from Politics.

The domestication of private international law – that is, the loss of its governance function - appears to have taken place when modern public international law emerged separately, in the course of the nineteenth century, as the great European apology for colonialism[57]. Since this apology required that the (Western) sovereign state should be the sole protagonist of international politics, its monopoly was then represented as inherent to the Westphalian legal ordering. Private actors, their status, transactions and conduct, previously subject in the transnational sphere to the *ius gentium*, were accordingly excluded from the remit of public law and relegated to the private[58]. Through the early years of the twentieth century, the apolitical neutrality of the conflict of laws progressively developed as a dogma, largely due to its supposed affiliation with natural reason, rising above the contingencies of

private governance through standardization : see Tim Büthe & Walter Mattli, *The New Global Rulers, The Privatization of Regulation in the World Economy*, Princeton, 2011, *passim* and esp. p. 200 ; Harm Schepel, *The Constitution of Private Governance*, cited above.

[55] On the tragedy of the global commons from the perspective of private international law, see H. Muir Watt, « Aspects économiques », p.273 et s.

[56] The reference is to Lacan's psychoanalytical theory of the severance (« *la Schize* ») of the consious and the unconscious. The image is used here to emphasise the split whihc took lace within the body and psyche of international law, while emphasising the importance of language (the rhetoric of international law) in constituting its schizophrenia.

[57] Martty Koskenniemi explains how modern public international law emerged when the European powers were dividing up le « grand gâteau de l'Afrique » : see « Empire and International Law » cited above.

[58] On the « private history » of (private) international law, see Alex Mills, *The confluence of public and private international law, ,* spec. Chapter 2, p.26 et s.

politics[59]. There is little need to point out that this schism was anything but mandated by the natural course of things. Indeed, in an interesting twist, « private international law » was first coined as a name in a largely contemporaneous effort by Joseph Story[60] to mediate between violently conflicting societal policies in the emerging American Confederation[61]. But the political potential of private international law in governing jurisdictional claims in the medieval world of multiple princedoms and city-polities, customary norms, and overlapping allegiances[62], had largely preexisted the emergence of the nation-state. As Martty Koskenniemi explains, the Scholastics themselves had acted as articulators and ideologues of a global system of production relationships[63]. At this early stage, the conflict of laws was invested with a largely political mandate in supporting the territorial framework of local power in pre-revolutionary France[64], while the Dutch School seized upon it to wall off the new independant polity from the universalizing authority of the Catholic Church – all the while using its content to further the imperial interests of private trading companies[65].

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[59] The supposed « naturality » of the principles of private international law owes an initial debt to Von Savigny's great Treatise of Roman Law System des heutigen Römischen Rechts, 1849, whose famous chapter VIII is believed to be the fount of modern conficts methodology. On the mythology involved in such a reading of the text, see Pierre Gothot, « Simples réflexions à propos du saga des conflits de lois », *Mél. en l'honneur de Paul Lagarde*, Dalloz 2005, p.343. On the parallelism between Savigny and Thibaut in the battle against codification, see Mauro Bussani & Ugo Mattei, « Le fonds commun du droit privé européen", 52 *Rev Int Dr Comp* 29 (2000). Curiously, Savigny's belief in the naturality of the essence and thereby of « seat » of legal relationships was then compounded in an analogous belief as applied to the great codes, whihc were also considered as the depositories of natural reason (see the references cites above FN 53) For a critique of the public/private divide on the European side see Norbert Reich, « The Public/Private Divide in European Law » in HW Micklitz & F. Cafaggi (eds), *European Private Law After the Common Frame of Reference*, Edward Elgar, Cheltenam, 2010, p56. On the ambivalence of the « private » in the global context, v. N Jansen & R Michaels, « Private Law Beyond the State ? Europeanisation, Globalization, Privatisation », cited above. These authors show (p.857) how the debate about the public/private divide takes on a different significance either side of the Atlantic since it is really about the role of the state in respect to society.

[60] Joseph Story, ***Commentaries on the Conflict of Laws***, *Foreign and Domestic* (Boston 1834), stating that « this branch of public law may fitly be denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons » (p10).

[61] See Joel Paul, « Comity In International Law", 32 *Harv. Int'l L.J.* 1. Indeed the political dimension of Story's doctrine is visible in the importance he attached to the concept - borrowed from the (public) law of nations - of Comity: "Story's intention in formalizing the doctrine (of Comity) was to enshrine comity as a mediating principle between free and slave states and thereby save the republic" (p.19).

[62] The rise of the conflict of laws during this period, based on a glose and post-glose of Roman law, is well documented throughout European private international law literature (see for an account and references, D. Bureau & H. Muir Watt, *Droit international privé*, PUF 2nd ed, 2010, vol 1, n° 357). For an analogy between this pre-national period and contemporary post-national rule-making, see Stephen Kobrin, « Economic Governance in an electronically networked global society », in Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in Global Governance*, 43, p.64, predicting that the post-modern future may well resemble the medieval past (with its ovelapping authority and multiple loyalites) more than the more immediate organised world of national markets and nation-states.

[63] See Martty Koskenniemi, « Empire and International Law » , p.16 s., explaining how international law had initially served the ends of peaceful commerce, banking and succession in the newly cosmopolitan context of trade fairs.

[64] Illustrated in the territorialist doctrine of Bertrand D'Argentré (1519-1590), known for his Glose of Article 218 of the Breton Custom, *De Statutis Personalibus et Realibus*.

[65] Grotius, the Father of modern international law, did not hesitate to use ideas of independance and sovereignty, imputed to the *ius gentium*, to plead for the interests of the Dutch East India company. See Martty Koskenniemi, « Empire and International Law », p.32.

However, this eminently political function of private international law became « pasteurised » [66] with the emergence of modernity. The public international law that was devised at the time of the dividing of the « great pie of Africa » by the European powers was equated with the proper allocation of jurisdiction as among sovereign states, to which it then left the excluisve regulation of the local territory, community and public goods. The promotion of the informal transnational economy was deputized to private interests[67], which expanded largely unchecked transnationally, because of the inherent territorial limitations in the reach of the jurisdiction of the Westphalian state. The essential consequence of this split between the public and the private international arenas was the dissolving of the *ius gentium* as an overarching system of legality and morality, integrating relations as between both princes and merchants[68]. International trade, finance and investment, duly separated from the political, were no longer subjected to any common horizon of public values[69].

The fundamental paradox of international law is that the supremacy of its public dimension, dealing with the relationships between its sovereign subjects, has led to an extraordinary empowerment of the private, demeurely masked all the while by its neutral, apolitical stance. Whereas private international law might, conceivably, have continued after the schism to articulate the legal and moral limits for the functioning of the global market beyond the state, it was inhibited in both scope and ambition by the imperious requirements of the public international legal ordering. In turn, it became doubly disempowered. It could neither provide an appropriate transnational regime to discipline private actors, nor subject non-state normative regimes[70] to principles of transparency and accountability. Its mimicry of public international law's exclusions – generally known as the « public law taboo »[71] – thereby actually facilitated expansion of informal empire[72]. This is notably because, in separating the subjects of public or private international law, on the one hand, and, on the other, in attributing to state sovereignty - in its double external and internal dimension[73] - a

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66 For the metaphor of pasteurization, used to denote a flattening effect, see Mitchel de S.-O.-l'E. Lasser, « The European Pasteurization of French Law », 90 *Cornell L. Rev*. 995 2004-2005.

67 On colonialism and private empire, see Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law*, Cambridge, Cambridge University Press, 2005.

68 Martty Koskenniemi explains how initially, the central concept of *dominium* within the *ius gentium* had served as a legal foundation to both private property and territory. « Empire and International Law », cited above).

69 The market was itself portrayed as a naturally free space within the ultimate constraints laid down by the liberal sovereign (or, in the field of transnational trade, by the community of liberal sovereigns). On the reassuring liberal assumption that the state had the last word over the market, Nils Jansen & Ralf Michaels, « Private Law Beyond the State ? Europeanisation, Globalization, Privatisation » cited above.

70 For a sample of the new transnational private regime literature, see Fabrizio Cafaggi, « New Foundations of Transnational Private Regulation », 38 *Journal of Law and Society*, Special Issue, 2011, p.20 s.

71 See William Dodge, « Breaking the Public Law Taboo", *Harvard International Law Journal,* Vol. 43, Winter 2002.

72 While private international law mimics its public counterpart in its apology of politics (on this apology, see Martty Koskennemi, *The Politics of International Law,* p.35 s.), it actually deepens this apology as far as private power is concerned (as will be shown below).

73 On these two « faces » of sovereignty, internal and external, expressed respectively in the domestic and international sphere, see Sophie Lemaire, *Les contrats internationaux de l'administration*, LGDJ 2005.

prescriptive monopoly in either sphere, the liberal model has induced a denial of private authority and law-making in the global arena[74].

B. Subsequent Denials : The Internal Inconsistencies of Sovereignty

No doubt the most notable result of the *schize* within international law was to draw an waterproof boundary between the two bodies of legal principles applicable respectively to sovereign and private actors[75]. Diagonal relationships (between private actors and foreign states) defied classification in either category and were therefore off the legal map[76]. In terms of substantive content, the two separate spheres were hardly differentiated initially, since much of customary public international law replicated liberal contract theory. Tensions and contradictions in liberal international theory became apparent however in the last tiers of the twentieth century, when « providential » public international law[77] came to comprise a growing set of human rights norms - possibly unrecognised in domestic constitutional law – which could be invoked individually or collectively as against sovereign states. The new status of individuals as right-holders disturbed the rarefied atmosphere of public international law[78], but instead of redesigning its boundaries so as to extend the reach of public discipline,

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[74] Private authority or private rule-making are, within the confines of the liberal model, an ontological impossibility. See Claire A Cutler, *Private Power and Global Authority*, p.64.

[75] While liberal public international law refused status to private actors, civil society and its representatives (in the form of NGOs – which now have standing before the Inter-American Court of Human Rights), or other collective interests (on the contemporary evolution of international law towards the recognition of various categories of collective rights, such as those of indigeneous peoples, see Dwight Newman, *Community and Collective Rights. A Theoretical Framework for Rights Held by Groups,* OUP 2011), private international law traditionally mirrored these exclusions, by abdicating any claim to regulate governmental actors (hence « the public law taboo » which prohibits courts from enforcing foreign criminal, tax, antitrust, and securities laws and judgments - on which, see William S. Dodge, « Breaking the Public Law Taboo », 43 *Harv Interna'l L J*, 2002).

[76] On the elaboration of a legal regime for « state contracts » that is, contracts between states and foreign private actors, see below p.15. For the current focus of attention on « diagonal » conflicts, see Christian Joerges, « The Challenges Of Europeanization In The Realm Of Private Law: A Plea For A New Legal Discipline », *14 Duke J. of Comp. & Int'l L. 149* ; C Schmid, "Vertical and Diagonal Conflicts in the Europeanisation Process" in C Joerges/O Gerstenberg (eds.), *Private Governance, Democratic Constitutionalism and Supranationalism* (Luxembourg, Office for Official Publ. of the European Communities, 1998), p. 155; Jérémy Heymann, *Le droit international privé à l'épreuve du federalism européen*, Economica, 2010.

[77] On the « providential » function of public international law, see E. Jouannet, *Le droit international libéral-Providence. Une histoire du droit international*, Bruylant, 2011. Providential international law not only trumped less favorable domestic constitutional law, but had the advantage, as compared to its domestic counterpart, of a plausible claim to universal application.

[78] While the *ius gentium* had applied universally, so as to include the Indians discovered by the conquistadors (on the debate over the status of the indigenous population among the Spanish Scholastics, see Martty Koskenniemi, « Empire and International Law » cited above), the exclusionary ethos of sovereignty led modern liberal international law to preclude « non-civilised » peoples from attaining legal status. The same peoples beyond the pale of Western civilisation were likewise prevented from participating in the formation of customary international law, which unsurprisingly reflected European values and indeed tended largely to mimic European private law. These were the same values of the « community of laws » on which continental European conflict of laws were grounded, with a similar exclusionary ethos. Shadowing these exclusions, private international law operated a similar selection when relying on a state-focused connection that does not exhaust personal affiliations, or mapped territory along geographical lines that cross through cultural communities. Once again, the domestication of private international law has prevented it from venturing to map jurisdiction otherwise than as dictated by public international law, although it may oppose a discrete but firm resistance from time to

it has instead condoned a series of outcomes which tend to work one-way only, to protect or liberate private sovereignty. Although there are many other possible illustrations of the internal inconsistencies of the classical theory of sovereignty[79], the following three examples are designed to show important instances in which the schism between the public and the private in international law has left private economic power unrecognized and therefore supreme in confrontations with public sovereign authority. Thus, corporate entities exercising private economic power have remained unaccountable under the principles applicable to states (a), while, conversely, states may find their sovereignty clipped in relationships with private investors, either in the name of public international law (b), or indeed under the private law of debt (c). None of this makes any sense in terms either of principle or policy.

a. Private power without public duties The most spectacular convergence of denials by public and private international law concern the forms of private power exercised in the global economy by non-sovereign entities such as multinational corporations or rating agencies, whose significant role in the shaping of the global market escapes any credible form of public accountablity or private responsibility[80]. Public international law has traditionally been constructed, by national and international courts alike, as ignoring (private) corporate actors, to which it denies the status of subjects and prevents their being called to account

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time on issues of private dimensions of citizenship (Karen Knop, « Citizenship, Public and Private » in K. Knop, R. Michaels and A. Riles (eds.), *Transdisciplinary Conflict of Laws*, *Law and Contemporary Problems,* 71 (2008), p.309), or on law-making authority over non-recognised territories (see Michael Karayanni, Choice of Law under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs » *5 Journal of Private International Law*, 1, 2009).

[79] A notable example can be found in the ICJ's recent judgment *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* of 3rd February 2012, holding that customary international law does not admit any exception to foreign sovereign jurisdictional immunities in the case of human rights claims based on the violation of a norm of *ius cogens*. The contradiction was described thus (by Judge Antonio Cançado Trindade in his dissent in ICJ *Germany v. Italy, §179*): "No State can, nor was ever allowed, to invoke sovereignty to enslave and/or to exterminate human beings, and then to avoid the legal consequences by standing behind the shield of State immunity. There is no immunity for grave violations of human rights and of international humanitarian law, for war crimes and crimes against humanity. Immunity was never conceived for such iniquity. To insist on pursuing a strictly inter-State approach in the relationships of responsibility leads to manifest injustice ». This line of argument did not convince, however. Among other inconsistencies, there may be private champions behind the sovereign veil in international arenas such as the WTO or the UN (on regulatory capture by private actors within the UN system, see B. S. *Chimni*, « The Past, Present and Future of International Law: A. Critical Third World Approach », *8*(2) *Melb. J. Int'l L. 499*, 2007). For contemporary reflection on the inconsistencies affecting both the concept and the practice of state sovereignty see Kalmo & Skinner, *Sovereignty in fragments,* cited above.

[80] Claire A Cutler, *Private Power and Global Authority*, p 14; Dan Danielson, « How Corporations Govern : Taking Corporate Power Seriously in Tranational Regulation and Governance », 46 *Harv. Int'l LJ* 411 (2005). From the perspective of public international law, Martty Koskennemi similarly observes that the current state of the international legal ordering tends to serve powerful corporate actors and marginalises regulation, *The Politics of international Law*, Hart, 2011, p.246. On the rise of private financing of international investment arbitration, see Philippe Pinsolle, « Le financement de l'arbitrage par les tiers », *Revue de l'arbitrage* 2011, p.385. The use of the term « power » rather than « authority » (see Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in Global Governance,* cited above) denotes a lack of any specific claim to its exercice within the parameters of legitimacy as applicable to state-centered power.

under the law of nations[81]. Such denial has been seen to persist even since individuals and groups have gained access to the international liberal order for the protection of their fundamental rights[82]. Change may now be on its way, in the aftermath of the highly controversial *Kiobel* decision by the United States Court of Appeals for the Second Circuit, which held corporate defendants to be non-justiciable under international law – at least from the perspective of the *Alien Tort Statute*[83] - for human rights violations[84]. Beyond the

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[81] Traditionally, corporate liability is a derivative of state liability in international law. Thus, a state may exercise diplomatic protection and sue another state on behalf of a national (see *Case Concerning Barcelona Traction, Light, and Power Company, Ltd. (Second Phase)* International Court of Justice, 1970. International Court of Justice Reports, vol. 1970, p. 3); it is then up to the defendant state to deal with the offending private actor. Similarly, a sovereign state may be sued by a citizen for violation of a human rights norm in an appropriate forum (such as a regional human rights court); however, its liability is only engaged transnationally through the conduct of its officials abroad, and is therefore of limited use in situations involving private corporate misconduct outside the territory of the defendant state. Horizontal effects of human rights norms reproduce these limitations (on all these points, see below, p. XXX). One of the potential avenues for change would therefore be to institute state liability for corporate misconduct abroad. See Olivier De Schutter, « La responsabilité des Etats dans le contrôle des sociétés transnationales: vers une convention internationale sur la lutte contre les atteintes aux droits de l'homme commises par les sociéés transationales », in Isabelle Daugureilh (ed), *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie,* Bruylant 2010, p.707. This would be one way of « piercing the veil of sovereign authority » in transnational situations (see Stefan Gardbaum, « Human Rights and International Constitutionalism »**,** in Jeff Dunoff and Joel Trachtman (eds.), *Ruling The World? Constitutionalism, International Law And Global Government,* Cambridge University Press, 2009, 233, p. 235).

[82] The status of non-sovereign infra-state or trans-state groups or communities such as unrecognised states, protectorates, tribes, religious communities or indigeneous tribes remains uncertain today, despite the move to recognize collective rights in international law : see Dwight Newman, *Community and Collective Rights. A Theoretical Framework for Rights Held by Groups,* OUP 2011.

[83] The ATS grants federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. This reference to (customary) public international law has been perceived as problematic because of its indeterminacy and the subsequent risk of extension of the jurisdiction of the US courts, against which the Supreme Court warned in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), where it limited the statute's scope to those "customs and usages of civilized nations," 542 U.S. at 734 which are are "specific, universal, and obligatory," 542 U.S. at 732.

[84] *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 142 n.44 (2d Cir. 2010). The literature on this case is already so voluminous, particularly given the numerous other – dissonant - decisions which have been handed down more recently in other Circuits, that, since certiorari has now been granted by the Supreme Court, it is no doubt wiser to direct the attention of non-US readers to the various amicus briefs, including the brief for the US government in support of the petitioners. See for an update of the multiple procedures pending, Symeon Symeonides, "Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey", forthcoming in 60 *American Journal Of Comparative Law* (2012) p.64, and for a synthesis in French of the litigation and the various legal issues involved, H. Muir Watt, "Les enjeux de l'affaire *Kiobel* devant la Cour Suprême des Etats-Unis: la responsabilité des personnes morales au regard des droits de l'homme", *Comité français de Droit international privé*, 27th January 2012 (forthcoming). While the debate rages in the US, where the *Alien Tort Statute* has encouraged collactive transnational corporate responsibility litigation through the promise of universal civil jurisdiction, other countries are beginning to experience the arrival of such claims. Thus, the 2005 Dutch Collective Settlement Act provides a specific framework for judicial approval of pre-negotiated settlements (on its economic implications, see R. Nagareda, "Aggregate Litigation Across The Atlantic And The Future Of American Exceptionalism », 62 *Vand. L. Rev*. 1 (2009). Closer to the *Kiobel* model, the English courts have also been seized with an

politics[85] and the economics[86] of this refusal, its legal foundations are hotly contested in other Circuits[87] and an appeal is now pending before the Federal Supreme Court[88]. Yet while the

environmental claim grouping 69000 individual claimants against Shell related to Nigerian oil spills. An agreement was announced in the medias in August 2011 (see Financial Times 3rd August 2011) under which a subsidiary of Royal Dutch Shell plc accepted its liability and conceded to the jurisdiction of the U.K. High Court. The parent company is thereby released. Whether or not the subsidiary is sufficiently capitalized to be able to provide compensation were it to be held liable is of course another question. The most notable point however is that the agreement appears to bind the parties to the application of Nigerian tort law. The outcome is therefore likely to be limited (on the way in which the *lex loci delicti* serves to limit transnational liability, see H. Muir Watt, « Aspects économiques du droit international privé », RCADI vol 307, §206 et s.).

[85] Among the political issues raised by this statute, it may be asked whether it is appropriate for the courts of the United States to be dictating the social policy of other governments, by sanctioning violations of Western standards of social protection within the territory of other sovereigns. See the words of the District Court in the Firestone (Liberia rubber plantations) litigation (United States District Court for the Southern District of Indiana, Case n° 1 :06-cv-0627-DFH-JMS, p. 62): « The court is confident that improvements in those wages and working conditions for many millions of people would make the world a better place. Yet federal courts in the United States must also keep in mind the *Sosa* Court's caution against having American courts decide and enforce limits on the power of foreign governments over their own citizens. 542 U.S. at 727, 124 S.Ct. 2739. How much more intrusive would American law be if American courts took it upon themselves to determine the minimum requirements for wages and working conditions throughout the world? ». The answer might of course be that the US courts are merely holding US-based corporate groups to such standards.

[86] Among the economic issues, there are opposing views on whether the obligation for foreign investors to respect human rights over and above the requirements of local legislation constitues a competitive disadvantage for non-complying actors, or, conversely, whether non-compliance by some is an unfair competitive advantage gained over the compliers ? The latter position is held by Judge Posner in *Flomo v. Firestone Natural Rubber Co., Llc.* (United States Court of Appeals for the Seventh Circuit, n°10-3675, p. 15). Another issue is whether the plight of the local population (children, in the *Firestone* case) who are not employed by the defendant multinational be taken into account in determining whether there has been a human rights violation ? See again, Judge Posner, p. 22, on the necessary trade off between family income and child labour and our ignorance of the net effect of plantation work on welfare). Yet another issue is whether it makes sense in the first place to subject corporate entities (without souls) to criminal liability ? See again, for an economic justification, Judge Posner for the Court, in *Flomo v. Firestone Natural Rubber,* p.9.

[87] United State Court of Appeals for the District of Columbia Circuit, *John Doe Viii, v. Exxon Mobil Corporation,* January 25th 2011; United States Court of Appeals, Seventh Circuit, *Flomo v. Firestone Natural Rubber Co.,* Llc, July 11th 2011.

[88] In *Kiobel v. Royal Dutch Petroleum Co*. the United States *Supreme Court* granted *certiorari* on 17th October 2011, No. 10-1491. The oral hearing took place on February 28th, but on March 5th a rehearing was ordered on the issue of extraterritoriality. The implication is that the *Alien Tort Statute* is not an instance of universal jurisdiction as is commonly thought. If this view prevails, the Alien Tort Statute would come closer to the European model of jurisdiction founded upon a denial of justice, which requires a link to the local Community (for example allowing exceptional access to the French courts in a fundamental rights case, on the basis of such a link : Cass. Soc., 10 Mai 2006, *Époux Moukarim*, Bull. 2006 V n° 168 P. 163 ; RCDIP 2006 P. 856, note É. Pataut Et P. Hammje ; JDI 2007 P. 531, note J.-M. Jacquet; JCP 2006 II 10121, note S. Bollée ; D. 2006 IR P. 1400, obs. P. Guiomard). However, an important point is made by Judge Posner in *Flomo v. Firestone Natural Rubber Co., Llc.* p.24, on the subject of the Alien Tort Statute: "Deny extraterritorial application, and the (Alien Tort) statute would be superfluous, given the ample tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country".

resulting impunity of multinational corporations has been widely criticised[89], judicial disagreement with the *Kiobel* majority is also expressed to a large extent as a methodological issue : framing the reference to international law on the issue of remedies (does international law recognize civil liability of corporations ?) is mistaken, since international law deals exclusively with conduct-regulation, leaving the means of its own implementation (civil or criminal law remedies) to the initiative of individual states[90]. Such a critique can only delight specialists of the conflict of laws, which has long mediated between different legal orders in allocating issues of loss-allocation/remedies and violation of rules of conduct, or in engineering « windows » within domestic law in order to import norms from other (foreign or international) legal systems[91].

On the other hand, the wider dissymetry in rights and duties created by the public/private divide as between corporations and sovereign states does not appear at present to be at the center of the debate. Indeed, while public international law has been kept at bay as a source of liability for violation of human rights norms by corporate actors, private international law - which might have been expected to emerge in order to fill the void and ensure the tethering of corporations and the regulation of their conduct in the private economy - has stepped down. Outside the confines of competition law[92], multinational corporations (it is said) are an economic, not a legal concept; only by piercing the corporate veil can the legal entity be reached through the private law categories of jurisdiction and tort law. However, even then, the victims may be disempowered through *forum non conveniens* or territorialist principles of choice of law[93]. On the other hand, the lack of an adequate legal status for the corporate group does not prevent multinational firms from taking advantage of the economic freedoms guaranteed to capital and services in cross-border markets in order to choose the corporate charter with the least share-holder regulation, or the least costly stake-holder protection[94]. The plight of the many victims of industrial disasters in cases such as *Bhopal*[95]

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89 This extraordinary impunity of corporations was the focus of Judge Laval's dissent in *Kiobel* : « The majority's interpretation of international law…accords to corporations a free pass to act in contravention of international law's norms (and) conflicts with the humanitarian objectives of that body of law ».

90 See Judge Laval's strong methodological point in *Kiobel*, and similar arguments used by the majorities in *Exxon* and *Flomo*. The methodological point is articulated either as a distinction between procedure (civil or criminal remedies) and substance (the human rights standard), or conduct-regulation (human rights standards) and modes of implementation (civil or criminal remedies).

91 In terms of continental conflicts technique, this would no doubt be a case of incidental application or « prise en considération » of legal norms which, for one reason or another, could not otherwise be given direct effect (see D. Bureau & H. Muir Watt, *Droit international privé*, 2éme éd, n° 436-1). See too below XXX.

92 Which, at least for continental private law orthodoxy, is not « law », to the extent that it is economic engineering rather than the product of natural reason: see for an emblematic example of such a position, *Bruno Oppetit*, « Droit et économie », *Archives de philosophie du droit*, Sirey, 1992, p. 19-28. A similar rejection applies to the attempts of labour law to define a corporate group as employer (on which attempts, see MA Moreau, *Normes sociales, droit du travail et mondialisation*, Dalloz coll. A Droit Ouvert, 2006.

93 For a more detailed account of the ways in which jurisdictional and choice of law principles have consolidated a race to the bottom among host countries competing for private investment through lower (and cheaper) social, environmental and tort protection, see H. Muir Watt, « Aspects économiques », p.228 et s..

94 For a recent study on the impact of economic freedoms in the EU on the level of social protection for the workers of mobile corporate employers, see Sara Migliorini, *L'interaction entre la mobilité des sociétés et les règles européennes de conflit de juridictions : l'exemple des relations internationales de travail,* PhD disseration, IUE Florence, September 2011.

95 *In re* Union Carbide, 809 F.2d 195 (2d Cir. 1987), *cert. denied,* 108 S. Ct. 199 (1987).

and *Lubbe*[96], along with the many other helpless claimants under the *Alien Tort Statute* – whom the European Union has as yet done nothing to help[97] - bear ample witness to the governance void.

b. Private power trumps public sovereignty. Another instance of the public/private divide - supposedly designed to subordinate individual interests to the common weal - being turned on its head in the transnational context, can be found in the area of foreign investment[98]. Here, the range of local resources or industries in developing countries, acquired or controled by multinational corporate actors, range from oil and gas to biofuels and agriculture[99]. Liberal international trade and investment regimes, combined with local private and public law governing oil concessions, title to land, or indeed contract or tort, combine to create a watertight corridor in which production and exportation can take place with little interference either from local regulatory barriers or international standards. These happen to be the areas which give rise most frequently to allegations of various human rights violations, environmental damage, land-grabbing or economic migrations.

However, during the first wave of concession agreements relating to natural resources by third world countries after decolonisation, attempts by the host state to regulate or reclaim natural resources in the name of the local public good[100] were neutralised[101] by various contractual devices such as stabilisation clauses[102]. In other words, restrictive legislation by the local sovereign qualified as a breach of the investment agreement contracted with the private investor[103]. Moreover, international commercial arbitration designed to avoid state courts – inacceptable to the investor if they are the host state's, and inacceptable to the

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96 UK House Of Lords, *Lubbe and Others and Cape Plc.* [2000] UKHL 41 (20th July, 2000).

97 See however the Falbr Report of 20 April 2011 on *The external dimension of social policy, promoting labour and social standards and European corporate social responsibility* (2010/2205(INI)), in favour (inter alia) of a European forum for extraterritorial human rights violations by corporations headquartered within the EU.

98 See José E. Alvarez, « Contemporary Foreign Investment Law : An Empire of Law or Law's Empire », 60 *Alabama L Rev* 943 (2008) ; M. Sornarajah, *The International Law on Foreign Investment,* 3rd ed, Cambridge University Press, 2010, emphasising the contemporary reversal under which Western states, previously exporters of capital and now the largest recipients of foreign investment, are becoming wary of the legal arguments and tools developed within 20th century investment law (p25 : citing examples of contestation, in the context of arbitration or multilateral dispute resolution, by Canada and the United States of facets of foreign investment regimes which they had initially crafted, particularly those which hamper the regulatory power of the host state).

99 On the various sectors most affected by foreign investment by multinational corporations in developing countries (natural resources, plantations, manufacturing, finance, intellectual property) see M. Sornarajah, *The International Law on Foreign Investment*, p.38 et s.). For a precise overview of the areas of greatest impact in the agrifood sector, see Kaitlin Y. Cordes, « The Impact of Agribusiness Transnational Corporations on the Right to Food », in Olivier De Schutter & Kaitlin Y. Cordes, *Accounting for Hunger*, Hart 2011, p. 27.

100 Of course, some of these attempts to regain supremacy over natural resources may be the doing of corrupt local elites pursuing personal profit. However, it is as wrong to disqualify all local claims on this basis as it would be to stigmatise similarly all corporate investors.

101 Pierre Mayer, «La neutralisation du pouvoir normatif *de l'État* en matière de *contrats d'État* » (1986) 1 *Journal du droit international* 5, p. 12.

102 And more generally by the principles of liberal (private) contract law. See M. Sornarajah, *The International Law on Foreign Investment*, CUP, 3rd ed. 2010 (spec. p.279 et s : « Contractual devices for foreign investment protection »).

103 Of course, the essence of such agreements is to provide legal security to the foreign investor ; this function was progressively reinforced by the addition of bilateral investment treaties. Now, however, the spectacular rise of foreign investment in developed states has led to a questioning of that very protection they engineered (see M. Sornarajah, p.25).

host state if they are not –worked ingeniously to fill the theoretical void between public international law – inapplicable when one of the parties is not a subject - and domestic law, inappropriate for the very same reasons which disqualify state courts. Thus, by a judicious choice of law and more than a little help from the wondrous doctrine of the *Grundlegung*[104], investors in foreign lands could hoist themselves by virtue of the doctrine of « internationalised state contracts » into the hospitable atmosphere of international law[105]. *Pacta sunt servanda*.

Subsequently, the ICSID Convention[106] and its network of bilateral investment treaties endorsed this upward mobility, so that private investment is protected from pressure of changes of all kinds by the host state – expropriations, nationalisations, adjustments in local public policy. While contract claims and treaty claims are theoretically distinct[107], the use of « umbrella clauses »[108] works to bring the contract claim within the ambit of international law, thus ensuring the right of the private investor to appeal directly to the higher values of international legal security when the host state attempts to assert its sovereignty over its natural resources. In short, the BIT arbitrator will be called upon to ensure the enforcement of private contractual rights under public international law[109]. That such an arbitral award is

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[104] The doctrine of the *Grundlegung* (« *ordre juridique de base* ») was developed to justify the « internationalization » of state contracts, that is, their « natural » elevation to the status of contracts governed by international law, despite the presence of a private party, non-suject to international law. See Prosper Weil, « Droit international et Contrats d'Etat », *Mélanges Reuter*, Pédone, 1981. However, the consequences of such internationalization are surprising : once the *Grundlegung* identified, it is then supposed to make a (secondary) reference to the set of legal rules governing the contract. Denouncing the *Grundlegung* as myth, see Pierre Mayer, « Le mythe de l'ordre juridique de base ou *Grundlegung* », *Etudes offertes à Berthold Goldman*, Litec 1983, p.217.

[105] On this device, see M. Sornarajah, p.289 et s.

[106]

The International Centre for Settlement of Investment Disputes (ICSID) created on the initiative of the World Bank, is, according to its own description,

" an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, with over one hundred and forty member States. …The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes." Its Administrative Council is chaired by the President of the World Bank. It has fostered the proliferation of Bilateral Investment Treaties (BITs) which contain advance consents by governments to submit investment disputes to ICSID arbitration. Practically this means that a host state which has signed a BIT with the state of origin of the private investor makes a permanent offer of arbitration, which the investor may take up in case of an investment dispute. While in essence similar to the 1958 New York Convention on the recognition and enforcement of (commercial) arbitration awards, it contains a more effective device to ensure enforceability. While the New York Convention requires recognition and enforcement by courts of the enforcing forum, an ICSID award is directly enforceable in the courts of Contracting states, as if it were a final judgment of a court in that State.

[107] Ivar Alvik, *Contracting with Sovereignty, State Contracts and International Arbitration*, OUP 2011, p. 177

[108] On « umbrella » clauses (and the variations on this theme clause), see Ivar Alvik, *ibid.* ; Sophie Lemaire, La mystérieuse « umbrella clause » (interrogations sur l'impact de la caluse de respect des engagments sur l'arbitrage en matière d'investissements) », *Revue de l'Arbitrage* 2009. 479. The hoisting device is simple : the host state is bound by the bilateral treaty (governed by international law) to protect the (private) rights of the (private) investors from the other State party. If the private contract is breached, then the treaty is also violated.

[109] *The Chevron* saga makes for an excellent illustration. Thus, an arbitrator acting under the aegis of the Permanent Court of Arbitration at the Hague has ordered provisional measures to prevent the enforcement of the judgment of Ecuador, the sovereign party, to the extent that its award of damages to indigenous peoples dwelling at the site of the oil and gas extraction interfered with the protection of a private property right guaranteed under the bilateral agreement. See : Permanent Court of Arbitration at the Hague, Interim award of 9th February 2011. On 25th January 2012, the same tribunal asserted its

formally justifiable under the terms of the treaty is not enough to dispel the impression that the power of the corporate actor to lever the application of international law to its own advantage is curiously out of step with the lack of correlative duties incumbent upon it under international law. One might wonder what has happened to the « parallelism of forms », the requirement of legal symmetry that liberal doctrine usually requires ?

c. Sovereignty subject to private law. Indeed, to a large extent, the firewall separating the world of sovereign states from that of « ordinary private actors » appears to work one-way only. The public/private divide does not prevent the commodification of sovereignty when the market so requires it. An illustration[110] taken from the field of sovereign debt shows how the same corporate actors (or their avatars, such as vulture funds[111]) which are immune from accountability by reason of their private status, are able to gain leverage through the rules of domestic private law against sovereign states, considered as acting « not as a regulator of a market, but in the manner of a private player within that market »[112] and thus despite their sovereign status. Of course, the loss of sovereign protection is apparently irrefutable as it proceeds from the very core of the « relative » sovereign immunity doctrine [113] : when states take advantage of the market *iure gestionis*, there is no reason that they should not be subject to the rules of the game applicable to private players. However, the analogy is seen to implicate « logically » a further step. Thus, under 1603(d) of the US *Foreign Sovereign Immunities Act*, whether or not a state actor should benefit from sovereign immunity depends upon the « nature » of the act or conduct : if it is one that a private actor could have done, then

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jurisdiction to decide on the company's liability under an investment treaty. Then a global anti-suit injunction was ordered in favour of Chevron, only to be lifted a year later (see District Court, Southern District of New York, Orders of February 7th and 6th April 2011 ; Federal Court of Appeals for the Second Circuit, Judgment of 17th March 2011. On 26 January 2012, Judge Gerard Lynch of the US Court of Appeals for the Second Circuit said such an injunction could only be sought "defensively, in response to an attempted enforcement". In the present case, the Ecuadorean plaintiffs "have made no effort to enforce their judgment in New York (nor, indeed, in any other jurisdiction)."). The Ecuadorian judgment was handed down by the Court of Sucumbíos, Lago Agrio, Ecuador, Judgment of February 14th 2011. On the whole saga see H. Muir Watt, *Rev crit DIP* 2011.339. The arbitration under the BIT here was an UNCITRAL arbitration, but the legal devices used are those described in the text.

110 There are many other well-documented examples of the use of private law as a leveller of sovereign interests, for instance in the case of development projects (see See José E. Alvarez, « Contemporary Foreign Investment Law », cited above).

111 The examples that follow tend to stem from oil and gas operations in developing countries. As Jonathan Lippert recounts ("Vulture Funds: The Reason Why Congolese Debt May Force A Revision Of The Foreign Sovereign Immunities Act », 21 *N.Y. Int'l L. Rev.* 1): at the outset, multinational corporate actors induce and re-cycle sovereign loans, backed by local (oil and gas) production. The proceeds of local production are then lent back through corporate screen lenders to the developing country at artificially high interest rates, ultimately generating more loans and worsening debt, and increasing the likelihood of sovereign default. The vulture funds then step in to buy up distressed sovereign debt and then deploy the strategies described below.

112 *Republic of Argentina v. Weltover, Inc.,* 504 US. 607 (1992)

113 The emergence of the « relative » immunity doctrine, first embodied in the US *Foreign Sovereign Immunity Act*, 1976, sparked analogous restriction of sovereign immunity throughout the western world. See for example, the *UK State Immunity Act*, 1978. The account below is representative of the position of these legal systems, although the particularly formalistic reading of the « nature » (exclusive of « purpose ») of a given private act may explain why vulture funds have honed into more to the US than, say, a jurisidction like France where the case law may not have closed the doors entirely to purpose (see Cass. Civ 1re, 25 févr. 1969, *Société Levant Express* JDI 1969.923, note Ph. Kahn, *Rev crit DIP* 1970.98, note P. Bourel).

it is not immune. The criterion of the « nature » of the act – carefully distinguished from « purpose » – is largely synonymous with the use of private law technique. Therefore, the issuing of sovereign bonds with a view to rescheduling sovereign debt is – whatever its purpose, or its importance for the local economy – a private act for which sovereign immunity is unavailable[114].

But, then, if sovereigns acting as private parties must be subjected to private law, a similar legal « logic » would seem to require that, conversely, when corporations exercice a rule-making authority analogous to private sovereignty, they should be subject by the same token to the discipline imposed by inernational law upon sovereign states. Apparently, however, the analogy does not work in that direction. One notable consequence is that « vulture funds »[115] - are able to syphon off development aid allocated to highly impoverished countries[116], having bought up distressed sovereign debt under the private law regime governing the secondary market. They may do so by suing the sovereign borrower directly, and then shopping for the most hospitable forum for enforcement ; at this stage, they will typically play a non-cooperative hold-out game during restructuring negotiations for distressed debt. Alternatively, they may garnish royalties due to the host country by foreign corporations conducting oil and gas operations within its territory[117]. Such a result may well seem singularly immoral, unfair and certainly contrary to the purpose of international aid to impoverished countries. However, in the words of the English High Court, when deciding upon the claim for more thatn $55million by a British Virgin Island-based hedge fund against

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[114] Thus, in *Republic of Argentina v. Weltover, Inc.*, the sovereign bonds were « in almost all respects garden-variety debt instruments, and, even when they are considered in full context, there is nothing about their issuance that is not analogous to a private commercial transaction. The fact that they were created to help stabilize Argentina's currency is not a valid basis for distinguishing them from ordinary debt instruments since, under 1603(d), it is irrelevant why Argentina participated in the bond market in the manner of a private actor. It matters only that it did so » (Opinion of the court per Justice Scalia, 504 US. 607 (1992) Pp. 4-9).

[115] These funds have been described as - "egregious predatory funds targeting the world's poorest nations" (Jonathan Goren, « State-to-State Debts: Sovereign Immunity and the "Vulture" Hunt », 41 *Geo. Wash. Int'l Rev.* 681, 689 (2010)). Typically, "vulture funds" - a particular variety of hedge funds usually incorporated in tax havens for the purpose of one particular purchase - purchase "sovereign distressed debts" of a highly impoverished country for a reduced price; these are bonds corresponding to loans on which the borrowing sovereign has defaulted, which can be bought at far less than their face value on the secondary market. The vulture funds then invest in extensive litigation in national courts - generating precedent on the way, in support of restrictions of sovereign immunity - for the full value of the claims (that is, the full nominal amount with the unpaid interest. See Jonathan I. Blackman and Rahul Mukhi, « The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal *Fauna « ,* 73 *Fall Law & Contemp. Probs*. 47, 49 (2010)

[116] For a clear account of the problems raised by vulture funds, with numerous references, see Human Rights Council, 14th Session, *Report of the Independant Expert Cephas Lumina on the effects of foreign ebt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social an cultural rights*, 29 April 2010 (A/HRC/14/21). Courts of the common law tradition have traditionally made hospitable fora, but courts belonging to the civilian tradition are also joining the game (Brussels and Frankfurt have proved equally open to vulture claims : see for instance *Elliott v Peru*, below).

[117] This strategy also requires by-passing potential obstacles under the FSIA linked to the destination (that is, the intended uses) of the royalties. An illustration can be found in the notorious *Af-Cap* cases, in which a vulture fund purchased a loan to the Congo at a "bargain basement" price and then obtained garnishment of the royalties and taxes owed to the Congo by a group of Texan oil companies. See Af-Cap, 462 F.3d at 421; comp. FG Hemisphere, 455 F.3d at 580.

Zambia, such disputes must be approached as « legal questions » and not as « questions of morality or humanity»[118].

Indeed, hold-out litigation by predatory hedge-funds paralyses debt rescheduling agreements, and generates additional bounties provided by private contract law. Sufficient investment in adversarial litigation (and thereby in the creation of favorable precedent)[119] can ensure that contractual clauses in international loan agreements are made to say what they do not necessarily mean.[120] Other tools of private law – including such niceties as the situs of the debt in private international law – can be seen to serve the interests of predatory funds[121]. Currently, although the case-law hardly encourages any optimism[122], change may be in view either as a result of alliances of wider public and private interests in order to fend off more intrusive legislation (in the form of contractual practice such as collective action clauses) [123], or as a result of militant action by NGOs (which has led, exceptionally, to protective legislation for highly impoverished sovereign debtors, such as the UK *Debt Relief Act*

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[118] *Donegal v Zambia*, (2007) EWHC 197 (Comm)

[119] Vulture tactics have generated a wealth of precedents eroding sovereign immunity throughout the Western world in connection with sovereign debt restructuring. A recent trend seems to be more restrictive however, and may accelerate vulture flight towards investment arbitration described below. See the various immunity cases litigated by *NML Capital* against *Argentina* (in the US : *NML Capital v. Banco Central* (2d Cir. 2011), July 8, 2011, in which the Second Circuit held that the assets of the Argentine Central Bank on deposit with the Federal Reserve Bank of New York were immune from attachment under 28 U.S.C. § 1611(b) ; in France, see Cour de cassation 1re Ch. Civ., 28 September 2011 n° 09-72057, maintaining immunity from enforcement against Embassy assets ; however, in the UK, decidely more welcoming to the vulture, see *NML Capital*, *Ltd. v. Republic of Argentina* (UKSC 2011 31). Does any of this indicate that adversarial litigation consolidates efficient rules (within the meaning given by Robert Cooter & Lewis Kornhauser, « Can Litigation Improve the Law Without the Help of Judges? », 9 *J. Legal Stud*. 139, 1980) ?

[120] The vulture Elliott acquired debt issuing from a 1983 loan on which Peru had defaulted, and then refused to participate in an Exchange or rescheduling agreement involving other creditors. It obtained a more than substantial award against Peru in the United States from the Court of appeals of the Second Circuit *(Elliott Associates, L.P. v. Banco de la Nacion and The Republic of Peru,* 194 F.3d (2d Cir. 1999) *),* which refused to entertain the champerty defense raised by the sovereign. It then applied successfully to the Court of Appeals of Brussels (at the location of Euroclear) in order to block payments by Peru to the other (participating) creditors on the basis of the *pari passu* clause (*Elliott Assocs. L.P.,* General Docket No. 2000/QR/92 (Court of Appeals of Brussels, 8th Chambers, Sept. 26, 2000). It obtained an *ex parte* order on the grounds that the *pari passu* clause – which was made to work somewhat like a most favored creditor clause - gave the vulture funds as holders of the rescheduled debt the right to participate *pro rata* in Peru's payments to other foreign creditors. Since then, vulture investors have repeatedly used this strategy. It is not clear however that *pari passu* really does anything more than ensure that the creditor's loan will not be subordinated to the claims of other creditors in the event of the borrower's bankruptcy; it does not mean that the solvent borrower must make *pro rata* payments to all its creditors.

[121] See, in the Royal Court of Jersey, *FG Hemisphere Associates LLC v Democratic Republic of Congo* ([2010] JRC 195) where an order of $100m payable to a Vulture fund depended upon the situs of a debt in private international law.

[122] See for example, an attempt in the UK by Court of Appeal to maintain Argentina's sovereign immunity against the Vulture NML : *NML Capital Ltd v The Republic of Argentina*, [2009] EWHC 110 (Comm), but then, allowing the appeal, UK Supreme Court, *NML Capital Limited v Republic of Argentina* [2011] UKSC 31.

[123] See the account of unlikely (or unholy ?) alliances in respect of the treatment of sovereign debt, Michael Helleiner, « Filling a Hole in Global Financial Governance ? The Politics of Regulating Sovereign Debt Restructuring » in Mattli & Woods, *The Politics of Global Regulation*, 89. Collective action clauses in loan contracts seem to have come into favour with both sovereign debtors and private creditors in order to forestall any more peremptory form of collective discipline.

2010[124]). However, this has not prevented a renewed air raid by vulture funds sweeping down in the past few months on Greek sovereign debt.[125] Moreover, were the courts to become less hospitable, international investment arbitration appears now ready to open its doors to holders of sovereign bonds. This new « Pandora's box » [126] is largely the consequence of the abdication of private international law, illustrative of its progressive but thorough domestication.

II.- CLOSET: The Domestication of Private International Law

These inconsistencies show how the schism between the public and private bodies of international law has allowed private economic power to acquire an informal sovereign status, without the duties attached to statehood. However, not only has private international law become impotent to rise to the challenge of private power, it has also been largely complicit in developing the very tools by which states are « losing control »[127] and private actors engineering their own « regulatory lift-off »[128]. In other words, as a direct consequence of the separation between the micro-world of legal technique and the macro-world of politics, the domestication of private international law led it to develop its own closeted epistemology - a form of tunnel-vision which actively contributed to consolidate the legal foundations of informal empire. Unable or unwilling to assume its governance implications in the global

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[124] The UK *Debt Relief (Developing Countries) Act* 2010 put a ceiling on the amounts recoverable against Highly Indebted Poor Countries before UK courts. It contained a sunset clause under which the Act was to expire after one year (on June 7th 2011), but new legislation has been passed in order to prolong its effects, on May 16th, 2011. Consequntly, the Vultures seem to have moved to other hospitable fora, such as Jersey (see *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] JRC 195 cited above). However, Jersey is now considering action: The Jersey consultation green paper (R.114/2011)

[125] Philip Aldrick, « Vulture funds to profit from a second Greek bailout », *The Telegraph*, June 25, 2011. These are funds such as Loomis, Sayles and Blackrock, which have already bought up hundreds of millions of euros of Greek sovereign debt. The latter appears to be governed very largely by Greek law, which has potentially significant economic implications. Thus, while Greek sovereign debt appears to have been rated indistinctly, markets appear in reality to factor in the « hold-out premium » linked to the choice of English or New York law, seen to provide greater protection to creditors not only against any unilateral changes in Greek law by the sovereign debtor, but also more spectifically against restructuring initiatives (see *Stephen J. Choi, Mitu Gulati and Eric A. Posner*, "Sovereign Debt Contracts: A Greek Case Study with Implications for the European Crisis Resolution Mechanism", The Chicago Working Paper Series Index: http://www.law.uchicago.edu/Lawecon/index.html, February 2011.

[126] Michael Waibel, « Opening Pandora's Box: Sovereign Bonds in International Arbitration », 101 *Am. J. Int'l L.* 711 (2007). The box is now open, since August 2011. A widely awaited and debated ICSID arbitration award, applying the Argentine-Italian BIT, has accepted that the acquisition of sovereign debt on the secondary market is indeed an « investment » within the meaning of article 25 ICSID. A sophisticated dissent argues, like Michael Waibel, that investment within the meaning of the treaty requires a real (and perhaps even territorial) link with the economy of the host country. See *Abaclat et al. v. The Argentine Republic (August 2011)*, and the dissent filed in Ocober 2011 by arbitrator Georges Abi-Saab.

[127] Saskia Sassen, *Losing Control ? Sovereignty in an Age of Globalization*, Columbia Univ. Press, 1996.

[128] Robert Wai, « Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization », 40 *Colum. J. Transnat'l L.* 209

economy, it began to suffer from denial when confronted with the expansion of informal power, a form of self-censorship linked to the dominant role which liberal theory confers on public international law in taming international politics. Indeed, it was proud to assert the axiologial neutrality of its process-based focus[129], and – largely in the image of civilian private law doctrine - fled any suggestion of contamination by international politics, or - more surprisingly still - domestic policy considerations, believed to belong to the realm of public law[130]. Relegated to the « domestic » sphere[131], where in the shadow of the Comity of princes[132] or the « clash of titans »[133], its modest – decorous[134], decorative[135] and homely[136] - scheme of governance of crossborder private transactions was equated with the merely national and the meekly apolitical. Its horizons were – and still remain to large extent - strictly and variously delineated by various doctrines such as territoriality, the « public law taboo », the doctrine of political questions, sovereign immunity, all ensuring that the domestic arts of private law - responsability, compensation, reliance and equality, all exclusive of bias and privilege - never interfered with issues of international policy or encroached on the field of informal power beyond the state. Here again, understanding how the closet came to be constructed (A), helps reveal the implications of its epistemogical tunnel-vision (B).

A. The Construction of the Closet.

For a time, although private international law had taken up its place in the shadow of public international law, the two spheres nevertheless remained connected[137]. At the

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129 This neutrality was a characteristic of its « signpost » rules, which directed the court towards the governing legal system on the basis of a (usually territorial) connecting factor (such as the place of the tort). A comparative and historical account of this methodology, familiar to students of the conflict of laws, can be found in D. Bureau & H. Muir Watt, *Droit international privé*, n° 329 s.

130 This denial of policy in private law is illustrated by Gerhard Kegel's vehement rejection of American functional, policy-driven methods in the 1960s in 'The Crisis of the Conflict of laws', RCADI II (1964), 1.

131 The vocabulary is of course significant : « domestic » is the term used by public international lawyers to designate national, as opposed to international law. It suggests that this body of the law deals with private matters (such as family law, under a civilian categorization) considered to be unimportant in the political economy.

132 See Joel Paul, « Comity In International Law", 32 *Harv. Int'l L.J.* 1.

133 The image of the clash of Titans is often used to characterize transatlantic regulatory or public economic law conflicts. See for instance, Milena Sterio, « Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules », 13 *U. C. Davis J. Int'l L. & Pol'y* 95 (2006-2007).

134 The ethos of private international law, expressed through a special concept of « conflicts justice », is tradtionally considerd to be harmony, coordination and order (see for example, Alex Mills, *The Confluence of Public and Private international Law*, p. 16 et s.).

135 Choice of of law rules were merely decorative in the sense that it was (and still is, to a large extent) left to the parties' discretion to raise or not to raise the conflict of laws before the court. Courts were usually precluded from bringing up the existence of a conflict of laws of their own motion, even in civilian inquisitorial legal systems where more initiaitve might have been expected. In France, for instance, the debate goes on today as to the procedural status of choice of law rules : see D. Bureau & H. Muir Watt, *Droit international privé* , n° 360 s.

136 Classical private international law in the civilian evolved in the field of family disputes and personal status (personhood), where the legal tradition, largely inspired from canon law, appeared apolitical or « natural ». See for example, in France, the first private international law decision after the Code civil of 1804, which concerns the validity of the marriage of a de-frocked Spanish monk : see Royal Court of Paris, *Cour* royale de *Paris*, 1re et 2e ch. réunies, 13 juin 1814, *Busqueta*, Sirey 1814.2.393, reported in B. Ancel & Y. Lequette, *Grands arrêts de la juriprudence de droit international privé*, Dalloz, 5th ed, 2006, n° 1.

137 The great international lawyers of the first half of the nineteenth century were no respectors of the public /private divide. A significant example is Roberto Ago, who served as a judge on the International Court of Justice from 1979 until 1995, and who was professor (at Rome at the end of his career) of both

beginning of the 20th century, the « gentle civiliser » that was modern public international law[138] translated, in private international law, into the universalist ideal which led to the creation of the Hague Conference on Private international law and the drafting of numerous conventions unifying the rules of conflict of laws[139]. A worldwide network of « signpost » rules[140], designed to transcend the dissonant idiom of substantive laws, was made available to courts dealing with private law disputes involving international succession or matrimonial property, crossborder contracts or multistate torts. « International harmony » - meaning recourse to similar conflict of law rules whatever the forum seized of the dispute - was proclaimed to be the ethos of private international law, fin de siècle. After all, since only private interests (no policies, no politics) were supposedly involved in such conflicts, the peaceful developement of world society turned largely upon the appropriate design for private dispute resolution. Sharing similar ideals, and as such resolutely orientated towards the search for commonalities among legal systems[141], comparative law would lend its resources to ensure uniform judicial intepretation of private law categories and concepts[142]. And when, accidentally, a source of international disagreement arose, benevolent liberal courts would act

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private and public international law. He lectured at the Hague Academy in 1936, 1939, 1956, 1971, and 1983, on the most controversial topics of both fields.

[138] See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002).

[139] As explained on the Hague Conference's website, it has constituted since 1893 « a melting pot of different legal traditions », developing and servicing conventions which correspond to « global needs » in the areas of protection of children, family and property ; international legal cooperation and litigation ; international commercial and financial law.

[140] A signpost rule is a so-called multilateralist choice of law rule which uses an ostensibly objective (usually territorial or peronal) circumstance (or connecting factor) to connect facts belonging within a given legal category to the governing law. For instance issues identified as « tort » are governed by the *lex loci delicti* or the place where the harm occurred. Such rules were rejected by the US functionalist « revolution » of the 1960s, but have survived in European tradition, in a more flexible version, often framed in terms of the « closest connection » (on this evolution, see Symeon Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', *Tulane Law Review*, 82 (2008), 1741–99). On the view of such rules as forming a peer network of international thrust, see Alex Mills, *The confluence of public and private international law*, p. 107.

[141] The private international law unification movement went hand in hand with the enthusiastic use of comparative law as a means to overcome local differences. On this bias in comparative studies towards discovering commonalities, see Pierre Legrand, 'The Same and the Different' in Pierre Legrand and Roderick Munday (eds.) *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press (2003).

[142] Ernst Rabel (whose comparative treatise was published in four volumes at Tubingen between 1965 and 1971; comp. in English, his "Private Laws of Western Civilization", *Louisiana Law Review* vol X, p1 (1949)) was the greatest adept of the use of comparative law to create transcendent categories for a common private international law : *The Conflict Of Laws: A Comparative Study* 558 (1945). For an instructive account of Rabel's comparative methodology see David Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language", in *Rethinking the Masters of Comparative Law* (Hart Publishing 2001).

with regard for international Comity[143], counting on the delightful intricacies of *renvoi* and incidental questions to help smooth the path towards harmony[144]. However, by the time that it was discovered that legal cultures were neither convergent[145] nor indeed converging[146], the universalist ideal had been swept away in the wake of the nationalisms prior to the Great War. But subsequent disillusionment with the discourse and mechanics of harmony and universalism did not lead, as it might have done, to the reconnection between the micro-legal perspective adopted by private international law and its wider environment of international politics, economics and social conflict, which was progressively to introduce profound contestation into the public international legal field.

Indeed, gradually disconnected from the substance of public international law while espousing the limits it prescribed, private international closed in on itself. Inhibited from interfering with interstate clashes of power, it continued to focus on private and domestic issues, developing for that purpose a specific methodology which consolidated its axiological neutrality and widened the breach between itself and international politics. Yet to a large extent, both fields evolved under the sway of the same liberal and positivist precepts, covered economic imbalance with sovereign equality and served parallel imperial projects. Both claimed the neutral axiology of legal discourse. Moreover, indeterminacy works out similarly in legal argument on both sides of the divide, so that, like its public counterpart, modern private international law has always oscillated between « apology and utopia »[147]. Thus, modern public international law, while dealing with the relationships between European powers, refused to inject substantive values into the rule of law, unless dealing with outsiders beyond the pale of civilisation[148]. Shadowing these limits, private international law was

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143 The traditional use of « Comity » reminds us that courts have always been aware of the presence of the political factor in international conflicts : see Joel Paul, « Comity In International Law", 32 *Harv. Int'l L.J.* 1. This may seem less true of the civilian tradition, where the public/private divide has always had a stronger hold. However, the omni-presence of public policy or *ordre public*, used similarly as a bridge and a wall (as Joel Paul describes) belies the official apoliticism.

144 On these devices (and their inherent methodological contradictions), see D. Bureau & H. Muir Watt, *Droit international privé*, n° 359 et s. On the coexistence of this « smooth » narrative of transnational law and a hidden, « rough », version, see Robert Wai, "*Private v. Private: Models of Private Governance in Private International Law*" , PILAGG paper November 2011 (available on *blogs.sciences-po.fr/pilagg/).*

145 This discovery heralds « conflicts of characterization », simultaneously theorized in Germany in 1891 by F. Kahn (Jherings Jahrbücher 891.1) and in France in 1897 by E. Bartin (Journal de droit international 1897.225) : these stem from different cateorizations of legal institutions as between different legal systems, and specifically as between the law of the forum and the foreign law designated by the forum's choice of law rules on the basis of its own categories. This leads to a « logical » dilemma : how can the law designated as the « law of the tort » be applied against its own will if it does not provide a solution in tort law to the dispute but frames the question in terms, say, of contract ?

146 Pierre Legrand's contemporary analysis of non-convergence applies equally well to this period : « European Legal Systems Are Not Converging », *International and Comparative Law Quarterly* (1996), 45: 52-81.

147 This characterization of the indeterminacy of public international law is Martty Koskenniemi's : see *Between Apology and Utopia : The Structure of International Legal Argument* (Helsinki, 1989). The often-used image of the swing of the pendulum in private international law describes its constant oscillation between an ideal world-design (multilateralism) and attention to concrete or effective reality (pluralism). For a historiographical account, see D. Bureau & H. Muir Watt, *Droit international privé*, cited above FN 57, n° 332.

148 International law required equality only as between the European states : see Martty Koskennemi, *The Politics of International Law*, p.59 ; comp. on the European-centered history of international law, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005.

equally indifferent to substantive outcomes, except when the foundations of civilisation were threatened ; such neutrality was justified by the reality, then the fiction, of a commonality of private laws[149]. It has been asked whether the indeterminacy of public international law has opened it to various uses – both good and bad -, or whether there is an inherent bias in its indeterminate technology[150]. There are certainly grounds for a similar questioning in private international law. The sanctuarisation of the public sphere and the correlative domestication of the private has led ultimately to the autonomy of the latter and to a reversal of the dominance of private interests over the public.

Politics, then, were squeezed out of liberal private international law[151], at the same time as its links were severed with public international law and the heritage of the *ius gentium*[152]. Beyond its supposed indifference to substantive outcomes, its proclaimed apoliticism, like that of public international law, served – and still serves, in the European tradition[153] - to hide the profoundly political nature of social conflicts - even when they do not, by definition, involve institutionalised public actors, or implicate the arbitration of collective interests[154]. Deprived of any systemic vision, private international law settled down to a homely life, viewing the field of informal international economy through the micro-legal lens of private domestic law – a lens which, in Europe, was progressively shaped by the legacy of the great Codes, and which in the United States, was not yet been shattered by the onslaught of legal realism. It was only during the second half of the 20th century that the conflict of laws in the United States shed its European heritage and turned over (or back ?), to

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On the analogous reference to civilization as a measure of the threshold of tolerance of public policy in private international law, notably, see Didier Boden, *L'ordre public : Limite et Condition de la tolérance. Recherches sur le pluralisme juridique, th. Paris I, 2002, notes 54, 1105, 1112 & 1119)*.

[149] Von Savigny's « invention » of multilateral conflict rules came accompanied with an explicit caveat that this methodology was workable only within the Romano-Christian cultural community composed of the various German princedoms.

[150] See Ugo Mattei and Luigi Rossi, « The Evil Technology Hypothesis : A Deep Ecological Reading of International Law », *Cardozo Law Review de Novo* (2011). Available at: http://works.bepress.com/ugo_mattei/42

[151] It could be said that private international law became resolutely « micro-legal » as opposed to « macro-legal », according to a terminology suggested by Benoît Frydmann, « Le droit global » (PILAGG paper, February 9th 2012), publication forthcoming.

[152] The parallelism with the evolution of the public international sphere on the other side of the schism is significant but of course unsurprising. Thus Martty Koskenniemi describes how, in the nineteenth century, « The fight for an international rule of law is a fight against politics… (Thus) …as contemporaries saw Europe as a 'system' of independant and equal political communities (instead of a *respublica Christiana*), they began to assume that the governing principles needed to become neutral and objective – that is, that they should be understood as law » (*The Politics of International Law*, Hart, 2011, p.37).

[153] For a denial see Pierre Mayer, « Le phénomène de la coordination des ordres juridiques étatiques en droit privé », RCADI vol. 217, (2007), p.9, spec. p. 163 et s.

[154] Indeed, the implication of the public/private divide, justifying private law's claim to political neutrality, is that private law articulates social conflict as individual litigation, and then brings to bear a supposedly unchanging – immemorial or ahistorical - set of rules based on reason (in the Enlightment tradition of the great Codes) or common sense (in the common law tradition). See *supra* FN 53. It would however be inaccurate to infer that proportionality or balancing, usually framed as the exact opposite of private law (meaning deductivist or syllogistic) reasoning, does not shy away from political, or distributional, issues (see Duncan Kennedy, « A Transnational Genealogy of Proportionality in Private Law», in R. Brownsword, H. Micklitz & L. Niglia,*The Foundations of European Private Law*, OUP 2011, p. 185. More generally, on the fortunes and functions of the public/private divide (in the US) see Duncan Kennedy, « The Stages of the Decline of the Public/Private Distinction", 130 UPenn LR 1349 (1982); William Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America*, 1886–1937, 1998; Morton Horowitz, "The History of the Public/Private Distinction ", 130 UPenn LR 1423 (1982).

functionalism[155]. And it was half a decade later still that the regulatory nature of the new European Union « private » law began to lead to a reconsideration of the place of politics and economics in private international law[156]. In either case, however, the turn from the dogmatic to the functional, from the private to the regulatory, led rather to the instrumentalisation of the field in the wake of domestic policy than to the elaboration of a wider project of global governance[157]. If anything, the impact of federalism (US) or quasi-federalism (EU) was to give greater attention to the needs of the community of Sister or Member States, but closed off the global horizon more deliberately than the previous unilateral attempts to fulfill an ideal of worldwide Comity.

The inward-looking turn taken by European private international law during the first decades of the 20th century, while its US counterpart still struggled with the mechanical dysfunctionality of a borrowed heritage[158], is largely reflected in its increasingly complex technical content[159]. Curiously enough, this content, which led ultimately to the American conflicts revolution and its distaste for dogma and mechanical rules, was attributed under romantic European lore, to the « Savignian tradition ». Thus, Savigny's seminal revisiting of Roman law, harnassed to the (conservative) political ideal of spontaneous cultural ordering, became a song to modernism and positivism, through an extraordinary narrative of progress and enlightment[160]. Its key feature, shared with comparative law during the same period, was a narcissic word-vision, a propensity to reduce the Other to one's own image[161] : this meant that all legal institutions either had to fit into Romano-Germanic categories, or were otherwise

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155 On this turn, see Symeon Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', *Tulane Law Review*, 82 (2008), 1741.

156 Evidence of this turn appears in the various recent EU instruments (see for example, Regulation « Rome II », 2008 , recital 20 : « The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undis- torted competition and facilitating trade").

157 American functionalist choice of law principles are based on domestic policy-driven analysis, but this methodology has, however, lacked wider horizon. See Symeon Symeonides, « A New Conflicts Restatement: Why Not? », *Journal of Private International Law*, Vol. 5, 2009, p.383. Similalrly, contemporary European private international law has tended to be subordinated to the requirements of the construction of the internal market. See H. Muir Watt, « Aspects économiques », §134 et s.

158 The realist critique of choice of law methodology at the time of the *First Restatement on the Conflict of Laws* (1934) was articulated by David Cavers, A Critique of the Choice of Law Problem, 47 *Harv. L Rev* 173 (1933). The traditional methodology, dogmatic and mechanicist, was perceived to be the legacy of Continental European territorialism. However, this critique misses the point to a certain extent. The Continental European tradition was far less territorialist than its American version : see Bernard Audit, « A Continental Lawyer Looks at American Choice-of-Law Principles », 27 *Am. J. Comp. L*. 589, 590-98 (1979).

159 In particular, European private international law saw the rise of « escapes » (renvoi, conflicts of characterization, preliminary questions) to which academic doctrine devoted considerable intellectual energy. Often described as « theoretical », these aspects of private international law are essentially technical and have little relationship with the great questions of legal theory.

160 Pierre Gothot, « Simples réflexions à propos du saga des conflits de lois », cited above. Even more curiously, it appears to have been in France, not in Germany, that attachment to the Savignian tradition was the strongest - but the supposed « Savignian tradition » as revisited by French internationalists such as Etienne Bartin at the turn of the century (according to a term coined by Bertrand Ancel, the « Savigniano-Bartinian » tradition : see « Destinées de l'article 3 du Code civil », *Mélanges en l'honneur de Paul Lagarde,* Dalloz 2005, p.1, FN3) was in fact anything but that! V. aussi D. Boden, *L'ordre public* : *Limite et conditon de la tolérance*, p.569-571.

161 See on this point, the comparative work of Pierre Legrand, cited above FN 126, 131. See too P.G. Monateri, « Black Gaius », 51 *Hastings Law Journal* 479 (2000).

denied voice in the international legal ordering[162]. As Pierre Gothot has pointed out, the Savignian mythology created a closed world[163]. The claims of different legalities were disconnected from their social context, then deviant institutions rejected beyond the pale. The explanation may lie in the fact Western systems of private international law were constituted to a large extent in an effort to deal with the exotic by-products of colonialism in the field of family law: *ordre public* served as a mediating, and often exclusionary, tool to deal with indigeneous marriages, polygamy, succession claims of unofficial offspring of colonial officers, unknown forms of matrimonial property under Muslim law, and so forth...[164].

The various doctrines elaborated under the mythological aegis of savignism barely disguised a set of « escapes »[165] which had become necessary as the world became progessively more diverse, showing up as fragile the « community of laws » on which the modern European tradition relied. At the same time, the welfare state began to weigh heavily on the public/private divide and the sustainability of a vision of private law as politically innnocent order and reason. While the latter model was rejected in the United States in the sway of legal realism[166], European methodology dealt with tensions within the classical vision by allowing an increasing number of exceptions to the multilateralist scheme[167]. This resulted in an increasing mismatch between the theoretical model of private international law and the evolution of European private law, now essentially geared to market regulatory policies (including consumer protection) and human rights. Multilateralist conflicts of law rules, while presented as the dominant methodological framework, were frequently trumped by a series of devices, such as derogatory, hyper-mandatory substantive policies (*lois de police*)[168] ; the old exception of public policy or « ordre public » ; or the international reach of fundamental rights protected by the ECHR[169]. Meanwhile, the increasing significance of jurisdictional

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[162] Private international law was often used to shore up the family stronghold of the colonial administrators. The examples, which belong to the field of « characterization » or « ordre public », are well-known to students of the conflict of laws. They take the form of non-recognition of polygamous marriages, children born out of wedlock, Islamic *talak* or *kafala*. Contemporary exclusions concern same-sex marriages, or adoptions of children by same-sex couples.

[163] Pierre Gothot, « Le renouveau de la tendance unilatéraliste », *Rev crit DIP* 1971.1. Of course, creation of closed worlds are not the monopoly of law. On closure in social theory, see Katarina Pistor, « Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change", cited above.

[164] See Didier Boden's account of colonial interlegality in *L'ordre public : Limite et Condition de la tolérance* (cited above), notes 139-142.

[165] These are « renvoi », conflicts of characterization, preliminary questions…See above FNXXXX

[166] See above, FN 141.

[167] D. Bureau & H. Muir Watt, *Droit international privé*, n° 518 s, on the progressive exceptions and adjustments which came to be derided by American functionalism as « escapes ».

[168] A good example is a recent decision in which, for the first time, article 7§1 of the 1980 Rome Convention is actually applied by a court of a Contracting State (Cass com. 16 mars 2010, *Viol,* n° 08-21511, *Semaine juridique, éd. gén*, 2010.996, note D. Bureau et L. d'Avout). The case concerns the validity/performance of an international maritime contract for the carriage of goods by sea. The Cour de cassation directs the lower courts to have regard to an overriding mandatory provision of Ghana law (an embargo on meat imports) designed to protect public health, although it was not the law otherwise governing the contract. See, more generally, Paul Schiff Berman, « Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era », 153 *U. Pa. L. Rev.* 1819 (2005).

[169] *Ibid,* n°540 s. Clearly, human rights norms are « migrating » to new sites (see Robert Wai & Craig Scott, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation", cited above). But on the complex methodological and substantive impact of human rights on the conflict of laws, see below, XXXX.

conflicts, the systematic practice of forum shopping and the gradual emergence of a « global market for judicial services »[170] highlighted, by the end of the century, the overwhelming presence of private and political power in transnational litigation[171]. How otherwise is to be understood the far-reaching implications for the freedom of the press of a judicial super-injunction in the toxic tort case of the *Probo Koala*, to take but one example?[172] Nevertheless, and despite the increasing opportunities for transnational social contestation and human rights norm migration[173], private international law persists in its denial of any involvement in the messy arena of global economics or politics, and remains ill-suited in its present state *de lege lata* to affront the enormous regulatory void beyond the state.

B. The Implications of Tunnel–Vision

It is to a large extent through the denials of their private international law that states have been complicit in the development of the informal empire which now threatens to overwhelm them[174]. While the commodification of sovereignty has clearly required deliberate moves at some point on the part of the governments of countries whose populations and ressources are now suffering its consequences, the dwarfing of the public sector and the growth of shadow finance have at the very least involved turning a blind eye to the increasing

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and, when invoked by or imposed upon private entities, wreak havoc (judged either salutary or subversive). They raise the issu of the survival of private international law as a discipline. These tensions will be examined below, XXXXX

[170] Jens Dammann & Henry Hansmann, « Globalizing Commercial Litigation », *Cornell Law Review*, Vol. 94, No. 1, 2008, building on William Landes & Richard Posner, « Adjudication as a private good », 8 *Journal of Legal Studies* 235 (1979).

[171]

[172] Among the signs of the growing presence of power struggles, « clashes of titans » or relationships of domination through the courts, is the use of energetic and sometimes violent judicial tools such as super-injunctions in disputes involving corporate social responsability. The *Trasfigura* case is infamously famous for the use of a super-injunction preventing the public revelation by the Guardian newspaper of a (human rights) dispute involving the dumping of toxic waste (carried by the *Probo Koala*) in the Ivory Coast (see for an account of the proceedings, *Rev crit DIP* 2010.495).

[173] Robert Wai & Craig Scott, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation", cited above.

[174] Saskia Sassen, *Losing Control ? Sovereignty in an Age of Globalization*, Columbia Univ. Press, 1996. As the current financial crisis shows only too well, blaming the markets for the inadequacies of public - domestic and international – policies, as if the markets were « out there », skittish, autonomous - unshaped by law and policy and subject to whims of their own invention - is more than suspect. As emphasised so forcefully in the domestic sphere by Amerian legal realism, markets are social - and therefore legal - constructs, so that not plying discipline is of course in itself a form of regulation. As Harm Shepel points out, there is no such thing as an 'unregulated market.' Markets are always already regulated, insofar as political intervention into markets is not a question of regulating a void, but of how to interact with the wider normative universe that constitutes markets (*The Constitution of Private Governance*, p.406 et s.). Indeed, "markets have always obscured distributive issues and helped diffuse blame for negative economic consequences" (Louis W. Pauly, "Global Finance, politicl authority, and the problem of legitimation", in Bruce Hall & Thomas J. Biersteker *The Emergence of Private Authority in Global Governance*, pp. 76, 77).

claim of private interests to sidestep state regulation. For example, while rating agencies are decried as having deleterious effects on interconnected markets[175], little has been done to address the whole area of private standardization, or more specifically to prevent conflicts of interests from festering behind the « issuer-pays » principle[176]. Similarly, while global warming, or the blight of starvation in the third world, are core concerns of the world community, no significant move has been made as yet to tame multinational corporate misconduct in respect either of environmental protection or access of local communities to agricultural land. Yet the tools which have might have addressed such issues belong to private international law. It is hardly surprising, therefore, that fundamental rights have stepped in to fill some of these gaps[177], and while such a move can but be welcomed, it does not necessarily suffice to enlarge the tunnel-vision which still works actively to shelter abusers of private sovereignty. The inadequacies of private international law in this respect are the direct result of its current apolitical status, which moreover posits them to be inevitable and thus inhibit legal change. They comprise :

a. Lack of any adequate theory of (public or private) conflict. The misnamed « conflict of laws » has developed, if any, a very tame conception of conflict. The break with the pre-modern vision of colliding statutes involved a pasteurisation of conflict itself, in which clashes of sovereign authority were watered down. In the modern, largely state-centered European tradition, « conflicts » were reduced to the abstract availability of multiple private laws, each reputedly complete and largely interchangeable[178]. In the English common law tradition, a similarly « smooth » account of legal ordering was favoured by a private interest focus on commercial dispute resolution and business convenience[179]. In either perspective, private power became invisible through the lens of the principle of party autonomy and Private actors acquired the freedom to opt out of state regulation, while the ultimate safety net provided by derogatory mandatory rules was gradually eroded through

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[175] See Timothy J. Sinclair, *The New Masters of Capital: American Bond Rating Agencies and the Politics of Creditworthiness*, Cornell Studies in Political Economy,2005; Norbert Gaillard, "Agences de notation : responsabilité, régulation ou laissez-faire?», in Mathias Audit (ed), *Insolvabilité des États et dettes souveraines*, p.165. For a fascinating, although perhaps unsurprising, economic account of the incentive structure of (in) accurate certification in unconstrained financial markets, see Jonathan Barnett, « Intermediairies Revisited. Is Efficent Certification Consistent with Profit Maximization ? », *University of Southen California Law and Economics Working Paper Series,* n°137.

[176] See Mathias Audit, « La responsabilité des agences de notation en droit international privé », *Rev crit DIP* 2011.581, showing that private international law issues are both rife in this field and remarkably untended.

[177] Albeit with a fairly inchoate theory of extraterritorial or transnational effects which frequently generates « expert » criticism from within the field of private international law. On these tensions between the two disciplines, see below XXX.

[178] The most influential and the most sophisticated contemporary mainstream theory of conflict in European private international law was articulated by Pierre Mayer, *La distinction des règles et des décisions en droit international privé,* Dalloz, 1973. Its theoretical underpinnings are largely Kelsenian. According to this account, conflicts are the result of the abstract availability, on any given issue, of all the world's systems of private law, each complete, exclusive and potentially able to provide an adequate, interchangeable answer. Policy-driven, peremptory norms (« lois de police ») are of course an embarassment, but they are presented as exceptions at the discretion of the (usually reluctant) court, and limited to those of the forum (see the careful wording of article 9 of EC Regulation « Rome I »).

[179] Representative of this account, see Adrian Briggs, *Agreements on Jurisidction and Choice of Law*, OUP 2008. On the existence of a rougher conflictual reality behind the « smooth » account, see Robert Wai, "*Private v. Private: Models of Private Governance in Private International Law*", cited above FN 144. The author points out how this account shies away from distributional consequences.

liberalization of requirements relating to circulation of foreign judgments and arbitral awards[180]. By contrast, in the context of the US functional approach, (« true ») conflict came to be defined, less blandly, as the clash of policies – before the insights of this approach were swallowed up by over-lax jurisdictional rules and the subsequent rise of forum shopping[181]. Likewise, while transnational regulatory adjudication appeared at one point to be investing the courts with a governance role in the global arena[182], such an approach now seems to have lost its bite in a (re)turn to territoriality, so that private power may once again slip through the net[183].

Whatever the reasons, in any of these perspectives, the exercise of economic power – whether public or informal - tends to be kept below the surface in the way issues of conflict are articulated. Among the consequences of this flattening of conflict, arbitrators are deciding governance issues, and sovereignty-free actors[184] are designing their own normative space through the tools of contract law, with the approval of the courts. Illustrations of both these trends are abundant and well-known. Recent illustrations include the *Chevron* saga, in which an arbitration tribunal disqualifies the judgment of the court of a sovereign state in respect of a private investor's corporate social responsibility, with (more than) a little help from international investment law[185]. Another notorious example is *Lloyds*' successful enforcement

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180 On the rise of party autonomy (that is, freedom to choose the governing law in an international contract) as international trade expanded in the first half of the twentieth century, and then the gradual loss of control through liberalization of the various control mechanisms, see H. Muir Watt, « "Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance", *ERCL* 2010.1.

181 On this evolution, see Symeon Symeonides, 'The American Choice of Law Revolution in the Courts: Today and Tomorrow' *RCADI* 2003, vol 298, 13.

182 See Hannah Buxbaum, « *Transnational Regulatory Litigation",* 46 *Virginia Journal Of International Law* 251 (2006); Christopher Wyteck, « Domestic Courts and Global Governance », 84 *Tulane Law Review* 67 (2009).

183 The cautious transaction-focused approach adopted by the US Supreme Court in *Morrison v. National Australia Bank* (see above FN 16) may entail losing sight of the politics underlying the conflicts. An analogous retreat behind territoriality may be taking place in the context of the the ATS litigation currently pending before the US Supreme Court (in *Kiobel :* see above, FN XX), with the risk that the statute may lose its bite and mulinational corporate conduct abroad benefit from impunity. Similarly excessive caution appears in judicial practice in Quebec: see (in respect of the cyanide spill allegedly due to corporate misconduct in Guyana), Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: Contribution of Transnational Private Litigation", p.17). It is true, however, that this caution contrasts with other, more aggressive or more instrusive, judicial reactions which are not necessarily more desirable, such as recourse to transnational injunctive relief, including anti-suit or super injunctions, or value judgments passed on other countries' judiciaries in the framework of a *forum non conveniens* analysis. It is rare that this more activist stance works, any more than judicial caution, in the direction of the regulation of transnational private power or human rights protection.

184 Stefan Kobrin sees two types of actors in the global market : those who are « sovereignty-bound » as subjected to local legislation, and the « sovereignty-free » (« Economic Governance in an electronically networked global society », p.58). The latter have « regulatory lift-of » according to Robert Wai's term (see « Regulatory Liftoff and Jurisdictional Touchdown », cited above).

185 On the *Chevron* saga, see above FN 95.

of judgments and awards in the US against investors who had been deprived of the informational protection of the Securities Act through a highly sophisticated combination of private legislation, choice of law, and jurisdictional side-stepping[186]. In both instances, private international law actively provides the tools – the wondrous myth of party autonomy, the « plug-in » network of international arbitration, the neutralization of peremptory rules of local public policy, the free « delocalised » movement of private awards – through which private actors have acceded to unshackle themselves from the constraints prevalent in the domestic sphere[187].

b. Inadequate mapping of the global political economy. Through its continued focus on territory, private international law subscribes to a map of the world which is clearly out of touch with the global political economy. Such a map hinders its ability to capture abuses of economic domination whenever such domination occurs « extraterritorially ». Indeed, whether formulated in terms of state action doctrine, conflicts of laws or the reach of rights[188], territoriality has to a large extent curtailed the purview of human rights[189], public economic regulation[190] or constitutional provisions[191]. Current developments within the US Supreme

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[186] See *Roby v Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir 1993); *Bonny v Society of Lloyd's*, 3 F.3d 156 (7th Cir 1993).

[187] For a more detailed account, see H. Muir Watt, « "Party Autonomy" in international contracts", cited above; comp. Nils Jansen & Ralf Michaels, « Private Law Beyond the State », cited above, asking whether, if all law is public in the domestic sphere, it might not be that all law is private in the global arena (p.873).

[188] On the striking similarities between these three problematics, see Jacco Bomhoff, « The Reach of Rights », cited above.

[189] Some of the highest courts (supranantional or domestic) tend on the one hand to be prudent about extraterritorial application of forum law (see the US Federal Supreme Court's decision in *Morrison*, penned by Justice Scalia *Morrison v. National Australia Bank*, 130 S.Ct. 2869, 2878 (2010), in the specific context of F-Cubed class actions in the field of Securities; comp.Justice Scalia's dissent in *Boumédienne v. Bush* (US Supreme Court June 12th 2008, nos. 06-1195 and 06-1196), asserting that "The writ of habeas corpus does not, and never has, run in favor of aliens abroad"). Conversely, they tend to be allow few exceptions to territorality in areas such as jurisdictional immunities where contemporary understandings justice might require some flexibility (see the judgment of the ICJ in *Germany V. Italy: Greece Intervening. Jurisdictional Immunities of the State*, 3rd February 2012: rejecting the argument that customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperii).* On the extraterritoriality of international law (and its limits) under the *Alien Tort Statute*, see above p.13 ; on the reach of European human rights, see below XXX s. On the way in which law contributes to construct territory, see Paul Schiff Bermann, « The Globalization of Jurisdiction", *University of Pennsylvania Law Review*, December, 2002, p.311.

[190] See *EEOC v. Arabian American Oil Co*., 499 U.S. 244, 248 (1991); *Morrison v. National Australia Bank*, above FN 16.

[191] See for example, *John Roe I v. Bridgestone Corp*. 492 F.Supp.2d 988 S.D.Ind., 2007 : « Even if the Thirteenth Amendment authorized a direct cause of action for damages against a private entity, the Thirteenth Amendment bars slavery and involuntary servitude only "within the United States, or any place subject to their jurisdiction." By its terms, that language does not appear to reach activity in other countries ». For the debate on the applicability of the Constitutional prohibition of slavery on foreign soil, and strong arguments for extending the Thirteenth Amendement to reach the conduct of US coporate employers abroad, see Tobias Barrington Wolff, « The Thirteenth Amendment And Slavery In The Global Economy », 102 *Colum. L. Rev.* 973 (2002).

Court illustrate the pervasiveness of the territorial paradigm[192]. Similarly, in the European context, special rules of jurisdiction and choice of law designed to protect weaker parties (consumers, workers or insurance policy holders) as against the stronger professionals focus exclusively on European residents, leaving residents of third states unprotected in their relationships with European professionals[193]. However, there are two specific examples, of global significance, which are particularly worrisome.

Firstly, it is through the assertion of territoriality as a governing principle that private international law has been complicit in preventing the assertion of transnational corporate social responsability. It has kept corporate liability within the limits of compartmented, local law both through *forum non conveniens*, and the *lex loci delicti*[194]. This has encouraged the migration of sites of production to legal environments where, behind the sovereign veil, international competition for investment tends to keep down both standards of care and levels of compensation. Gross abuses of power – often combing the economic power of the foreign investor and the political power of the local governement[195] - in the form of ecological damage, expropriation or land-grabbing, forced migration, repression of freedom of expression, mistreatment of workers, child labour (and more) - have thus been condoned through the applicability of local law whose content is hostage to the desires of the investor. It is only recently that a challenge of territoriality has emerged in connection with corporate social responsibility, showing up « extraterritoriality » as a way of framing a problem rather than an expression of intrinsic limits[196]. Thus, there is there is nothing « extraterritorial »

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[192] In the words of Justice Scalia, writing for the Supreme Court in *Morrison v. National Australia Bank Ltd et al* 2010 (FN 16 above), « The results of judicial-speculation-made-law…demonstrate the wisdom of the presumption against extra-territoriality ». On a similar appraoch which seem to be surfacing in the context of the Alien Tort Statute, see above FN XX.

[193] The European Commission has proposed to extend the scope of EU jurisdiction rules (EC Regulation Brussels I) to third states (COM (2010) 748/3). However, the extension seems only to reach defendants domiciled in third states, and not the inclusion of foreign resident consumers or workers in any form of protective regime. Moreover, even this limited extension has met with considerable opposition and is currently at the centre of heated debate in the European Parliament (for a very critical view, see R. Fentiman, "Brussels I and Third States: Future Imperfect", *Cambridge Yearbook of European Legal Studies*, vol 13 2010-2011, p. 65). On the attitude of EU law and policy towards third states, see more generally, Marie Cremona, Jôrg Monar & Sara Poli (eds), *The External Dimenbsion of the European Union's Area of Freedom, Security and Justice*, College of Europe Studies, Peter Lang, 2011. It has been much debated in the conflict of laws as to whether focussing on local (one's own) citizens, workers etc, is discriminatory or a mark of deference (see, defending Currie's governmental interest analysis on the latter grounds against criticism of discrimination, see Herma Hill Kaye, "A Defense of Currie's Governmental Interest Analysis", RCADI 1989, t 216, p.9).

[194] While the illustrations are legion (See « Aspects économiques », §242), the emblematic example of the working of private international law to create corporate impunity remains the *Bhopal* litigation : *In re* Union Carbide, 809 F.2d 195 (2d Cir. 1987), *cert. denied,* 108 S. Ct. 199 (1987).

[195] The issue of private corporate complicity in human rights abuses by local governments (or military forces) arises frequently in the context of ATS litigation. The *Kiobel* litigation focuses on whether international law governs the identity of the author of the violation of a human rights norm ; a connected questions is whether it governs tort liability for aiding and abetting (see above XXX).

[196] The term « extraterritorial » in this context usually signifies that harmful conduct occurs in the course of delocalised activities, outside a corporate actor's « home » state (and the territorial jurisdiction of the court). The use of the term is often connoted negatively, particularly when applied to the reach of legislation or even fundamental rights provisions (see William Dodge, « Extraterritoriality And Conflict-Of-Laws Theory: An Argument For Judicial Unilateralism », 39 *Harv. Int'l L.J.* 101. However, extraterritorially is far more about how an issue of conflict of laws is framed : there is nothing « extraterritorial » about regulating corporations at the place of their seat. Currently the EU is contemplating the extension of Regulation Brussels I to disputes involving defendants domiciled in third States. The debate is also framed in the controversial terms of « extraterritoriality » of EU law. Whatever

about regulating corporations at the place of their seat, and there is no reason why the state in which a corporate group is headquartered should not (and indeed should not be obliged to) sanction that group's delocalised industrial misconduct on the same terms as similar domestic misconduct, in tort claims for harm suffered by stakeholders or third parties elsewhere.

A second striking example of the inadequation of the implicit (territorial) geography of private international law to the political economy of the real world is a similar inability to address the structure of the global food supply chain as organized by finance-driven multinational « agribusiness »[197]. The latter have a significant impact on the mapping of agriculture throughout the developping world and, by way of consequence, on the access to nutrition of a large segment of the world's population[198]. While the emphasis here is on misguided (or deliberately predatory) policy decisions by governments, such market-led decisions are geared to the needs of massive-scale investment projects and depend ultimately on the requirements of investing foreign capital[199]. By levering open state boundaries and commodifying land, the global economy has in effect lifted any restraints as to the extent to which foreign investment should impact upon sovereign decisions over natural resources including agriculture, with private international law correlatively hindering the access of those who suffer the consequences locally to any external judicial fora, and freeing the investor from any risk of responsibility.

c. Structural bias. The liberal paradigm favours an approach to legal problems in terms of the « micro »[200] or the individual : individual civil or political rights ; private property ; discrete contracts ; non-mass torts. In addition, « private » law adopts a backward-looking perspective, providing the tools for solving inter-subjective conflicts *ex post*, on a case by case basis. Issues relating to collective goods often tend to be confiscated or occulted by private conflicts. Private international law has internalised these limitations and disconnected from the macro-perspective which focuses on the surrounding social and politial context.

For example, in a dispute involving alleged harm to the environment, it will tend only to act through individual rights ; it is limited by the same categories (tort, contract) and procedural constraints (standing, reparable damages) as its domestic private law counterpart. Such tunnel-blindness creates significant obstacles to the enhancement of the global good, or at least to the consideration of the planetary dimension of environmental protection - unless

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the policy arguments for and against such an extension, it is no more « extraterritorial » to apply Regulation Brussels I to out-of-state defendants, than to out –of-state claimants.

[197] See Kaitlin Y. Cordes, « The Impact of Agribusiness Transational Corporations on the Right to Food », in O. De Schutter & Kaitlin Y Cordes (eds), *Accounting for Hunger*, p.27 ; .

[198] Writing on the impact of multinational agribusiness and the current « green rush », on the world population's access to food, Olivier de Schutter has shown the extent to which hunger itself is a legacy of policy choices : « the single most important proximate cause of structural hunger today is that developing countries have either not invested sufficently in agriculture or have invested in the wrong kind of agriculture, with little impact on the reduction of rural poverty ». See Olivier De Schutter, "The Green Rush: The Global Race for Farmland and the Rights of Land Users", 52 *Harv. Int'l L.J.* 504 (2011); O. de Schutter & Kaitlin Y. Cordes, « Accounting for hunger : An Introduction to the Issues », *op cit,* p. 2.

[199] This is how the international division of labour as practiced during the colonial era (periphery supplying the centre with raw materials) has been consolidated since by the economic push towards export-led agriculture and increasing dependance upon highly volatile international markets for raw agricultural commodites - with disastrous effects within each developing economy, where rural flight has led to an increase in imported subsidized food to feed the urban poor. See De Schutter & Cordes*, op cit*, p.3.

[200] On the distinction between a micro- and macro-legal analysis, see above FN 150.

the steering potential of choice of law rules is unearthed from under the dogma of neutrality[201]. This has effectively been done, to a large extent, by EC Regulation Rome II, which ensures by means of an option opened for the claimant that the most compensatory – therefore the most pollution-repellant - law, will apply[202] – despite the reluctance of conflicts lawyers to accept that the purpose of the choice of law methodology is other than aiding the individual victim[203].

Similar micro-bias can be found in the position of private international law with respect to the crossborder labour market, as excellently illustrated by the *Viking/Laval* litigation which was brought before the ECJ in December 2007[204]. When the ECJ was called upon to arbitrate between the economic freedom of the employer (to relocate, in *Viking* ; or to call upon cheaper foreign labour, in *Laval*) and the social rights of the local workforce, the structure of the relevant choice of law principles was such that in both cases, the employer was able to benefit from the less socially protective of the two laws in conflict – in one case, the law of the new place of incorporation (*Viking*), in the other, the law of the initial place of employment (*Laval*)[205]. Articles 43 (now 49 TFEU) of the EC Treaty (freedom of establishment) and 49 (now 56 TFEU; free provision of services) prohibited industrial action designed to induce a collective agreement and resist social dumping, subject to the usual general interest proviso and proportionality test. While the outcome has been duly critiqued by labour lawyers, who usually point to the biases inherent in the proportionality test, it has

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[201] For the parallel example of crossborder pollution seen from the perspective of public international law and appraoched in the terms of the rights and freedoms of sovereigns (to pursue economically beneficial activities or to enjoy a clean environment) and a similar conclusion that the conflict framed in such terms is insoluble, see Martty Koskenniemi, *The Politics of International law*, cited above FN 1, p.50. However, at least as far as the experience of private international law is concerned, the question of structural bias is whether an individual rights analysis will not tend to skew the outcome in favour of the more traditional property right, simply because the collective right to a clean environment finds less ready expression in private law terms.

[202] See article 7 of EC Regulation « I » : « The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred".

[203] André Huet, *Trav Comité fr DIP* 2006-2008, ed. Pédone, Paris, p.201, (« si on avait voulu favoriser l'intérêt général ce n'est pas à la vctime qu'on aurait donné le choix, c'est au juge ! »).

[204] Aff. C-341/05 (*Viking)* et C-438/05 (*Laval*), C-346/06 (*Ruffert)*.

[205] Under article 6 of the Rome Convention (now article 8 *EC Regulation no 593/2008 on the law applicable to contractual obligations* « Rome I »), the law governing the individual employment contract is the law initially chosen or initially applicable by reason of the place of performance. When the worker is posted to a country with greater social protection, the 1996 Posting of Workers Directive extends the higher local level of protection to the worker for the duration of the posting whenever there is local legislation on various points listed in its article 3, including minimum wage. However, this list had not been designed to cater for the « Swedish social model » under which there is no legislation or extended collective agreement instituting a minimum wage. *Ruffert* reaches a similar outcome, insofar as Germany was precluded from requiring that a Polish undertaking, submitting a tender for public works in Germany, be required to accept in writing that it would respect the minimum wage laid down by a collective agreement at the lace of performance. In these cases, therefore, workers from Latvia or Poand could not benefit from the extra protection at the (Swedish or German) place of posting (and continued thereby to represent a competitive threat to the local workforce). In *Viking*, where no issue of posting arose, the owner of a ferry flying first a Finnish and then an Estonian flag, was able to benefit from the legal consequences of a change of flag (considered as the place of performance under article 6 of the Rome Convention and thereby governing the terms of employment). In both instances of social dumping, the workers' action came up against the economic freedoms of the employer.

rarely been acknowledged the extent to which the terms of the dispute were actually framed by conflict of laws provisions on the law applicable to the employment contract - including provisions on the posting of workers in the context of cross-border provision of services under Directive 96/71/EC, which was clearly designed not as a protective measure for foreign employees, but as an economic stimulus for cross-border services within the internal market[206].

An analogous demonstration can be made in respect of the international protection of cultural property : the private international law rules concerning the law governing the transfer of property constitute an effective means of laundering imported stolen cultural goods, thereby neutralizing historical collective ownership[207]. It is enough to introduce the stolen object into a jurisdiction – the *lex situs* – which allows the rights of the buyer or current possessor of stolen goods to prevail over those of the initial (rightful) owner. Supranational legislation - Unidroit rules and EU Directive – has proved necessary, once a stolen cultural object has been exported and sold under the aegis of foreign property law, to allow repossession by a given community of its cultural heritage[208].

A further example can be found in the legal means through which the contemporary phenomenon of « land-grabbing » takes place – understood as the acquisition of vast areas of arable land in developing countries (notably in Sub-Saharan Africa) by foreign corporate interests, for the purposes of producing either food or biofuels for export and consumption in developed countries. While these massive investment projects may be generative of revenues for the host states (although the levels of income are themselves restricted through the effects of regulatory competition for investment), the benefit of such windfalls rarely falls to the population as a whole. The projects themselves lead to massive expropriation, displacement and migration of the rural poor ; harness local production to the needs of the foreign consumers ; and increase the dependance of the growing local urban poor on foreign aid and the import of cheap food. As illustrated by an increasing number of « villegisation » entreprises mandated by investment projects in Sub-Saharan Africa, the law plays an essential role here in ensuring these consequences, while attention is diverted from the economic and social reality of the land-rush[209]. Sovereignty is bartered with the help of private (international) law of contract and property, and little attention to the needs of the local communities, particulary in terms of sustainable development[210].

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[206] For an analysis in these terms of the posted workers directive, see Marie-Ange Moreau, *Normes sociales, droit du travail et mondialisation : confrontations et mutations*, cited above.

[207] Since property rights may be transferred under the law of the place where the goods are situated, it is enough to have them transit through a place where the law recognises the rights of the possessor to launder any defect affecting the property rights. See for example, in a case of stolen aborignal artefacts, *Winkworth v Christie Manson & Woods Ltd* [1980] 1 All E.R. 1121.

[208] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995); in the EU, Directive 93/7/EEC on the Return of cultural objects unlawfully removed from the territory of a Member State. Both derogate from the usual private international law of sale and property .

[209] Olivier de Schutter, « The Green Rush: The Global Race for Farmland and the Rights of Land Users", 52 *Harv. Int'l L.J.* 504 (2011); Tomaso Ferrando, "Large-scale agricultural investments and forced migration in Sub-Saharan Africa: What role for the law? » , publication forthcoming.

[210] See for example the case-studies in David Ong, « The implications of the Chad-Cameroon and Sakhalin transnational investment agreements for the application of international environmental principles », Sheldon Leader & David Ong, *Global Project Finance, Human Rights and Sustainable Development, CUP 2011, p. 319.* Comp. too the analysis by Tomaso Ferrando of the various legal steps involved in the

d. Insufficient attention to « private » rule-making. Has private governance become the center of modern law, with state authority at its periphery[211] ? Gunther Teubner suggests such a reading of the current direction of legal pluralism in a post-national setting, in which others point to the fragmentation of sovreignty[212] and the structural disempowerment of states[213]. More generally, the rise of new, post-national legalities is drawing considerable attention, including from non-legal disciplines, to the need of redefining the features of law and authority once disengaged from state. In particular, regime theory has been imported from international relations into social theory and international law in order to theorise « post-national rule-making », « colliding social spheres » and « private authority in global governance »[214]. Its focus is on the multifarious transnational normativities – codes of conduct, standards, usages, benchmarking - and hybrid authorships[215] – international court-like dispute deciders[216], certifiers, rating agencies, NGOs, TNCs - which all contradict the liberal assumption of state monopoly on law-making and its orderly doctrine of hierchised legal sources, according to which there is no « real » law which is not produced directly or by delegation by the state. Beyond the descriptive question (what counts as law ?), there is of course a fundamental legitimacy issue, linked to their private origin[217]. Here, depending upon the disciplinary and ideological yardstick chosen, non-state transnational regimes are either commended as more efficient than burdensome public regulation and more in tune with the claims of global civil society, or, conversely, condemned as the result of expert-knowledge-driven fragmentation and as an undemocratic – unaccountable and untransparent - exercise of

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financial operation. The first step consists in framing the economic conflict between foreign investment (international markets) and local community as a domestic legal issue relating to individual property rights. This comes about when the host sovereign uses its legislative powers to establish a modern, centralized land-title regime, often posited by international financial institutions as a condition of access of local enterprise to foreign loans. Under the same (colonial) model, « vacant » land will fall to the state ; the definition of vacancy will of course be exclusive of collective or nomadic forms of appropriation. The host country may then sell such land to foreign intersts for ready income, through an investment contract coupled with and governed by a bilateral investment treaty with the corporate investor's home state. The contract may again define vacancy, so as to delimit the land or natural resources to be put to the use of the investor, and the state is held to that definition under the principles of contract (or treaty) law geared to upholding the sanctity of the terms of the agreement. Any conflict between the foreign investor and the local community will be framed then as a foreign investment dispute, typically subjected to arbitration. Ultimately, the content of bilateral investment agreements between states, or indeed private investment contracts, purportedly effective only as between the parties, will determine the status of public land in the host country.

[211] Gunther Teubner, « The Two Faces of Janus : Rethinking Legal Pluralism », (1992) 13 *Cardozo L Rev* 1443 (1992).

[212] Hent Kalmo & Quentin Skinner, *Sovereignty in fragments*, cited above.

[213] On the notion of remedial capacity of states, and its current decline, see Dahan, Yossi; Lerner, Hanna; and Milman-Sivan, Faina (2011) "Global Justice, Labor Standards and Responsibility," *Theoretical Inquiries in Law*: Vol. 12 : No. 2, Article 3. Available at: http://www.bepress.com/til/default/vol12/iss2/art3.

[214] See the references cited above FN XXX

[215] Social theory also uses the term « authorship » to describe the normative action of non-state actors (NGOs or MNEs), covering agenda-setting, *amici* interventions, codes of conduct, and various other kinds of influence or leverage affecting third parties. In this context, norm-making may be separated from monitoring.

[216] See José E. Alvarez, *International Organisations as Lawmakers*, OUP 2005.

[217] From a foucauldian perspective : see Martin Herberg "Global Governance and Conflict of Laws from a Foucauldian Perspective: The Power/Knowledge Nexus Revisited", (2011) 2(2) *Transnational Legal Theory* 243–269.

private power[218]. For example, it is clear that private regimes may be put to excellent use in the protection of the planetary commons (for instance, the global water and forestry stewardship programs[219] do seem to contribute to the general interest despite their private origin). Nevertheless, there also remains a largely unmonitored risk that at least some affected interests are not adressed by non-state standards[220].

In private international law the paradigmatic *lex mercatoria* debate[221] well illustrates the challenge posed by these various private or non-state legalities and hybrid public/private law-makers which develop beyond (or irrespective of) the state, and cannot entirely be explained away through traditional public or private categories of delegation and custom, or contract and trade usage. Thus, the combined result of the selective focus of public international law on state sovereignty, and the tight harnassing of private international law to legal positivism, has been to turn the blind eye of the law on the multifarious non-state actors and norms which continued to support the expansion of informal empire. Outside the realm of the public and its institutionalised processes, but equally beyond the tunnel vision of private law still focussed on individuals and their domestic relationships, the expressions of private authority in the global arena continue to develop outside formal legal discourse. Thus, rather than contributing to improve transparency and accountability of the various practices of post-national benchmarking and rulemaking, the law shelters and nurtures private authority by persistant denial of its existence.

This debate also reveals the profound ambivalence that the « private » has come to mean in private international law[222]. In the positivist model, the « private » initially expressed the confluence between a field of law (private law) and a category of interests (issues not involving the public order), and was to be taken as a clear indicator of the absence of any

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[218] Regime theory appears basically to have been an attempt to inject empirical questions into public international law. As defined by Stephen Krasner, a regime is a set of explicit or implicit "principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area." A regime may be an informal group and is not necessarily composed of states (see Stephen D. Krasner, ed., *International Regimes*, Ithaca, NY: Cornell University Press, 1983). For a sample of the most recent literature on non-state regimes, which now gives greater room to the lawyers, see : Rodney Bruce Hall & Thomas Biersteker, *The Emergence of Private Authority in Global Governance*, CUP 2002 ; Walter Mattli & Ngaire Woods (eds), *The Politics of Global Regulation*, Princeton 2009 ; Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code,* Hart 2010 ; Tim Büthe & Walter Mattli, *The New Global Rulers, The Privatization of Regulation in the World Economy*, Princeton 2011.

[219] On such examples, see Ronnie D. Lipschutz & Cathleen Fogel, « 'Regulation for the rest of us ?' Global civil society and the privatization of transnational regulation », in Rodney Bruce Hall & Thomas Biersteker, *The Emergence of Private Authority in Global Governance*, p.115. For an overview of the various forms of international law-making by non-state entities, see Barbara K. Woodward, *Global Civil Society in Interntional Lawmaking and Global Governance, Theory and Practice*, Martinus Nijhoff, 2010.

[220] A good example is privately promoted food safety and quality standards, which are diffused along the chain of production to the small producers in poor and developing countries, which may well ignore their needs (see Margaret Cowan Schmidt, « The Transformation of Food Retail and Marginalisation of Smallhold Farmers », in De Schutter & Cordes, *op cit*, p.65). Another example can be found in the use and misuse of standardization in the field of labour law : see Isabelle Daugareilh, « L'ISO à l'assaut du social : Risques et limites d'un exerice de normalisation sociale », in Isabelle Daugureilh, *Responsabilité sociale de l'entreprise transnationale*, cited above FN XX.

[221] This debate, launched by Berthold Goldman and Clive Schmittoff in the 1960s, opposed those who see it as an autonomous legal order composed of transnational principles administered by private (arbitral) courts, and those who see it as an instance of state delegation and control through enforcment. An excellent summary of the legal arguments can be found in Paul Lagarde, « Approche critique de la *lex mercatoria",* dans *Études offertes à Berthold Goldman,* p.125.

[222] See Nils Jansen & Ralf Michaels, « Private Law Beyond the State ? Europeanisation, Globalization, Privatisation », cited above.

power issue. But « private » has now come to signify a non-state source. Its continued use occults the fact that the field may well implicate private power – a form of non-state law-making - and impinge upon the public good. Of course the point here is not that all non-state norms should be seen as « law », at least if such a category implies a recognition of legitimacy, as many may be coopted, captured, the fruit of unholy alliances[223]. But it does mean that since these sources are self-styled, and perceived, as authoritative, they should receive attention as such and their place in the global system questioned and articulated. The rise of international commercial and investment arbitration provides an excellent illustration of a system of economic power asserted under the cover of the « private » : left unarticulated as such, it will inevitably expand unchecked.

***e. No sense of systemic linkages*.** The risks linked to fragmentation are well identified in public international law : specialised regimes are seen to compete for authority (the prince's ear), to the detriment of more general principles[224]. Disconnectedness might be seen as the expression of the same syndrome in the private international sphere, where diverse specialised spheres – governed by a variety of transnational private regimes : garden varieties of state law ; human rights ; regional law ; transnational customary sources – tend either to overlap, or cancel each other out, with no regard for the consistency or the acceptability of the end result. Thus, an identical issue – such as whether pharmaceutical products may be tested by foreign manufacturers on children in developing countries[225], or whether patent rights belonging to multinational corporations may block the sale of generic medication in countries whose populations suffer from catastrophic levels of HIV[226] - might simultaneously and alternatively be approached, in transnational context, in terms of intellectual property, products liability, human rights, pharmaceutical standard-making, WTO…[227]. Beyond the public/private divide, the disaggregation of the law may well be the hallmark of globalisation, which interconnects markets as much as it dissolves other linkages – particularly those which might make sense of multiple legalities. Private international law, while purporting to exercise a coordinating

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223 On the workings of legal entrepreneurship and he alliances which lead to legal change, see Walter Mattli & Ngaire Woods, « In Whose Benefit ? Explaining Regulatory Change in Global Politics », in Walter Mattli & Ngaire Woods, *The Politics of Global Regulation,* Princeton 2009, p.1 et s.

224 See the fragmentation/specialization/competition critique by Martty Koskennemi, *The Politics of International law*, p. 319. It may be seen as a more general issue of legal epistemology : see Geoffrey Samuel, *Epistemology and Method in Law*, Ashgate 2003, p.248. But can the Center reassert itself ? Mads Andenas addresses this question (see « Is the Center Reasserting itself ?», Conference Sciences po, PILAGG, 20th January 2012, publication forthcoming) asking to what extent contemporary loss of faith in CIJ is due to the court's own positivistic approach to *ius cogens*, erga omnes, extraterritoriality, which makes it a bilateeral dispute resolution mechanism rather than the maker of a credible body of public international law with a centrifugal pull.

225 See the dispute in *Abdullahi v. Pfizer Inc.* Unites Sates Court of Appeals, Second Circuit, Jan. 30, 2009, n° 05-4863-cv (L) finding that the prohibition of non-consensual medical experimentation on humans is binding under customary international law. In July 2009, Pfizer petitioned the US Supreme Court, in May 2010 the Solicitor General submitted a brief to the court urging the court to deny Pfizer's petition. On February 23, 2011, the parties announced that they had reached a settlement in this lawsuit.

226 The South African government has been in conflict with American pharmaceutical manufacturers which claim patents on all HIV medications and attempt to block generics from being offered, claiming patent rights. Foreign companies such as Cipla, an Indian maker of generic drugs, are ready to provide far cheaper generic copies.

227 Similarly, in the context of the global financial crisis, the legal effect of credit swap agreements might be framed in terms of insolvency law, occulting issues of self-regulation of banks and other perspectives under which the duties of private actors towards those who are affected by their conduct might be expressed. The example is Hugh Collins' (see "Flipping Wreck: *Lex Mercatoria* on the Shoals of *Ius Cogens*. », and below XXXX).

function, nevertheless lacks an integrated vision of its own systemic governance implications and the distributional consequences of its rules. Whereas it is quick to respond to « logical » or esthetic inconsistency (void, overlap, and misfit) between interlocking pieces of national law[228], fragmented regimes lead to a nonsensical governance puzzle on a wider plane, when their interactions and economic consequences are ignored[229] ? How can international investment arbitration be allowed to soar beyond the reach of national law, while fundamental human rights or peremptory regulatory policies are asserted with increasing conviction on the other ? How plausible is the assertion of worker protection at home when home-based employers use child labour elsewhere? How can norms of corporate social reponsibility (such as ISO 26000) plausibly be decoupled from the WTO trade regime[230]? How can a jurisdictional regime designed to protect weaker parties credibly not extend to arbitration?[231] How can free choice of forum be justified by consent and then extend to unsuspecting third parties ?[232] How can collective action by workers be both a fundamental right and a restriction to free movement of the employer?[233] In each of these instances, one regime undermines the other[234]. The policy signals put out by private international law are characteristically ambivalent, because they are not assumed as such. More generally, its ostensible neutrality has leads to a blacking-out of background rules and their distributional consequences[235]. If

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[228] The is a considerable body of conflict of laws literature on the systematicity of private law, which mandates respect in the design of the conflict of laws for the internal balances within institutions (for example between conditions and effects), for the systemic integrity of the legal system (within succession law, for instance), or avoidance of legal irritation (unknown institutions). Thus, categories should be designed so as not to cut across issues which should be dealt with together, or avoid institutional misfits. An often cited example concerns the rights of a widow of the decease of her spouse : when matrimonial property is divorced from succession,

[229] Adde : How can South African Black Empowerment legislation be considered as a violation of South Africa's obligations towards European investors in the course of international investment arbitration, yet at the same time be hailed as progress by the investors' home States ? Example given by Elisabet Fura, « Droits humains et monde économique – liaisons dangereuses*", La Consciences des Droits*, Mélanges en l'honneur de Jean-Paul Costa, Dalloz 2011, p.265

[230] ISO 26000 is not an « international standard » for the purposes of WTO and does not provide a « basis for legal actions ». But is it in itself a non-tarrif barrier to trade ? see Isabelle Daugareilh, « L'ISO à l'assaut du social : Risques et limites d'un exercice de normalisation sociale », in Isabelle Daugareilh (ed), *Responsabilité sociale de l'entreprise transnationale,* Bruylant 2010, p. 563 ; more generally on the abdication of of law's role in structuring private governmentalism, Harm Schepel, « The Empire's Drains : Sources of Legal Recogntion of Private Standardisation Under the TBT Agreement », in Christian Joerges & Ernst-Ulrich Petersmann, *Constitutionalism, Multilevel Trade Governance and Inernational Economic Law,* Hart Publishing, Oxford, 2011, p.397.

[231] In the EU, choice of forum agreements involving consumers or employees are strictly regulated, but international arbitration is left to each Member State (except if an arbitration clause is considerd abusive within the meaning of EC consumer law). In the US, mandatory arbitration clauses are permitted in consumer contracts, but class arbitration may be specifically excluded.

[232] This problem, which implicates the access to justice of parties who are hauled before a contractually « chosen » forum without their consent, is, to date, dealt within the EU under a conflict of laws analysis (the law governing the contract must allow the transmission of the obligations to which the choice of forum applies) : see ECJ *Coreck*, case C-387/98 ; *Tilly Russ,* case 71/83 ; *Castelletti*, case C-159/97.

[233] See *the ECJ case-law,* C-341/05 (*Viking)* et C-438/05 (*Laval*), C-346/06 (*Ruffert)* discussed above, FN177.

[234] It is worthy of note that he contradictions may even arise as a form of an institutional schizophrenia: how can the WTO both encourage the expansion of agribusiness, while showing equal concern for the protection of the access to food by the world's population (O. de Schutter, XXX).

[235] This point is made tellingly in the field of family law by Janet Halley & Kerry Rittich (« Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism", 58 *Am Journ Comp Law* 753 (2010). Comp. too in the context of substantive private (European) law, M. Brigitta Lurger, « Old and New Insights for the Protection of Consumers in Euroepan

therefore it is to address the issues raised by the transnational exercice of private power, it must evolve on these various points, in terms both of philosophy and technique in order to overcome the legacy of the closet. To do so, it must articulate a project.

III. PLANET : The Politics of International Law Beyond the Schism

. Beyond the closet, the planetary[236] function of private international law requires it to rise to the challenge of private power beyond the state. The project involves reaching over the current schism within international law to reassert its political function in moderating conflicts of normative authority. To to do means to quarry the potential of human rights in cases of abuse by private actors (A), to explore the resources of legal pluralism to address transnational normative claims beyond the state (B), and finally to re-embed global governance in its social context (C).

(A) The Fundamental Rights Quarry

The closeting of private international law has meant that, by not responding to the need induced by the advent of globalization for new forms of regulation of the cross-border conduct of private actors, it has been side-lined to a certain degree by the extraterritorial application of fundamental rights norms[237]. These have been observed as « migrating » steadily towards sites of transnational governance[238]. Such migration has generated a battle of disciplines, in which human rights norms are usually presented as a methodological irritant, of somewhat primitive sorts[239]. Clearly, however, the struggle is largely ideological, rights being perceived as the harbinger of disorder within an otherwise harmoniously governed arena[240]. The clash is of course hardly surprising, given the highly political content of human rights, as

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Private Law in the Wake of the Global Economic Crisis », in Roger Brownsword, Hans Micklitz, Leone Niglia & Stepen Weatherill, *The Foundations of European Private Law*, Hart 2011, p. 89, spéc. p102)

[236] The significance of planet is thus described by Hardt & Negri, *Empire,* p.41 : « the earth may be emerging as an imanent field upon which to relocate visceral exeriences of identification traditionally reserved for the territorial nation. The earth becomes a rallying cry through which to fashion and tame capital ». See too the 2012 « European Charter on the Protection of the Commons » launched by Ugo Mattei, International University College, Turino, Italy, 2/3 December 2011.

[237] The term « fundamental rights » will be used here to designate rights of international, regional (European or Interamerican Conventions), or indeed national-constitutional origin. This does not mean that there may not be significant differences in their content, scope or conditions of application (for instance, in respect of comparative judicial use of the proportionality test, see Duncan Kennedy, A Trannational Genealogy of Proportionality in Private Law », in Roger Brownsword, Hans Micklitz, Leone Niglia and Stephen Weatherill, *The Foundations of European Private Law*, p.185). The point made here is that these rights may increasingly disrupt the more traditional rules of private international law.

[238] Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: Contribution of Transnational Private Litigation", cited above.

[239] These critiques are widespread in Europe (see for instance, Louis d'Avout, *Rev crit DIP* 2011. 673 denoucing the « inappropriate politization » of legal debate induced by human rights).

[240] See again Louis d'Avout, *Rev crit DIP* 2011, p. 675, on the disorder created by the introduction of human rights into the conflict generated by the two successive marriages (twenty years apart) of a Maltese woman, who had believed, no doubt in good faith (or with insufficient knowledge of conflict of law rules), that the first marriage had been legally dissolved. The case discussed was handed down by the ECtHR, 4th Section, on 6th July 2010 (req. 38797/07). The decision is one of inadmissibility however, so that its real thrust on the merits is doubtful.

opposed to the supposedly neutral and resolutely technical terrain of private international law. Methodologically, they bring proportionality where the conflict of laws uses deductivism ; and as a matter of epistemology, they are no respectors of the public/private divide which remains so engrained in dominant private international law doctrine. The resulting disciplinary confrontation means that human rights and the tools of private international law are in a state of competition which looks at present to be likely to end in the demise of the latter, rather than in a quest for confluence or mutual benefit.

(a) Competition

Fundamental rights are not equipped with any specific technology for dealing with the transnational sphere; indeed, their very fundamentality means that they are, if not universal[241], at least non-discriminatory and thus border-blind. Frequently, therefore, private international law is perceived to have been brushed aside by the imperious demands of fundamental rights, with little regard for its foundational distinction between the international and the domestic. In the European context, for example, non-discrimination (article 14 ECHR) will frequently impose the protection of a Convention right (often the right to privacy under article 8), irrespective of the national legal regime applicable under the forum state's conflict of law rules. This means that, in many cases, the tools which private international law has developed to determine both the geographical and personal reach of rules (jurisdiction and choice of law), and the acceptability of foreign solutions (*ordre public*) will be paralyzed[242]. More technically, the sidelining of private international law takes place through the three different channels through which human rights claim to regulate the conduct of private actors.

1. Verticality. The first set of instances in which fundamental rights appear to be in competition with private international law mechanisms are cases of "vertical" application, in which states or their agents are held to the protection of such rights by a supranational court. Cases of violation may give rise to any of the various mechanisms of state responsibility in

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241 Regional human rights instruments accept their own cultural components and limited scope (ex article1 CEDH). The fundamental rights of international law comprise a claim to universality, but their very content is contested. Paradoxically, the relativisit doctrine, respectful of alterity, which was first canvassed by Western comparatists and anthropologists in order to curb imperialist legal attitudes towards third world legal cultures is now in tension with the universalist claim by the latter, who (rightly) see an emancipatory potential in international human rights law.

242 For instance, illustrating the requirement of non-discrimination, the European Court of Human Rights ruled on 2 March 2010, in the case of *Kozak v. Poland* that a same-sex partner should be able to succeed to a tenancy held by their deceased partner. The Court held that the Polish authorities' exclusion of same-sex couples from succession could not be justified as necessary for the legitimate purpose of protection of the family and was a violation of the right to non-discrimination under Article 14 of the European Convention on Human Rights. Although this particular case was domestic, the same regime will apply whatever law governs the succession, and whatever the answer the conflict of laws brings to the 'incidental question' of status raised in conection with the vocation to assert siuccession rights. Although much criticsed for its intrusions on national sovereignty, the Court shows considerable prudence in using the principle of non-discrimination (article 14) when the right is not itself protected by the Convention. Thus, in *Gas et Dubois c. France*, 15th march 2012, the Court ruled that the right of a person in a same-sex partnership to adopt his or her partner's child is not protected by the European Convention on Human Rights. The case involved a French woman who was denied her request to adopt her civil partner's child, who was conceived through in vitro fertilization (IVF). She argued the adoption denial violated articles 8 and 14 of the Convention on Human Rights, which protect against invasion of family privacy and discrimination, respectively. In its decision, the court found that the denial did not discriminate against same-sex couples, because opposite sex couples in civil partnerships are equally denied a right to adoption. The court reiterated that the European Convention on Human Rights does not require its members to legalize same-sex marriage.

international, regional or specialized regime settings (through diplomatic protection before the CIJ; interstate actions before the dispute resolution body of the WTO or the ECJ; or specific private actions in the context of ECHR, etc). The confrontation may take any of several different forms :

- The first set of instances reveals nothing specific about the conflict of laws. Fundamental rights may be invoked in any of these fora in order to challenge the international legality/conventionality/constitutionality of a choice of law rule, in the same way as they might invalidate domestic substantive law. The combined effect of privacy and discrimination (articles 8 and 14 ECHR) provides a good example. Thus, in *Christine Goodwin v. United Kingdom*, the ECHR imposed legal recognition for transsexualism in a domestic context, on the basis of article 8[243]. It follows from there that in a case in which a foreign individual claims official recognition of a change of sex, a national conflict of laws rule which retains the nationality of the individual as connecting factor for questions of personal status and thereby prevented such recognition, is discriminatory (under article 14 ECHR, or under national constitutional rules)[244].

- In a second set of cases, the clash between the conflict of laws and human rights is specific to the former, since they involve situations which are inherently transnational. More remarkably, the violations are independent of the substantive content of the domestic laws involved. For example, in its decision in *Wagner*, the ECtHR holds that Luxembourg is in contravention with article 8 ECHR in refusing recognition to an adoption granted in Peru, under its choice of law rule on the validity of inter-country adoption; the source of the illegality was thus the working, in this particular context, of Luxembourg's choice of law principles which prevented the foreign adoption from producing its effects in the forum[245]. The illegality, therefore, is not linked to Luxembourg's own regulation of the substantive institution of adoption, and certainly does not impose any particular legislative enactment of adoption within a Contracting State. The violation concerns the protection of the claimants' right to family life in a cross-border context: once an effective family relationship had been constituted in Peru, Luxembourg from whom judicial recognition of the foreign judgment was sought, was bound to protect it. Human rights protection takes the form the articulation of a specific methodology, imposing recognition of the foreign relationship, whatever the outcome

[243] In *Christine Goodwin v United Kingdom*, on 11th July 2002, the ECHR ruled that Contracting States must provide legal recognition to sex change under article 8, given the serious interference with private life arising from the conflict between social reality and law (in circumstances where sex was of legal relevance, such as in the area of pensions, retirement age etc.) which placed the transsexuals in an anomalous position in which they could experience feelings of vulnerability, humiliation and anxiety.

[244] *Bundesverfassungsgericht* (BVerfG Federal Constitutional Court) 18.7.2006, cases 1 BvL 1/04 and 1 BvL 12/04 (NJW 2007, 900 ; IPRax 2007, 217) declaring unconstitutional the Transsexuals Act (Transsexuellengesetz, TSG), which benefited only German nationals. As a result of the use of nationality as connecting factor, most foreign transsexuals had no means to apply to German authorities with regard to an adjustment of their official documents. Under this ruling, German law has to offer to each transsexual living in Germany an equal means for the official recognition of gender affiliation. This raises the burning question as to whether all differentiation on the basis of citizenship is discriminatory (see in the context of US conflicts debate, as a critique of Currie's governmental interest analysis : Douglas Laycock, « Equal Citizens Of Equal And Territorial States:The Constitutional Foundations Of Choice Of Law" 92 *Colum. L. Rev. 249*,1992).

[245] *Wagner et J.M.W.L. c. Luxembourg (Req n° 76240/01)*, 28th June 2007.

was mandated by the conflict of laws rules[246]. What counts here is that the situation originally constituted (or the expectations initially generated) should benefit from continuity when it crosses the frontier, irrespective of the forum's private international law.

- The third set of cases illustrate indirect or "mirror" violation of a fundamental right, in cases where the initial offender is a foreign (and in the case of the ECHR, not necessarily Contracting) State. This situation arises in cases of recognition and enforcement of foreign judgments, or other circumstances in which a state is called upon to give effect to the laws of another. If those foreign laws or judgments offend a right that the recognizing state is bound to protect, then recognition of the law or judgment will constitute a violation by the receiving state. Thus, in the *Pelligrini* case, Italy was held to account by the Strasbourg Court for the violation of article 6 of the ECHR, for omitting to verify whether a judgment handed down by the courts of the Vatican, which was operative in Italy by reason of the Concordate, had respected with the defendant's right to a fair trial[247].

- A fourth category is composed of instances in which a State is responsible for the violation of human rights by its own agents, whether within its own territory or abroad. This responsibility based on agency frequently involves positive obligations, whereby states must actively ensure that the rights are protected. For instance, a state must not only refrain from torturing prisoners, but must ensure that prisoners do not torture each other in their cells. It may therefore be responsible for inadequate supervision by state agents (police, officers, functionaries). Such responsibility for agents may also apply extraterritorially, in cases where the state exercises effective control over a foreign territory[248].

- The fifth set of cases of vertical effects of fundamental rights overlap significantly with choice of law principles governing transnational private law relationships, although the issues raised here have not yet been addressed in the courts. They correspond to an idea canvassed contemporaneously by John Ruggie and Olivier de Schutter, according to which states could (and should) be held accountable for violations of international law by the corporations which - without being state agents as in the previous hypothesis - are nevertheless within their sphere of influence or impact[249]. In support of this idea, the economic tie between the

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246 On the rise of this methodology (painted in broad brush strokes), see H. Muir Watt, "The New Unilateralism. European Federalism And The New Unilateralism", 82 *Tulane Law Review* 1983 (2008). It is often likened to that of the vested rights doctrine, which required recognition of rights vested under a foreign law (although the unconditionality of such recognition was only apparent, since it referred implicitly to the principle of territoriality). Similar reasoning can be found in the ECJ's case-law, where it shares common ground with the "country of origin" principle dictated by the economic freedoms. See, emblematic : ECJ 2 October 2003, *Carlos Garcia Avello v Etat Belge,* Case C-148/02, mandating recognition by Belgium of the structure of a child's family name under Spanish law.

247 See ECtHR 20th July 2001, *Pelligrini v Italy*, req n° 30882/96. The violation is imputable to Italy for Italy's own action in giving effect to the Vatican's judgment (which is not examined by the Court ; the Vatican is not party to the ECHR).

248 For constitutional rights, see US Supreme Court *Boumédienne v Bush*, 553 U.S. 723 (2008); for European human rights, see ECtHR (Grand Chamber) *Al Skeini & Others v United Kingdom*, joined *Al-Jedda V. The United Kingdom (Application No. 27021/08)* 7 July 2011. The overlap with private international law remains however relatively limited here ; while foreign citizens may benefit from state liability before the courts of the home country as seen in these instances, an official agent acting under orders will generally benefit from foreign sovereign immunity before the courts of another state.

249 The (controversial) concept "sphere of influence" was introduced at the instigation of John Ruggie into the preamble of UN Global Compact, which asks companies "to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment,

corporation and the state of its seat or incorporation would seem to imply that the latter benefits from fiscal returns on corporate activity in trade and investment abroad. As a corollary, therefore, the home state can be seen to owe a duty of care to the local community of the host state and its environment, under which it is responsible for the harmful effects of the foreign conduct of the revenue-generating corporation. One might indeed go further and suggest that bilateral investment treaties, under which corporate investors receive state protection and encouragement when investing in a foreign country, might equally constitute the legal foundation for a corresponding duty of care on the part of the investor's home state. In a similar perspective, in an attempt to make effective the right of the world's population to adequate food, Olivier de Schutter has explored the legal foundations of a duty for states to ensure that their own corporations in the multinational food supply chain do not interfere with the access to food (via the access to land and agriculture) of foreign communities[250].

2. Diagonality : « Diagonal conflicts » evoke the confrontation and articulation of rules or norms originating in formally distinct legal orders which are themselves in some form of relationship other than one of primacy or of verticality[251]. It can be used to describe the reference by a national statute such as the *Alien Tort Statute* to international law (the law of nations), whereby domestic law provides a remedy in cases of violation of the latter. The way in which the national remedial rule "fits" with the substantive norm borrowed from international law is now at the core of a methodological debate, which has led to the US Supreme Court's granting of certiorari in the *Kiobel* case[252]. Under the Alien Court Statute, does international law govern the entire question as to whether a given defendant is civilly liable, as the Second Circuit thought, leading it to look for international precedent for the civil liability of corporations? Is the addressee of the norm of conduct (or the authorship of the violation) an inherent part of its definition? Or does international law provide only the the content of norm of conduct of which the violation is in issue, leaving it up to domestic law to determine who can be made liable (and for what kinds of liability)?[253]. The latter approach can be convincingly explained in terms of "incidental application" or "prise en consideration" of norms from other legal systems, a technique well known in conflict of laws methodology when one domestic legal system "borrows" from another for specific purposes[254].

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and anti-corruption." For Olivier de Schutter's ideas on the world population's right to food, see Olivier de Schlutter and Kaitlin Cordes, *Accounting for Hunger*, cited above.

[250] He emphasises however in this respect the dangers of fragmentation of international law, and the correlative tendancy of states to opt for compliance with trade agreements backed by immediate economic sanctions rather than human rights - despite their *ius cogens* status.

[251] The term was used by Christian Joerges (« The Challenges Of Europeanization In The Realm Of Private Law: A Plea For A New Legal Discipline", *14 Duke J. Of Comp. & Int'l L. 149)* to denote the specific relationship of European Union law and national law of Member States, in cases where the latter governs (availability of procedural remedies) but may not frustrate the ends of the former (as illustrated in *ECJ* C-453/99, *Courage Ltd v Bernard Crehan* Sept. 20, 2001); Comp., generalizing the concept as a federalist tool, Jeremy Heymann, *Le droit international privé à l'épreuve du fédéralisme*, Economica 2010.

[252] See above, p. XXXX

[253] The second of these two alternative interpretations has prevailed in three other Circuits : see US Court of Appeals for the DC Circuit (*John Doe v. Exxon Mobil* 09-7125), 9th Circuit (*Sarei v. Rio Tinto* 02-56256), 7th Circuit (*Flomo v. Firestone* 10–3675).

[254] Borrowing takes place when choice of law rules cannot do the job, usually because the borrowed norm is part of a heteregeneous normative order. In the context of theories of legal pluralism, it might be said that one system has « relevance » for another (see Santi Romano, *L'Ordinamento Giuridico*,1918). It also appears in conflicts doctrine the US, where it accounts for the relevance of "local data" (see Brainerd Currie, *Selected Essays on the Conflict of Laws*, Durham NC, 1963, 82).

3. Horizontality : There is a real need for effective sources of discipline of private actors in the transnational sphere, where local conceptions of the public interest do not reach. The response of human rights, at least in their regional form (ECHR or IACHR), is to subject such actors to identical obligations as are applicable to states, through the mechanism known as "horizontal effect". Private persons may thus be held responsible for human rights violations « by catalysis », that is, through the intermediary of the responsibility of the state which had a duty to prevent their action[255]. The catalysis is achieved first by interpreting human rights to include "positive obligations" whereby states are accountable for violations by third parties (as seen above), then by considering that these obligations may be invoked by all persons « subject to their jurisdiction » (as in article 1 ECHR). For instance, as seen above, a state must not only refrain from torturing prisoners, but must ensure that prisoners within its territory do not torture each other in their cells. Supposing that domestic criminal law does not provide adequate sanction and reparation in such a case, the family of a tortured prisoner may nevertheless bring an action before the courts of a Contracting state against the fellow detainee-torturer on the basis of article 2 ECHR (right to life). The responsibility of the defendant co-detainee is derived by catalysis on that of the state which by virtue of its positive obligations under article 2 should have prevented the harmful conduct.

However, it appears that under human rights law, the positive obligations which private individuals may invoke horizontally, in interactions with other individuals, do not extend beyond the limits of the territory of the (accountable contracting) state[256]. For instance, the victim of corporate misconduct outside teh corporation's home state cannot, in the present state of judicial doctrine in international law and according to dominant academic opinion, use horizontal effect to hold that corporation to account before the courts of the home state for violation of fundamental rights. Such instances are said to lack sufficient public nexus (state action requirement) with the home state to justify the direct liability of the latter, thereby excluding any horizontal effect. In many cases, domestic law will be insufficient either because the right in question is unarticulated as such (for instance, the right to food) or because the conflict of law rules of the forum will lead to the application of local law, whose standards of care/level of protection are too low to provide any effective redress. If framed in terms of vertical effect, this hypothesis would correspond to the fifth set of cases envisaged above: ones where current doctrine draws the line and does not allow the responsibility of states for private extraterritorial conduct, for want of a public nexus (the state action requirement). Under current judicial doctrine, horizontal or vertical effects of human rights are therefore largely powerless to ensure that corporations conducting their activities in third states respect therein the rights which are guaranteed at home.

This is where private international law comes into the picture and where its specific tools could make a significant contribution to the use of such rights in respect of private actors acting outside the territory of the defendant state. In the specific case of multinational firms whose conduct in third countries violates standards applicable in the home (contracting) state, the choice of law rule in Rome II leads to the application of the *lex loci delicti*, thereby consolidating the vocation of the less protective standards of the host country. Of course, if the ordinarily applicable law does not provide the protection due to fundamental rights, these will interfere in the derogatory form of the exception of *ordre public*, which will then require a fine-tuning of their scope; it will be asked, in particular, if the nexus with the forum state is

[255] The concept of responsability by catalysis was invented in this context by Roberto Ago, Special reporter of the International Law Commission (v. *Fourth Report,* p. 105, par. 65 & note n°120).

[256] As opposed to the agency hypothesis, discussed above XXX.

sufficient to allow (oblige) the court to set aside the content of the foreign law and make the right prevail[257]. A preferable version of this reasoning suggests a teleological approach designed to ensure that right is given a scope that makes sense in terms of the objectives that are sought to be accomplished. Here, it would be inconceivable that an employer not be subject to home standards in respect of the rights of employees, or that a polluter escape liability simply because the affected environment is that of another country.

This, therefore, can be seen as a case of confluence, which calls for further enquiry.

(b) Confluence:

The political dimension of fundamental rights explains why they have been perceived as an unwelcome onslaught in a "smooth" or uncontested system of private international legal ordering[258]. Clearly, however, such resistance by the discipline of the conflict of laws to the surfacing of political choice in transnational contexts will lead to its being sidelined by other forms of governance - except perhaps in contexts where there exists sufficient underlying consensus on the content of legal institutions to justify the primacy of technical rules. The European Union aspires to such a "community of laws", and may conceivably be able to maintain traditional methods of determination of the applicable law on the basis of shared core values[259]. However, even here, practice tends to show that radical conflicts still surface, not the least of which oppose the two regional Courts on issues of allocation of jurisdction among national courts[260]. It would be useful and perhaps urgent, therefore, to rethink some of the core positions of private international law, to see how they could be changed to ensure confluence and mutual enrichment, rather than conflict and absorption. For a start, this could involve revisiting the dividing line between the private and the public, and re-mapping the purview of (state and non state) responsibility for human rights violations.

1. Redefining the private : One of the most radical disturbances induced by human rights on traditional private international law thinking is the disappearance of the foundational distinction between public and private law. The main difficulty raised by the subjection of private actors to human rights norms for private international law is that public and private law are supposed to obey different precepts in respect of their application in the international sphere. As seen above, while private law was seen to possess an abstract vocation to apply to any given legal issue, wherever the geographical location of the underlying facts, the sway of public law was perceived to be limited to local territory. Hence the difficult issue of extraterritoriality in the horizontal application of state responsibility, which reflects the paralysis of public law in the transnational sphere. On the other hand, through the combined workings of positive obligations and horizontal effect, private actors are no longer immune from human rights norms which were once thought to address only the public exercise of power. Human rights therefore encroach on the realm of the private, and are equally indifferent to the traditional modes of operation of public and private law in respect of territory.

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[257] Such fine-stuning owes much to German constitutional doctrine : see Petra Hammje, "Droits fondamentaux et ordre public", *Rev crit DIP* 1997.1

[258] See above, n°

[259] At least if all EU Member States suscribe, or continue to subscribe, to the same liberal market project. The limits of this condition are evident in the European markets for corporate charters, or the labour market, where it is difficult to conciliate the different existing economic and social models (See H. Muir Watt, « Aspects économiques », §60 et s.

[260] Comp. (in the field of child abduction) : ECJ – C-491/10 PPU, 22 December 2010 ; ECtHR. -n° 14737/09, 12 July 2011, *Sneersone*.

This does not mean, however, that the usefulness of distinguishing public and private sphere has disappeared; simply, the foundations of the distinction need to be revisited. Working on the horizontal effect of human rights law on private actors, Andrew Clapham has suggested an analytical framework[261] which structures the justification for human rights around the dual goals of dignity and democracry[262]. Clapham's thesis is that by identifying the foremost aim of the right invoked in any one situation, the scope of rights can be determined without having to deal with "the intractable riddle of conflicting human rights, or endless 'balancing and weighing' exercises". Thus: if the situation calls for the right to be justified by the goal of democracy, then there has to be a *public element* in the private actors' activities, that is, the private actor is operating in the sphere of the public domain. But in a situation where the justification for the right in question concerns dignity, then rights must be protected even in the absence of a public element. Thus, inhuman treatment threatens dignity wherever it may take place, whereas freedom of speech needs to find expression in public fora[263].

It is doubtful that conflicting rights claims can really be so readily resolved, or that the division of rights as between dignity and democracy is any easy matter[264]. Indeed, such classificatory endeavors as a method of conciliating conflicting norms are familiar in private international law: they are evocative of the medieval glossators' (and then post-glossators') determination of the personal or territorial reach of statutes, and the accompanying characterization exercise, which required determining whether the statute is mainly personal or mainly real[265]. However, despite these inevitable frontier disputes, the suggested framework appears extremely useful as a broad tool for understanding the "public" element which conditions the violation of certain rights. In turn, it sheds light on the public nexus or « state action » requirement which triggers the horizontal effect of human rights, and may in turn help in the latter context with the complex issue of extraterritoriality. As seen above, such an issue arises when private actors are held responsible through the catalysis of state responsibility. But once it has integrated the fact that the private exercise of public power

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261 *Human Rights In The Private Sphere*, Oxford XXX

262 The author proposes to translate these concepts into Raz's termonology : For 'collective goods' read 'democracy', and for 'autonomy' read 'dignity' (Chapter 5 FN 27).

263 Andrew Clapham illustrates the distinction by comparing two examples. The first case concerns measures taken by local authorities restricting the freedom of expression of protesters in a (private) shopping precinct. If this precinct is the only forum in the town, democracy demands that there is full participation and representation of different ideas in the community. The second case concerns of a coven of witches demanding to speak at a Christian prayer meeting. Here, there is no question of democracy being threatened where the witches are free to disseminate their views via alternative means. "Both these situations relate to freedom of speech and democratic participation, yet in one situation banning the speakers results in a breach of human rights and in the other it does not. It is suggested that in the shopping precinct example this is because there is a *public* element, yet in the witches example there is not. (Of course 'public' in this context does not require a nexus with the State, but simply means relevant to the interests of the community or collective goods.) But if the witches were denied the right to meet at all, this would threaten their dignity, as their freedom of conscience, expression, or autonomy would be restricted" (p145 s).

264 Referring back to the example cited in the previous footnote, is it entirely clear that a blanket ban on witches' covens would not also contravene the requirements of democracy, or that the reduction of a group of protestors to silence would not also offend the dignity of that group insofar as it carries a particular belief ?

265 See D. Bureau & H. Muir Watt, *Droit international privé*, vol I, n° 357

calls for the same constraints as those applicable to public actors, private international law needs to concede an effort of remapping, before this line of exploration can go any further.

2. Remapping (state and non-state) responsibility. Jacco Bomhoff has pointed out the analogy between the vocabulary used to describe the impact of fundamental rights within the private sphere and their ambit outside home (forum) territory[266]. The methods for determining the reach of rights in either case differ, however. In the first case, considerations relating to the (public) nexus are integrated into the balancing or proportionality test[267], under which the violation of a right is assessed; simply put, violation may be less likely if the claim relates to a factual situation which has a weak nexus with the defendant state, while responsibility is more justified when such a nexus exists. In the second case, there is a non-integrated, two-step analysis, which starts by asking if a given right is applicable given its (territorial or personal) nexus with the facts, before determining whether, as a distinct matter of substance, it has been violated. Bomhoff asks whether these two methods for determining the reach of rights (respectively in private sphere cases or in foreign cases) should not be merged, and whether, in transnational cases, responsibility of the defendant state for violation of fundamental rights - and, by catalysis, that of private actors - could be framed as a single issue, aligned on nexus.

Obviously, collapsing the traditional rule-based approach into a single proportionality test would represent a radical change of perspective for traditional forms of private international legal reasoning: the conflict of laws has always singled out applicability or jurisdiction as a preliminary matter, to be determined before issues of substance may be addressed. However, the idea that responsibility – whether of public or private entities - should be directly correlated to nexus and that each entity exercising political or economic power should be held to the respect of human rights within the sway of such power, both towards and on the part of third parties (subjects, contractors, communities, etc), has been gaining considerable ground in the past decade. This idea finds expression in various contexts: state responsibility[268], jurisdiction[269], or private corporate liability[270]. Indeed, as we shall see below, extending responsibility of private actors according to influence and affectedness could be one of the new axiological foundations of private international law. This is what we shall now attempt to verify, in addressing the legitimacy issues which come with transnational legal pluralism.

(B) The Resources of Legal Pluralism

As seen above, the recent focus of the global governance debate, in various non-legal vocabularies - political science, social theory, economics – has been the emergence of authority beyond the state[271] and the subsequent legitimacy issues arising when traditional democratic structures and processes are no longer there to ensure – or can no longer plausibly be presumed to ensure – that the resulting legalities are not merely the one-sided expression

[266] « The Reach of Rights », cited above.

[267] On the relationship between balancing of interests and the proportionality test, see Duncan Kennedy, « A Transnational Genealogy of Proportionality in European Private Law», in Roger Brownsword, Hans Micklitz, Leone Niglia & Stephen Weatherill, The Foundations of European Private Law, Hart 2011, p.185-220.

[268] As seen above XXX

[269] As seen above XXX

[270] As seen above XXXX

[271] See the discussion above p. 30 and the references cited FN 175.

of economic power[272]. Severe hardship, injustice, imbalance and crisis linked to the rise of « private global rulers » have largely dampened the initial excitement over the brave new world freed from the constraints of parochial (when not totalitarian or corrupt) state regulation. The backlash may often come in the form of a return to the national, whereas the real need now is not for protectionism or integrism, but for forms of governance which adequately address the issue of private power in the global economy. In this respect, private international law's own « private history »[273] reveals that it has the potential to make an essential contribution on the enabling and tethering of private authority. Indeed, it is contended here that there has always been, in varying guises, a pluralist counter-narrative, left over from the era, before the nation-state, when it was in effect the only governance instrument available to mediate the conflicting regulatory claims of the medieval cities and ensure the fair resolution of disputes between merchants hailing from diverse origins[274]. As Robert Wai has suggested, private international law has always served as an interface between the local and the global[275], allowing national cultures their place in the governance of situations beyond their own territiorial boundaries. This mediating function of private international law needs to be remembered and reinvented in a world where the « disembedding » of regulation is seen to be one of the prime causes of global *mal-être*[276].

The abundance of diverse public and private regulation now to be found in the global arena where diverse actors and legal entrepreneurs compete or cooperate extensively to acquire legal influence[277], has sometimes led to the very concept of a governance gap being challenged[278]. But pointing to such a gap does not signify that there is a dearth of (state and non-state) normativities, but rather that despite and sometimes because of their multiplicity, they do not achieve - and indeed may conspire to impede - the tethering of private interests in name of the global good[279]. Indeed, in some cases, private regulation may actually constitute

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[272] At the same time, while considerable harm can been wrought by governmental practices sheltered by sovereignty (or indeed the reverse, if the state is perceived to be a mere receptacle for cultural practice, see Makau Mutua, « Savages, Victims and Saviors : The Metaphor of Human Rights », 42 *Harv. Int'l La J* 201, 2001). The claim here is certainly NOT that « private » is synonymous with virtuous.

[273] Alex Mills, *The confluence of public and private international law,* spec. Chapter 2, p.26 et s.

[274] And, all the while, laying the foundations of informal economic empire : see above p.12 et s.

[275] Robert Wai, « Conflicts and Comity in Transnational Governance : Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regimes », in Christian Joerges & Ernst-Ulrich Petersmann, *Constitutionalism, Multilevel Trade Governance and International Economic Law,* Hart Publishing, Oxford, 2011, p240.

[276] On disembeddedness as loss of connection between markets and society, Christian Joerge & Josef Falke, « Introduction », in *Karl Polyani.Globalization and the Potential of Law in Transnational Markets,* cited above. Comp. Mark Granovetter, « Economic Action and Social Structure, The Problem of Embeddedness », (1985) 91 *Am. Journ. of Sociology* 481., and below p. 45. One of the virtues of private international law as a global governance project is that it does not « disembed » but mediates between the global and local by ensuring that societal forces have their say.

[277] Such entrepreneurs may be public and private standard-setters, certifiers, lobbies, monitoring agencies, corporations and corporate alliances, in addition of course to the sovereign states and international organisations.

[278] See Tim Bartley, « Transnational Governance as the Layering of Rules : Intersections of Public and Private Standards », *Theoretical Inquiries in Law* 12(2) p.25 et s

[279] See Sol Picciotto, « *Disembedding and Regulation : The Paradox of International Finance »,* in *Karl Polyani. Globalisation and the Potential of Law in Transnational Markets*, cited above FN 33, p.157, spec. p.160 et s; comp. David Kennedy, « The Mystery of Global Governance », in Jeffrey Dunoff & Joel Trachtmann (eds), *Ruling the World*,Cambridge 2009, p.56, noting that rather than the lack of regulation, the governance black hole is where somes rules apply and other don't (in relation to Guantamano). The gap refers not to the quantity of available norms, not indeed their content, but the processes through which they are articulated. This is precisely the focus of « Global administrative law », which aims to apply standards of good governance to rule-making in contexts such as comitology where state-centered

the governance gap that it purports to fill[280]. That rating agencies are governed by codes of conduct[281], or financial markets by purportedly autonomous regimes designed and monitored by market actors[282], illustrates the ambivalence of such private legislation ; however, who could object on moral grounds to environmental (water or forestry) stewardship[283], equally private ? Similarly, the effect of corporate compliance mechanisms, superimposed upon human rights standards, may be to coopt, disactivate, or otherwise keep at bay apparently mandatory international regimes[284].

At the same time, these new legalities collapse some of the most established organising principles of the liberal legal system. Thus, describing standardization, Harm Shepel observes[285] that « standards hover between the state and the market ; standards largely collapse the distinction between legal and social norms ; standards are very rarely either wholly public or wholly private, and can be both intensively local and irreducibly global »... They constitute « a normative fabric far beyond the capacity of any state. Markets wouldn't exist without them... ». Significantly, while a public law approach assumes that standards are essentially political, private law considers them to be essentially economic[286]. By the same

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democratic values are inapplicable. However, Nils Jansen and Ralf Michaels make the important point that lack of regulation can only be considered as a form of regulation if it corresponds to a deliberate abstention and not a failure of states having lost conrol (see « Private Law Beyond the State », cited above , p.872).

[280] See for example, making this point in the context of global project finance, in respect of the web of private contracts framing investment which tend to reduce the protective potential of the host-state's human rights responsibilities, Sheldon Leader & David Ong, *Global Project Finance, Human Rights and Sustainable Development*, Cambridge Univ. Press, 2011, spec . p.9

[281] On such codes, see Mathias Audit, de al responsabilité des agences de notation », « Aspects internationaux » *Rev crit DIP* 2011, pp581-602, spec. p. 584).

[282] Such as ISDA. On the clash between conflicting claims of autonomous private regime and ultra-mandatory international public law principles, see H Collins, "Flipping Wreck: *Lex Mercatoria* on the Shoals of *Ius Cogens*. » (LSE conference paper, forthcoming).

[283] On the functioning of certification by the forest stewardship council, see Stéphane Guéneau, « Certification as a new private global forest governance system: the regulatory potential of the forest stewardship council », in *Non-State Actors as Standard Setters,* CUP 2009, p. 379. The Alliance for Water Stewardship defines its own mission as promoting responsible use of freshwater that is socially and economically beneficial as well as environmentally sustainable, in order to maintain or improve biodiversity and ecological processes at the watershed level. It "recognizes basic human needs and ensures long-term benefits (including economic benefits) for local people and society at large". Among the subscribers to the Alliance is the Coca Cola Company, with the goal is "to ensure the water we use in our manufacturing processes, everywhere in the world, will be returned to the environment at a level that supports aquatic life by 2010 through comprehensive wastewater treatment". How credible is this commitment? How legitimate is the standards setting process? How effectively are such standards monitored?

[284] On the illusions and delusions of social corporate responsability, which makes worker protection in the third world dependant upon the vagaries of the Western consumer market, and its cooptation of human rights norms, see Franck Cochoy & Aurélie Lachèze, « Capture et Contre-Capture dans les Politiques de Responsabilité Sociale de l'Entreprise », in Isabelle Daugareilh *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, Bruylant 2010, p.31 ; David Vogel, *The Market For Virtue: The Potential And Limits Of Corporate Social Responsibility*, Brookings Institution Press (July 15, 2005).

[285] Harm Shepel *The Constitutution of Private Governance*, p.3

[286] Tim Büthe and Walter Mattli suggest that standardization actually covers an array of market-driven, industry-driven and public norms (*The New Global Rulers*, p. 18 et s. for a typology). Social theory sees

token, it is also quite clear that the avenue of legal pluralism, which implies accepting the claim of effective normative authority beyond the state, is the only one which adequately addresses the issue of private power in the global arena. However, in order to solve the legitimacy problem raised by transnational expressions of non-state authority, the purely process-based methodology often associated with legal pluralism is clearly inadequate (a). Here the search for a methodology more fitted to the governance function of private intenrational law requires excavating neglected episodes of its own history (b).

(a) The legitimacy issue

Private international law has traditionally remained aloof from debates on the democratic legitimacy of the rules with which it deals[287]. This is no doubt because such an issue is solved implicitly in state-centered methodologies as a threshold matter, by excluding any law elaborated by entities which do not conform to the definition of State as accepted in public international law. In Savigny's initial formulation of « multilateralist » methodology, only the communities (at the time, German princedoms) belonging to a closed « community of laws » cemented by shared cultural (religious, linguistic and legal) tradition[288], were considered as participants in the common allocation of prescriptive authority[289]. At the end of the nineteenth century, the ambit of savignian methodology was extended, along with its academic success throughout continental Europe, to the world of sovereign states[290]. At that point, the lines of political communities were redrawn so as to exclude infra-state and trans-state normative authority from the scope of the conflict of laws. This exclusion created undeniable tension in cases involving multiple religious communities, or non-recognised states, or claims by indigeneous people ; this was particularly so since the methodology was made to apply « universally » to cases involving laws beyond the cultural pale, notably in colonial and post-colonial encounters with the exotic[291]. By and large, however, while carving out exceptions, this state-based model remained intact until today[292].

However, the challenge arising from the contemporary multiplication of normative

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them as stabilising and generalising normative expectations, and constituting at least partially autonomous systems (see Gunther Teubner, « The Two Faces of Janus : Rethinking Legal Pluralism », (1992) 13 *Cardozo L Rev* 1443, 1992).

[287] Even the controversial issue of *lex mercatoria* is more about the frontiers of law than the requirements of democracy.

[288] No « true conflicts » were conceivable here. With the exception of « odious statutes », which did not belong to the community (the concept, ancestor of the exception of public policy or *ordre public*, appears to have originated with the post-glossateurs : Bartole, 1314-1357 ; Balde, 1327-1400). See Bertrand Ancel et Horatia Muir Watt, "Du Statut Prohibitif (Droit savant et tendances régressives)", *Etudes à la mémoire du professeur Bruno Oppetit,* Litec 2010, p. 7.

[289] Since such allocation was designed on the basis of a shared model, shaped by a common understanding of the « nature » of legal institutions. For the analogous assumption of a like-minded community of European sovereign States in public international law, see above, p.10.

[290] Prime rival was the Italian Mancini, whose influential state-centered doctrine was based on the public international principle of nationality.

[291] On colonial public policy, see above FN 164.

[292] On the tensions within multilateralist methodology on this point, see Valérie Parisot, « Les conflits internes de lois », PhD Paris I (doctorat) 2010.

claims from diverse sources beyond the state[293], is more unsettling, since such claims may no longer be disqualified as exceptional. Today, « private governance regimes produce law exerting validity far beyond the borders of single nation-states, controlling and sanctioning behaviour in trans-national markets »[294]. They constitue « an entire set of governance mechanisms within and without the state, generating new legalities and legitimacies »[295]. At the same time, their very number implies that the acceptability[296] of the norms involved in the governance of transnational private power can no longer be presumed without further scrutiny of their democratic pedigree[297]. If, for instance, an issue of corporate environmental responsibility arises and it is claimed that a private code of conduct, or soft-norms created by international institutions, or standards set by an international private agency (such as the Forest stewardship council), are applicable, in addition to, or instead of, the national rules of the place where the pollution was felt, then it must surely be asked whether the norms thus invoked, while lacking the standard criteria of democratic legitimacy, are nevertheless the result of a sufficiently transparent process, and benefit from adequate compliance pull, to be considered by a (planetary-minded, pluralist) court[298]. When should a claim to normative authority by a non-state regime should be considered legitimate, and indeed relevant, in case of competing claims, to the particular case[299] ? What if in the above example of an issue of liability for environmental harm on which various state laws are also in conflict, a programatic agenda set by a prominent ONG, public opinion in a particular sector or locality, indigeneous custom, private codes of conduct drafted in the context of an alliance of corporate groups, and the UN global compact all have something (different) to say? Which are to be considered as potential sources of the applicable law on which a given court (investment arbitrator ? domestic court ?) must ground its decision ? Another telling illustration can be found in the context of the legal aftermath of the financial collapse of Lehmann Brothers[300], a situation characterized by Hugh Collins as a « flipping wreck »[301].

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293 Identified by Boa de Sousa Santos, « State, Law and Community in the World System : An Introduction », (1992) 1 *Soc & LS* 131. The term « beyond the state » will often be used as a synonym for « private » norms, meaning « privately-made » norms (on the multiple meanings of the « private », see Nils Jansen & Ralf Michaels, « Private Law Beyond the State », cited above FN 3).

294 Harm Shepel, *The Constitutition of Private Governance*, cited above FN 7, p. 21.

295 Saskia Sassen, « The state and globalisation », in *The Emergence of Private Authority in Global Governance*, 91, p.94.

296 Christian Joerges, « The Idea of a Three-Dimensional Conflicts Law as Constitutional Form », addresses the « acceptability » question as one of the legitimacy of norms in private international law.

297 Julia Black, « Constructing and contesting legitimacy and accountability in polycetric regulatory regimes », 2 *Regulation and Governance* 137 (2008).

298 Comp. the problematic example of the self-regulating financial « OTC » market (disussed above FN 262). Or indeed, the self-regulating Lloyd's insurance market (discussed above FN163).

299 See again, on the issue of legitimacy and accountability of polycentric regimes, Julia Black, « Constructing and contesting legitimacy and accountability in polycetric regulatory regimes », 2 *Regulation and Governance* 137 (2008), for whom « legitimacy lies as much in the values, interests, expectations and cognitive frames of those who are perceiving and accepting the regime as they do in the regime itself » (p.145). In cases of multiple legitimacy claims, this explains why a goven organisation or regime may suffer « multiple accountability disorder » withe deleterious effects. Hence, for example, increasing bureaucratization of NGOs to take account of accountability requirements formulated by state or itnernational public actors, may lead to a decrease in acceptance by the communities that they seek to represent (p.154).

300 See the conflicting decisions handed down respectively by US and UK courts, both framing the issues as a matter of insolvency law : *Lehman Brothers Special Financing Inc v BNY Corporate Trustee Services Ltd* Case no. 09-01242 (Bankr. SDNY) January 25 2010. *Perpetual Trustee Co Ltd, Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd, Lehman Brothers Special Financing Inc* [2009] EWCA Civ 1160. See H. Muir Watt, *Rev crit DIP* 2011.662

Here, British and American courts, reaching radically contradictory decisions, approached the legal issues in terms of their own national (and conflicting) insolvency laws, all the while ignoring the comprehensive system – as powerful as it is problematic - of self-regulation devised by the various financial players in the OTC (« over the counter ») market in which the disastrous credit swap agreements took place[302]. At this point, therefore, one may ask whether claiming room for legal pluralism in such a context is really a means of furthering the privatization of regulation in the world economy, avoiding the constraints of democracy in their elaboration and implementation? And if the relevant legalities are contradictory, which trump which ?[303] Are not pluralism and deference, on the one hand, and conflict settlement on the other, an ontological contradiction (or an utopian ideal[304]) ?

A seemingly obvious path here, in order to assess the legitimacy of private law-making, would be to turn to the resources, developed elsewhere - within global administrative law, or political and social theory - to formulate requirements of effectivity, transparency and accountability which compose « good governance ». As a meta-regulatory system, a procedural law « law of law production », would appear to hold most promise[305]. The implication is that private international law, eclipsed or superceded by a constitutional approach to transnational regimes, would have little to offer at this stage. However, it has also been suggested recently that its eclipse could be reversed. Christian Joerges proposes a « three-dimensional » system of conflict of laws as « constitutional form »[306]. The idea, which

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301 See H Collins, "Flipping Wreck: *Lex Mercatoria* on the Shoals of *Ius Cogens"*.

302 The "OTC" (over the counter) market, whose functioning was at the heart of the Lehmann saga, is described by Hugh Collins as having " flourished internationally on the basis of a belief that its standardised transaction constituted a form of *lex mercatoria.* In the international financial markets, the ISDA Master Agreement, together with its supplementary documentation, was believed to provide a comprehensive system of self-regulation. The Master Agreement was devised by all the major players – that is, the banks and their lawyers – with a view to providing an appropriate system of checks and balances between the parties to the transactions. The Master Agreement rose above national legal systems because it provided a comprehensive code of self-regulation for the international financial market, which might be, and in practice invariably was, used as the documentation for these transactions". Nevertheless, no mention (for better or worse) of an alternative normative system was made in the two sets of decisions cited above.

303 At least part of this dilemma was identified long ago by the early critics of Italian unilateralism, more recently by the opponents of Currie's governmental interest analysis, and finally today by the detractors of balancing approaches to conflicting human rights : what good is a methodology if it cannot provide a criterion (other than the equity or the subjectivity of the court) for selecting the conflciting claims and then settling « true conflicts » ?

304 Martty Koskenniemi, *The Politics of International Law*, p.353, formulates a scathing criticism: « The problem of legal pluralism is the way it ceases to pose demands on the world. Its theorists are so enchanted by the complex interplay of regimes and a positivist search for an all-inclusive vocabulary that they lose the critical point of their exercice »...And again, on social systems theory, « A part of the problem and not of its solution, law has no argument to defend its ambition to be anything but 'a gentle civiliser of nations' » (*ibid*). And again : the substance of the law has dispersed into... » a generalised call for equitable solutions or 'balancing' whenever conflicts arise » (p.51).

305 See Jacco Bomhoff & Anne Meuwese « The Meta-Regulation of Transnational Private Regulation ». The authors turn to good governance principles after dismissing the governance potential of private international law as excessively state-centered.

306 Christian Joerges, « The Idea of a Three-Dimensional Conflicts Law as Constitutional Form », in Christian Joerges & Ernst-Ulrich Petersmann (ed), *Constitutionalism, Multilevel Trade Governance and Inernational Economic Law,* Hart Publishing, Oxford, 2011 p. 413 ; for an earlier model, see P. Hay, O.

posits the governance implications of private international law, is that conflicts of laws could deal with collisions between public and private norms on several levels of governance[307]. Thus, for instance, beyond horizontal conflicts of private or regulatory law, a conflict of laws approach could govern clashes between general international law and WTO norms, or « diagonal » collisons between EU law and that of Member states[308]. A similar allocatory mechanism could extend to the relationship, for instance, between WTO and private regulation[309]. Such a proposal aptly reflects the complexity of the normative environment beyond, above and across state jurisdiction. Within this plural context, it rightly emphasises the central problem of recognition arising in connection with polycentric norms and sources of authority. Moreover, it legitimately refuses both to stop at the public/private divide, and to derive any comfort from any hierarchical doctrine of « sources ». And indeed, it may be that a body of multi-dimensional collision rules is, at least at present, the only form of « constitutional form » that is realistically available in a global (non-constitutional) context. As such, it is in line with the perceived quasi-constitutional function assumed by the conflict of laws in an environment which does not provide constitutional checks on local over-reach[310].

Nevertheless, the process-based form of this approach, presented as « the proper constitutional form of law-mediated transnational governance ; as a democratic perspective which is not dependent on the establishment of a European state or a world republic » [311] means that it appears more as an apology for the chaos of competing normative claims (or an « enchantment with the complex interplay of regimes » [312]) than as creating an opening for axiological choice. Because it asserts political neutrality, it cannot explain how to sift between the acceptable and inacceptable among the expressions of private autority[313]. It may be,

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Lando and R. Rotunda, , *Conflict of Law as a Technique for Legal Integration* in Cappelletti, Seccombe, and Weiler (eds.), *Integration Through Law, Europe and the American Federal Experience Volume 1,* 161.

307 The thesis is that « the 'geolocal' transformations that have been re-constructed within legal systms of constitutional democracires necessitate the development of a differentiated, three-dimensional conflicts-law approach with the *first* reflecting the interdependance of the formerly more autonomous jurisidctions, the *second* dimesnion responding to the rise of the regulatory state, and the *third* dimension considering the turn to governance – in particular the inclusion of non-governmental actors in regulatory activities and the emergence of para-legal regimes » (*ibid* p.414)

308 On diagonal conflicts, see Christian Joerges, « The Challenges Of Europeanization In The Realm Of Private Law: A Plea For A New Legal Discipline », *14 Duke J. of Comp. & Int'l L. 149* ; C Schmid, "Vertical and Diagonal Conflicts in the Europeanisation Process" in C Joerges/O Gerstenberg (eds.), *Private Governance, democratic constitutionalism and supranationalims* (Luxembourg, Office for Official Publ. of the European Communities, 1998), p. 155; Jérémy Heymann, *Le droit international privé à l'épreuve du federalism européen*, Economica, 2010.

309 On the interlegality of WTO and soft norms, see also, Joost Pauwelyn, « Non-tradtional patterns of global regulation : is the WTO 'Missing the Boat' ? », in Christian Joerges & Ernst-Ulrich Petersmann (ed), *Constitutionalism, Multilevel Trade Governance and Inernational Economic Law,* Hart Publishing, Oxford, 2011, p.199.

310 H. Muir Watt, « Aspects économiques »§206 et s; Alex Mills, *The confluence of public and private international law,* p. 291 et s. , spec. p.295.

311 *Ibid* p.415.

312 Comp. the criticism addressed by Martty Kokenniemi to process-based approaches to pluralism as a stereotyped reaction to modernity : « Its theorists are so enchanted by the complex itnerplay of egimes and a positivist research for an all-incusive vocabiulary that they lose the political point of their exercice » (*The Politics of International Law,* p353).

313 For a severe judgment on the claims of pluralism as a « stereotypal reaction to modernity », see Martty Koskenniemi, *The Politics of International Law,* cited above FN 1, p.355.

therefore, that a more promising road might lie in excavating the potential of historically marginal doctrines of private international law, in order to integrate and reconnect plural norms.

(b) Methodological approaches : an historical reminder

In the heyday of positivism - during the long era of the closet -, there was always a dissident, pluralist-compatible methodology present in the « unofficial portrait » of private international law[314]. It looked to foreign sources and institutions on which societal expectations had been formed, accepting them on their own terms in an ethos of tolerance. At the time, it was described as « suffering from the worst defect that ever affected a methodology, its lack of positivity »[315]. The unsung song of private international law – counter-intuitively named « unilateralism »[316], - was a project for the open-ended articulation of diverse claims to govern, based on mutual deference and balancing, rather than exclusiveness and hierarchy. While the dominant methodology – here, as in comparative law - carried a project of assimilation, unilateralism worried about the violence implicit in the transposition of idiom and strove for the recognition and tolerance of otherness[317]. The first step towards reinventing a pluralistic version of private international law might therefore be to garner the insights of this alternative methodology, and ensure that the starting point of any new governance approach is openness to competing legalities of various origins and horizons. Once it is recalled that the conflict of laws has always carried the hidden imprint of pluralism (i), the lesson to be drawn from its own tools for assessing the relevance of conflicting norms (ii), is that it the « private » should be taken seriously (iii).

(i) **The imprint of pluralism:** The minoritarian methodology known in European terminology as « unilateralism »[318] was elaborated in its most sophisticated form in Italy by

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314 On the delicate balance and interplay between « official » and « unofficial » self-portraits, each feeding into the other, see Mitchell E. de l'O Lasser, "Judicial (self-) portraits: judicial discourse in the French legal system"104 YLJ 1325 (1995). On the repressed ethics, methodology and epistemology of private international law, see H. Muir Watt, « New Challenges in Public and Private International Legal Theory : Can Comparative Scholarship Help ? », in Mark van Hoeke (ed), *Epistemolgy and Methodology of Comparative Law*, Hart, 2004, 271.

315 Pierre Gothot, « Le renouveau de la tendance unilatéraliste », *cited above*.

316 Despite disparagement by the « multilateralist » camp (equally a misnomer : see above p.24), the concept of « unilateralism » (which is self-defined in opposition to « multilateralism ») is not to be conflated with « judicial unilateralism » (within the meaning used by William Dodge, « Extraterritoriality And Conflict-Of-Laws Theory: An Argument For Judicial Unilateralism », 39 *Harv. Int'l L.J.* 101.: see above, FN 68), which denotes an inward turn or a turn to the protection of national interests and a correlative disregard for the foreign or Other. It would be a mistake to mistake deference for self-interest (although the mistake is current in private international law : see, for example, the debate over the real meaning of Currie's governmental interest analysis : Herma Hill Kaye, « A Defense of Currie's Governmental Intersts Analysis », RCADI 1989, t216, p.9).

317 In his work on subjectivity and language, the French philosopher Gilles Deleuze (1925-1995) was concerned with the violence of the transposition of idiom to the Other. For an excellent account of Deleuzian philosophy, see *Dictionnaire des philosophes*, sous la dir. de Denis Huisman, 2nd ed,, Paris, PUF, 1993.

318 On the contemporary avatars of this doctrine, see Pierre Gothot, « Le renouveau de la tendance unilatéraliste ». For an account of unilateralism v. multilateralism, see Symeon Symeonides, « American Choice of Law at the Dawn of the 21st Century », 31 *Willamette LR* 1 (2001).

Quadri[319]. It finds contemporary support in Europe in the work of Pierre Gothot[320] and Didier Boden[321], while across the Atlantic, its *Doppelgägner* is easily identified in American functionalism[322]. Unilateralism originated in the medieval doctrine of statutism, arbitrating the colliding claims made by the various laws of the European city-states. These conflicts were articulated in terms of clashes of power, and their settlement involved allocating to each claim the scope which made best sense in policy terms[323]. This vision of the conflict of laws is the one Savigny assumed still to be the working model when, in the middle of the nineteenth century, he suggested that the functional problematic could be rephrased in the terms of multilateralist « signpost » rules whenever the conflicting laws belonged to a legal community composed of shared institutions and characterisations. In other words, rather than determining the (territorial or personal) scope of statutes according to their object (things or persons or contracts), it was equally possible to identify a category of « legal relationships » (personal, or property-based or contractual) and allocate each to its governing law through a connecting factor representing its « natural seat » (situs of the property ; domicile ; place of contracting, etc). It is only when, towards the end of the century, the new approach was extended beyond the scope of the German princedoms, that it became apparent that the two methodologies did not in fact yield identical results in a context of diverging legal cultures. A choice became necessary : unilateralism was about tolerance and opening the legal order to other normativities on their own terms[324] ; multilateralism was about fitting the foreign into « monist » categories[325]. The multilateralist version carried the day.

Multilateralist conflict of law theory borrowed its categories, as Savigny had designed them, from Roman law (along with its public/private divide and its systematicity). But once extended beyond the Romanist legal community to a rapidly internationalizing world at the turn of the turn of the 19th Century, there was necessarily a risk of legal misfit – lack of

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[319] Rolando Quadri, *Lezioni di diritto internazionale privato* , 5th ed Naples, 1969 ; for an instructive account of the Italian School of private international law in wider context, see Enzo Cannizzaro, « La Doctrine italienne et le développement du droit international dans l'après-guerre : entre continuité et discontinuté », AFDI 2004.1.

[320] Pierre Gothot, « Le renouveau de la tenanace unilatéraliste en droit international privé ».

[321] Didier Boden, *L'ordre public : Limite et Condition de la tolérance, pp 504-813*.

[322] For a comparison, see D. Bureau & H. Muir Watt, *Droit international privé*, n° 358)

[323] For instance, two different city-states may have claimed authority simultaneously over the estate of a person deceased domiciled within the remit of the one, leaving immovable property within the other. The question which fascinated and divied the statutists was whether succession was personal (in which case the domicile could legitimately assert its claim), or real (in the sense of *in rem,* in which case the territorial law of the situs would prevail). The conflict was discussed in terms of policy and consequences, before it gradually became reframed in terms of the « nature of things ». Contemporary US functionalism responds to an analogous policy-orientated definition, except insofar as the statutists « typified » the various categories of policies according to whether they required general implementation throughout the territory, or whether they were designed to shape personhood (and would therefore apply extraterritorially to all persons subject to the home jurisdiction based on domicile).

[324] Among pluralist proposals in political science for global institutional design, the most prominent is « deliberative polyarchy » (Joshua Cohen & Charles Sabel, "Directly-Deliberative Polyarchy", 3 *European Law Journal* 314 (1997). It can be analogised to the reflexiveness and the quest for mutual understanding which underlie unilateralism.

[325] Didier Boden, on the analogies between unilateralism/pluralism, and multilateralism and monism : *L'ordre public : Limite et Condition de la tolérance* , pp524-543, spéc., p.533.

equivalence - between the conceptions which inspired the categories of the forum's conflicts rule and those of the applicable law[326]. In the United States, evidence of « true conflicts » generated by such misfit led, in the end, to a rejection of traditional « sign-post » conflict of laws methodology altogether ; the functionalist turn clearly espoused a neo-statutist, unilateralist approach[327]. In Europe, the same difficulties were either denied, at the price of deforming foreign law[328], or dealt with at later stage in the choice of law process with decidely unilateralist « escapes »: the latter option, preferred under the more cosmopolitan second half of the twentieth century, explains the emergence of conflicts of characterisation, renvoi, preliminary questions and all the other legal-theoretical niceties which American legal realism had come to abhor.

An attentive analysis, therefore, shows that for all its rejection by dominant doctrine, unilateralism left a significant imprint on the methodology used by the courts. The more such multilateralism called for monism and dealt with difference by reducing the other to its own image, the more frequent were the instances in which it was clear that despite its official portrait, it provided space for alterity and reflexivity[329]. Its contemporary uses are most visible in *lois de police* methodology, which uses policy analysis to determine the scope of derogatory, hyper-mandatory rules[330]. But it also provides the most convincing methodological approach to horizontal effects of human rights, whose reach depends upon « nexus » with the Protecting state[331].

(ii) « Incidental application »: The specific resource that private international law has to offer in instances of conflicting norms is a methodology of linkages[332]. The whole discipline is traditionally about « linking up » legal issues to the most adequate source of

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326 See FN 129 above.

327 And, to a certain extent, to a throwing the baby out with the bath water of the conflict revolution. In the end, for the reasons given in the text above, the US conflicts revolution, with its turn to flexible, policy-orientated methodolgies, may have, to a certain extent, missd the mark in rejecting wholesale the European acquis. See Symeon Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', *Tulane Law Review*, 82 (2008), 1741–99).

328 Thus, in France, the nationalist pre-war conception of Bartin, for whom the international legal order was necessarily formed in the image of the domestic (French !) legal order. See D. Bureau & H. Muir Watt, *Droit international privé*, cited above FN 57, n° 357.

329 Id, n° 379 s. ; 474 s. ; 491s. ; 504s., for the many cases of methodological misfit where unilateralism comes back through the window, having been chased out by the door (*renvoi*, characterization, incidental questions…).

330 These derogatory rules circumvent the « normal » choice of law rules (see article 9 of Regulation Rome I on the law applicable to contractual obligations). On the rise of this methodology, see H. Muir Watt, « Les limites du choix : dispositions impératives et internationalité du contrat » in, Sabine Corneloup & Natalie Joubert (dir), *Le règlement communautaire « Rome 1 » et le choix de loi dans les contrats internationaux,* CREDIMI, Dijon, 2010, p. 341.

331 See above, p.XXX

332 European private international law literature often cites Santi Romano's work in the field of social norms, without however making very much of the richness of the concept of « relevance » of one legal order for another. It is this concept which is at work in a pluralistic account of private international law. See Santi Romano, *L'ordre juridique*, translation by Lucien François & Pierre Gothot, Paris, Dalloz, 1975. Relevance entertains close links with the philosophical concept of recognition in a pluralistic society (within the meaning of Paul Ricoeur, *Parcours de la reconnaissance. Trois études*, Stock, 2004. On Ricoeur's concept of recognition, see the Special Installment of the Review *Esprit, La pensée Ricoeur* March/April 2006).

regulation. However, whereas multilateralism concentrates exclusively on linkages to state sources, the unilateralist stream has, at the margin of traditional theory, developed a tool for including those non-state sources of normativity which are officially excluded from the ambit of multilateralist conflict of law rules but which may nevertheless have « relevance »[333]. The significance of this approach comes into focus when it is remembered that an important cause of governance voids, no doubt the corollary of fragmentation, stems from disconnectedness, or the lack of articulation of different norms issuing from diverse sources. Indeed, on either side of the public/private divide, the race to redefinition and primacy by various specialised regimes may occult the wider picture – with the risk of leaving the governance holes untended[334]. Framing a question as one of trade or investment or economic freedom may work to hide the claims of human rights, environment or indeed personal dignity.

The resource that unilateralism has to offer here is known as « incidental application » (or « prise en considération »), which constitutes a formidable tool for reconnecting heterogenous norms. It is frequent that a non-state norm is undoubtedly relevant but formally inapplicable in the sense that it does not meet the « entry requirements » set up by private international law - such as belonging to private law, being of state origin, being valid under public international recognition standards…Thus, incidental application developed as an alternative technique principally in order to get round the « public law taboo » (for instance, to allow foreign social security law to be taken into account despite its public law nature[335]), to give effect to commercial custom or usage (which may be « incorporated » into the applicable law[336]), or to allow foreign judicial dicta to carry weight even if the judgment is not deemed to be valid. Like the « window » opened by the Alien Tort Statute in the jurisdictional law of the forum towards international law[337], this tool allows for the recognition of the relevance of norms originating in another legal order, and otherwise deprived of any official currency[338].

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[333] For Santi Romano (id), « relevance » is the key methodological tool for reconecting diverse normative orders.

[334] In public international idiom, this is « fragmentation » through the rise of functional regimes, with its resulting incoherence and power politics (Martty Koskennemi, *The Politics of International Law*, p. 69). For an example that directly implicates private international law, see the potential overlap of competition law and free movement in the EU in respect of private conduct such as industrial action as illustrated in the *Viking, Laval* and *Ruffert* cases cited above, FN 177, in Julio Baquero Cruz, *Between competition and free movement: the economic constitutional law of the European Community,* Hart, 2002)

[335] See for example, a French decision, Cass Soc, 24th Feb. 2004, *Rev crit DIP* 2005.62, note Louis d'Avout, in which foreign social security law (including the duties it imposed on employers) was taken into account (or applied incidentally) in order to characterize a fault of the employer under the governing (French) tort law.

[336] As suggested by Recital 13 of EC Regulation Rome I, cited above FN 224.

[337] It is clear once again that the same methodological device is at work here as in the context of the *Alien Tort Statute* : international law does not dictate the remedies attached to its own rules of conduct. See above p.13.

[338] This is why it is difficult to subscribe to the idea that incidental application serves to correct the choice of law rule in cases of homegeneous conflicts (as suggested by Estelle Fohrer-Dedeurwaerder**,** *La prise en considération des normes étrangères*, LGDJ, vol 501, 2008).

For instance, a corporate code of conduct does not qualify formally as law-making under a state centered methodology[339]. However assertive it is of the rights of sub-constractors and stakeholders in far away places, its « private » origin has meant (at least until recently) that it does not provide grounds for contractual liability before the courts, nor does it serve as legal foundation for tort liability ; its lack of legal bite explains its very success among corporate manufacturers relocating industry to foreign environments. However, it is now becoming clear that reliance induced in its addressees may nevertheless give rise to a right to redress if the conditions for estoppel are fulfilled. This *ex post* approach, balancing the equities, by-passes the legitimacy issue and looks straight at the effective impact of the code on those who are affected by it. Ultimately, however, the legal effect of that code derives from the (state) law governing estoppel. The cases of Nike's spontaneous code of conduct for its own (or its sub-contractors') factories, or Total's volontary vetting process for its sea-bound oil-tankers, similarly show how self-regulation can be given teeth by harnassing it to formal sources of private law[340]. In these cases, the advantage of this methodology is that the coordinating forum retains control over the applicability of the private norm, either giving it extra bite, or moderating it claim. Thus, given again the appropriate conditions of reliance, the norm ISO 26000 could be used, despite its own self-denying claim not to provide the foundation of legal action[341]. Properly used, the methodology consisting in giving teeth through private law to non-state sources may be signal a move towards the constitutionalization of private codes, as identified by systems theory[1].

(iii) **Taking the « private » seriously.** Be that as it may, the legitimacy issue remains. How can effect be given to a norm that has been adopted through an opaque or unaccountable process ? The examples examined above lead to suppose that the legitimacy issue could be reframed in the context of incidental application. Digging up the resources of unilateralism suggests a promising avenue towards resolving of the legitimacy dilemma raised by non-state claims to normative authority. This would consist in taking seriously the « private » dimension both of the governance gaps and the remedial tools available. To the extent that the governance holes result from the undisciplined exercise of private power, this may appear to be no more than a truism. But the proposal here is rather to highlight the specific disciplinary potential of private law. The idea has already been convincingly canvassed by Harm Shepel in respect of standard-setting[342]. Thus, the « constitution of private governance » may lie in tort or competition rules, which can be used to discipline private authority when it causes harm to third parties.

Of course, the very concept of « private law » needs to be elaborated further in this context. In the first place, the idea of compensation is not the monopoly of the (private) law of

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339 Within the meaning given by Julia Black, « Constructing and contesting polycentric regimes ». Indeed it may not qualify as binding, for the lack of intention to make it so, or lack of consent or mutuality, under traditional contract law.

340 For the effect of *Nike's* code of conduct under consumer law, Supreme Court of California, *Mark Kasky v.Nike Inc.,* 27 Cal.4th 939, 45 P.3d 243, 119 Cal. Rptr.2d 296, 2002); for the *Erika* pollution case involving the Total group and its self-regulating vetting procedure, see Court of Appeals of Paris 30 mars 2010, *D.* 2010. 967, obs. S. Lavric, and 2238 obs. L. Neyret.

341 See above, FN 195.

342 Harm Shepel uses this idea in the context of private standard-setting (in *The Constitution of Private Governance*). More generally, there is a clear a renewal of interest in the governance potential of private law, essentially sparked developments in the EU context : see Fabrizio Cafaggi and Horatia Muir Watt, *The Making of European Private Law*; Roger Brownsword, Hans Micklitz, Leone Niglia and Stephen Weatherill, *The Foundations of European Private Law* , Hart, 2011.

tort but exists in administrative law too[343]. On the other hand, the privateness of competition law is doubtful ; its only « private » aspect is the nature of the actors to which it (as opposed to public procurement) applies. However, the cue can be taken from here: it may be that while a « public law » approach to accountability tends to focus *ex ante* on transparency and deliberation in decision-making process, « private law » tends to repair harm *ex post* in individual cases. Taking « private law » seriously in the global governance context means ensuring that – irrespective of whether this is « administrative » or « civil » action[344] – the exercice of sovereignty beyond the state, in the forms of standard-setting, or certifiying, or code-drafting, gives rise to adequate reparation when it is harmful, and is conversely held to respect the reliance of third parties. While the determination of the means by which public law (in the form of *ex ante* legitimacy) tools can be implemented in a transnational context belongs to the realm of global administrative law (GAL), private international law reveals its own, complimentary, governance potential through allocating a duty to compensate damage *ex post*[345].

How do non-state norms fit into this scheme ? Claims based on functional regimes[346] are usually framed as questions of *applicable law*[347]. Here, private international law will

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343 Administrative law in systems inspired from the French model has borrowed extensively from private law, since it is for a large part in substance a specific regime for contracts and liability applicable to the State

344 In the French context, this issue may give rise to a problem of jurisdiction between administrative or civil courts. Administrative courts (applying French administrative law) are not competent for disputes involving foreign states : see Malik Laazouzi, *Les contrats administratifs à caractère international,* Paris Economica 2008.

345 See below p.47 et s. for the ways in which the allocation is to be done.

346 In order to better understand how such a pluralist approach might be implemented in private international law, social theory provides a helpful taxonomy of non-state legalities. Thus, Talia Fisher distinguishes two different ontologies of non-state authority, according to whether it corresponds to the idea of community or market (Talia Fisher, « A Nuanced Approach to the Privatization Debate », 5 *L. & Ethics of Human Rights* 71(2011). The first category provides a complete and exclusive set of norms to govern the lives of its members, whereas the second come the guise of specialised expert functional regimes, which compete for primacy on specific issues but make no claim to exclusiveness. Each raises a different set of difficulties when it comes to assessing its acceptability. For instance, judging whether or not to give effect, on legitimacy grounds, to indigeneous law, or to the law of an unrecognised state, is a line of inquiry clearly distinct from that of whether a specialised expert regime which claims to benchmark or certify is impartial (or independant from the funding of its addresses) or not. On reflexion, distinguishing these two different ontologies reflects the two different ways in which private international law can operate in respect of non-state authority, suggesting both a path to assessing legitimacy and solving the question of relevance. The regimes envisaged in the text above belong to the second category, of expert functional regimes.

On the other hand, private international law also has the resources to take account of community, usually in connection with the question of jurisdictional authority. Although the latter has been long connected to state, there is currently a rich reflection on the ways in which jurisdiction can reflect the contours of community (Paul Schiff Berman, « The Globalization of Jurisdiction ». In particular, for an account of symbolic assertions of jurisdiction by communities beyond the state, see p. 491 et s. For the links between jurisdiction, community and responsibility, see below, p.48). As has been shown in connection to issues relating to the very « public » question of citizenship (Karen Knop, « Citizenship, Public and Private » in K. Knop, R. Michaels and A. Riles (eds.), *Transdisciplinary Conflict of Laws*, *Law and Contemporary Problems,* 71 (2008), p.309), taking the « private » seriously here can bring in a social perspective that is not necessarily aligned on the geo-political frontiers of state. Here, the private law perspective, which involves measuring the effectivity of group identity and the degree of social reliance on the norms claiming authority, tends to absorb the public legitimacy question. An example familiar to the students of the conflict of laws is the way in which courts have recognized the validity of religious marriages celebrated

naturally turn to its categories of private law, distinguishing according to whether the wielding of private power is invoked as a grounds for liability, or as generating reliance on the part of third parties, or indeed as the source of anti-competitive effects. In all such cases, taking the « private » seriously means mobilising *ex post* remedial tools in order to promote the public good[348]. Thus, when a rating agency, a certifier, the author of a code of conduct or an industry-driven standard setter does its job badly and causes damage, or betrays the reliance it has created, there is no reason why its exercice of private authority should not be subject to liability, promissory estoppel, securities law, or (in the case of corporate alliances resulting in various forms of private codes or standards) disciplined by competition law. In such instances, the rules of remedial law are used in the general interest, as a complement to *ex ante* public law « good governance » principles. As seen above, the best example of reliance-type remedies that have effectively been administered by the courts are the legal effects that are sometimes, or progressively, applied to volontary codes of conduct drawn up by multinational corporations – usually in the opposite aim of warding off liability to show corporate good will. The *Nike* and *Erika* cases illustrate this trend[349]. In such cases, private international law attempts to devise the most appropriate disciplinary tool. Its dominant trend in the field of tort and economic law is to give greatest weight to the law where the effects of harmful conduct are felt, ensuring voice to the affected community or market[350].

In all these cases, when the wielding of private economic power is held responsible for harm (or anti-competitive effects), the legitimacy issue is absorbed into a private law problematic of compensation. Importantly, there is no need here, as a preliminary matter, to ascertain *ex ante* whether the exercise of overweening market authority by a corporate actor is legitimate in the global arena, in the sense of whether it fulfills the requirements for democratic law-making under global administrative law; a private law approach will look straight to the question of whether, under a balance of interests, an act alleged to be unfair has caused undue and reparable harm transnationally[351]. In doing so, it goes a long way in resolving the legitimacy problem envisaged above, all the while preparing the ground for a re-reading of the political agenda of private international law in terms of « re-embedding » the global.

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despite their lack of official or civil status within the host state, by assessing the reasonableness of the parties' own expectations, given the changing social and political context (See for instance, *Schwebel v Ungar* [1964] 48 DLR (2d) 644 (Supreme Court of Canada) ; *Moatti,* Cass civ 1re, 15 June 1982, *Rev crit DIP* 1982300, note J.M. Bischoff, JDI 1983.595, nore R. Lehmann (France, Cour de cassation). This example shows that a little loosening up could go a long way to inject greater responsiveness – along with an ethos of responsibility of those wielding state authority towards those who must navigate their way through an environment of conflicting norms - into existing methodology.

347 Martty Koskemmieni disparagingly describes the current state of international law as induced by regime competition to provide the applicable law, a « politics of redfintion » (*The Politics of International Law*, p.67).

348 Harm Shepel, *The Constitution of Private Governance,* p. 384 ; Gerald Spindler, « Market Processes, Standardisation and Tort law », 4ELJ 316 (1998).

349 See above FN 258. Counter-examples are unfortunately legion: thus the *Lloyds* affair shows how securities law or the law of misrepresentation could have been – but was not – mobilised as a disciplinary tool.

350 On the « effects » test in comparative perspective, see H. Muir Watt, « Aspects économiques du droit international privé », §251.

351 At this point, the use of ex post methodology is bound to encounter the objection of legal certainty . Its political economy is hardly clear, however : see A. Claire Cutler, *Private Power and Global Authority*, p. 33 ; Duncan Kennedy « Form and Substance in Private Law Adjudication », 1976 *Harv. LR* 1685.

C. Re-Embedding the Global

There was a time at the beginning of the liberal era, post Second World War, when « international » commerce bore a highly positive connotation ; it was seen to signify a salutary shedding of retrograde, parochial concerns, in favour of new open horizons of peace, communication, solidarity and prosperity. Liberalization of exchange rates, trade and finance bore the same cosmpolitan banner as human rights. The private international law of commercial transactions received considerable impetus from courts throughout the western world, which similarly subscribed to the Washington Consensus on a macro-legal level. However, the progressive slippage from liberalism to neo-liberalism brought disenchantment. The negative connotation now associated with the global is due to the financiarisation of the economy, and its indifference to concerns of humanity and planet, on which the voices of the third world can now distinctly be heard. There is pressure to « re-embed »[352]. Now, private international law can contribute to a re-embedding of the global, on condition that it is allowed to expand its mediating function between the claims of the global, on the one hand, and local circumstances, on the other (a). Do do so, it must work to ensure the double correlation of affectedness and voice, on the one hand, responsibility and sphere of influence on the other. These are ideas that are emerging, as we have seen, in human rights methodology, but which would benefit considerably from the technology which private international law has to offer (b).

(a) Mediating between the global and the local

Social « disembeddeness » of regulation, a concept borrowed from economic sociology and currently in the process of rediscovery in the context of the current financial crisis, has come to be seen as the « dark side » of modernity, the consequence of global financial logic [353]. As Karl Polyani famously observed, market rationality has effectuated the « Great Transformation » of society into an « adjunct to the market »…. « Instead of economy being embedded in social relations, social relations are embedded in the economic system…(Hence) society must be shaped in such a manner as to allow that system to function according to its own laws »[354]. Similarly, Saskia Sassen observes « the incipient formation of a type of authority and state practice that entails a partial denationalizing of what had been

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352 *The Great Transformation, The Political and Economic Origins of our Time*, (1944) Boston, Beacon Press, p.57.

353 Christian Joerge & Josef Falke, «Karl Polyani (eds), *Globalization and the Potential of Law in Transnational Markets,* Hart 2011. Comp. Mark Granovetter, « Economic Action and Social Structure, The Problem of Embeddedness », (1985) 91 *Am. Journ. of Sociology* 481. « Let them eat credit ! » : see Karl-Heinz Ladeur, « Globalization and the Conversion of Democracy to Polycentric Networks : Can Democracy Survie the End of the Nation State ? », in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization*, Ashgate, 2004, p.89. See too on the disembeddedness of the economic system from its societal pre-conditions, Nikolas Luhmann*, Die Wirtschaft der Gesellschaft*, Frankfurt, 1988, discussed in Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999- 1046.

354 Christian Joerges and Josef Falk rightly compare this observation to Foucault's analysis of the rationality of market governance (Introduction, p.3, FN11). See too on the hegemony of the economic system in a functionally differentiated society, Niklaus Luhmann, *id*..

constructed histrically as national »[355]. In a field of more particular relevance to private international law, Harm Shepel observes that the trend towards global standardization « disconnects standards from cultural normative and cognitive frameworks and hence leads to a disconnection between socially accepted and legally required behaviour », and, ultimately, to the degradation of the public good[356]. This suggests, perhaps paradoxically, that by shattering local patterns, not only of culture and production but also of governance, globalisation is the principal threat to the global commons. Beyond the language of inevitability which tends to accompany globalisation, the autonomy of markets is shown up as a strategic discourse both for legislators and private actors intent on by-passing local policies or interests in the pursuit of profit through competition. Legislators may lay blame for the harm caused by domestic policy on the market[357], or argue that their hands are tied by a international treaty in which it has consciously lobbied in favour of a given category of actors, occulting its distributional effects[358]. Private actors argue that they are merely surfing on the inexorable tide of the world economy.

However, growing awareness of the dangers of disembeddeness has induced a trend in the opposite direction, towards of a re-embedding of the global. Of course, the reversal is not without its own risks ; globalisation offers an escape from parochialism and the excesses of nationalisms, integrisms and feudalisms of all kinds. A backlash heralding the return of all these would be singularly regressive, so that the challenge today is to navigate between the false glitter of the global and the dark sides of localism. However utopian or desperate such a quest may seem, it appears in areas such as post-crisis proposals for the regulation of financial markets[359], or in policy changes in the area of economic development where a certain return of the local signals a reaction against the one-size-fits-all favoured by the Washington consensus[360]. Both cases seem to suggest a more holistic approach to global finance and development, reinstating local culture in the assessment of needs and the search for appropriate solutions[361]. In a similar turn, social theory now works towards the

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[355] Saskia Sassen « The state and globalization « ,p.91. Interestingly, this observation is made in connection with the « embeddedness » of the global (*id*, p.91), which signifies that the global has needed the participation of states in order to...disembed.
[356] Harm Shepel, *The Constitution of Private Governance*, p.22.

[357] Markets have always obscured distributional issues and helped diffuse blame for negative economic outcomes (ibid). It may of course be debated whether sovereign states « lost control » as a result of the impotence in which the liberal paradigm had emprisoned them, or through the complicity of governing elites whose interest it was to make the progression of global capitalism appear both inevitable and self-regulating. The causal factors are no doubt complex, as is the resulting embeddedness of states and actors in a global framework they have contributed to create, both enabled and contained (see Saskia Sassen, *Losing Control ? Sovereignty in an Age of Globalization,* Columbia Univ. Press, 1996).

[358] On the example of the private lobbying in international maritime treaties, see above FN 36.
[359] An emblematic example is the book by Christian Joerges' and Joseph Falk's book on the thinking of Karl Polyani : see Christian Joerges & Joseph Falke (eds), *Karl Polyani. Globalisation and the Potential of Law in Transnational Markets,* Hart, 2011.
[360] Duncan Kennedy, "Two Globalizations of Law and Legal Thought: 1850-1968" (2003) 36 *Suffolk U.L. Rev*. 631. For an equally severe critique on development - as implemented by the World Bank - as driven by a private epistemology, see Kate Bayliss, « The World Bank and Privatization : a flawed development tool », *Global Focus* 2001, vol 13, June.

[361] Contextualist comparative law is coming back into its own on development : see H. Muir Watt, « Comparer l'efficience des droits ? », in *Comparer les droits, résolument*, Les voies du droit, dir. P Legrand, PUF 2009, p.433 ; see too for a new approach in project finance, looking at the potential impact of risk allocation in the society in which the project is located, Sheldon Leadrer, « Risk management,

constitutionalisation of reflexive social systems[362], while the « footprint » metaphor in human rights movement denotes an « evolving, pluralistic, and relational view of rights", attentive to the way in which they are constructed in collective memory[363]. In cases of outsourced industry, labour lawyers plead for responsive regulation of the workplace[364]. Similarly, the 2010 Ruggie Report to the Human Rights Council on corporate social responsibility for human rights violations, emphasises that "companies need to consider how particular country and local contexts might shape the human rights impact of their activities and relationships"[365].

The question for contemporary private international law is therefore whether, in its mediating function between the local and the global, it can join forces with this movement and contribute in its own field to « re-embeddedness ». The contention here is that it can and - under an admittedly optimistic rereading of existing solutions – actually does. Indeed, the turn towards re-embeddedness is visible, here and there, in reaction to the excessive autonomy acquired by both public and private actors, whether in respect of fundamental norms or local constraints. Illustrations can be found in the European context, on the one hand, in the progressive integration of human rights into private international law methodology[366], and, on the other, in the primacy of functional, policy-driven analysis in areas where parties are endowed with freedom of choice[367]. Both of these allow a sifting process in which the claims of peremptory norms can be weighed in context, and priorities clearly set out. An observation made by Harm Shepel in respect of the role of private law in general in respect of global standard-making can be extended here as an apt description of the mediating function of private international law, which « forces standards bodies world wide to connect « universal » standards to local circumstances »[368].

(b) The two poles of embeddedness : affectedness and responsibility

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project-finance and rights-based development », in Sheldon Leader and David Ong, *Global Project Finance, Human Right and Sustainable Development*, Cambridge 2011, p. 107.

362 See Gunther Teubner on reflexive law as response to disembeddedness : « Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct", Gralf-Peter Calliess (ed), "Governing Transnational Corporations - Public and Private Perspectives", 18 *Indiana Journal of Global Legal Studies* 17 (2011).

363 Jeremy Perelman and Katherine Young, "Rights as Footprints: A New Metaphor for Contemporary Human Rights Practice", 9 *Northwestern Journal of International Human Rights* 27 (2010).

364 Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate,* OUP 1992, arguing for tripartism (the participation of local public interest groups) in workplace regulation.

365 John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2010* (§58).

366 See above, XXXX

367 See above XXXX. Although « governmental interest analysis » in the United States is now to a certain extent disqualified as being associated with parochialism (or *lex forism*), its potential in the global arena is to allow deference to local policies when appropriately weighed both against each other and in respect of other wider, public and private, interests.

368 Harm Shepel, *The Constitutionalization of Private Governance*, p.401.

It may be that the time has come for embeddeness to replace proximity, which famously captured the 20th century paradigm of private international law[369]. Proximity was a response to changing social and political conditions, a move away from territoriality towards a more flexible, functional allocation of spheres of state authority in a world where geography began to count less. However, it remained inexorably horizontal, and state-centered ; it continued to claim axiological neutrality, and pursued the liberal ideal of individual choice. Embeddeness is, on the other hand, a political project. It is geared not to ensuring the content-neutral « best fit », but to protecting the global or planetary commons by tackling head-on the exercise and abuse of private economic power. To do so, it integrates what might be described as a disciplinary dimension in respect of state and private action. It uses jurisdictional and conflict of law rules to give voice to affected communities, and simultaneously forces non-state actors to « jurisdictional touchdown »[370] by extending their social and environmental responsability to match their sphere of influence. To this extent, the double correlation of affectedness and voice, and responsibility and sphere of influence, are the two complementary poles which best implement the idea of embeddedness, and constitute from this perspective a possible reading of contemporary trends in private international law[371].

(i) ***Voice and Affectedness*** : A first contemporary trend in choice of law technology reveals an attempt to give voice to affected communities – that is, to those whose interests may not have been taken into account when decisions were made and who may nevertheless feel the impact of the externalities – the negative effects of such decisions outside the state[372]. Many examples illustrate the way in which traditional expressions of proximity could thus be re-read in the context of a more deliberately political project. The « effects test » which now seems predominant as a choice of law principle in the field of economic law, is an expression of this idea to the extent that it allocates authority to the law of the « affected market »[373]. Perhaps more tellingly, the idea that voice should be given to those who feel the impact of a particular policy explains why the new EU choice of law rules can be seen to carry the fundamental values of due process which, on the other side of the Atlantic, are expressed instead in the Constitutional checks on overreaching by the individual states[374]. Futhermore,

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369 On proximity as a paradigm, see Paul Lagarde, « Le principe de proximité », RCADI 1986, t.196, p.9 et s.

370 Robert Wai, « Transnational Liftoff And Juridical Touchdown ».

371 Such a reading corresponds to Robert Wai's proposal for an « ideational function » of transnational law, directed at disturbing dominant logics in other governance processes », Robert Wai, *Ibid*. See too, on the correlation between authority and responsability in international law, Joel Trachtmann, « Conflict of Laws and Accuracy in the Allocation of Government Responsibility », 26 *Vand. Journ. Transnat. Law* 975 (1993).

Conflict of

372 On the idea of affectedness as a prerequisite for legitimacy in global administrative law, see Anne-Marie Slaughter, *A New World Order*, Princeton Univ. Press, 2004. On the idea that the conflict of laws may give expression to the voice of affected communities, and thereby give effect transnationally to domestic constitutional requirements of due process, see H. Muir Watt, « Aspects économiques », §198 et s. ; comp. in a similar direction, Michelle Everson, "The Limits of the 'Conflicts Approach': Law in Times of Political Turmoil", 2(2) *Transnational Legal Theory* 271–285 (2011).

373 See above p.44. On the economics of the effects test, see Joel Tratchmann, « Conflict of Laws and Accuracy in the Allocation of Government Responsibility », cited above, p. 985.

374 Thus, in tort conflicts*, Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations,* known as « Rome II » provides for a specific choice of law rule in cases of transnational environmental pollution. Article 7 of that instrument gives the claimant a choice between the laws of the place of the conduct and the place of the harm. The technology integrates a private attorney general mechanism into the conflict of laws rule so as to ensure that private interest (in obtaining higher damages) coincides with the interests of the global commons (ensuring the highest available level of

an emerging « methodology of anticipation » aims to ensure that a situation or relationship created in a given forum will survive its cross-cultural transplantation to another legal order without « irritating » the receiving culture[375]. In family law, this may even be an attitude implicitly mandated by article 8 of the ECHR, which imposes upon the authorities at the receiving end a high degree of deference to situations officially created abroad[376]. This duty to anticipate may well entail a correlative duty on the creating court to monitor its own effects, ensuring that it is not imposing a relationship which is too disturbing to the local cultural ordering where they are destined to be implemented.

(ii) ***Responsibility and Sphere of Influence***

A second complementary pole correlates the ambit of social and environmental responsibility with the sphere of influence of the various non-state actors. On the one hand, the idea that jurisdiction should be coextensive with the responsibilty of a community towards the world has been developed convincingly in several quarters. Noting that « jurisdiction has always been about the way in which societies demarcate space, delineate communities, and draw both physical and symbolic bondaries », Paul Schiff Berman develops the idea of jurisdiction as assertion of community membership[377], entailing rights or interests[378], but also the correlative duty of the community to address issues relating to the conduct of its members elsewhere. Remarkably, this idea, which has similarly been offered as an explanation for the mutations of sovereignty in public international law[379], can also be found

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protection of the environment), all the while taking away the incentive for the strategic implantation of polluting factories upstream (or in case of cross-winds at the borders of the place of conduct), when the pollution is carried down towards a more lenient jurisdiction. In the field of international contractual relationships, *Regulation EC no 593/2008 on the law applicable to contractual obligations* « Rome I » aims to ensure that structurally weaker parties (consumers, workers or insurance policy holders) always benefit from the level of protection ensured by their country of residence or employment, by allowing party choice only when it improves of the local level of protection, guarding all the while against strategic barrier-crossing through forum-selection by rendering jurisdiction exclusive and blocking rogue foreign judgments. Both instances may be read as an attempt to give voice to the policies of the most affected community, all the while making room for overarching (Union) policies. Externalities imposed on those who were not present in the decision-making process are internalised. For more extensive discussion of the economic and constitutional function of these rules, see H. Muir Watt, « Aspects économiques », §219 s.

375 On « legal irritants », see Gunther Teubner, « Legal irritants : Good Faith in British Law or How Unifying Law Ends Up in New Divergence », 61 *Modern Law Review* 11, 1998 ; on this methodology impelled by the impact of human rights in cross-border situations, see above, p. XXX.

376 While the sweeping effect of human rights before the recognizing court has been principally illistrated in the field of family law, an excellent illustration of the idea of a correlative duty appears, outside this field, in the reading by US federal courts of the conditions for certifying classes, particularly the superiority requirement of article 23 (b) 3 Federal Rules of Civil Procedure, when a proposed class action has a vocation to include parties from abroad (*Vivendi*, 242 FRD 76 SDNY 2007; *Alstom*, 253 FRD 266, SDNY 2008).

377 « The Globalization of Jurisdiction », p.354, p.429. On the membership paradigm in private international law, see Michael Karayanni, Conference PILAGG, Sciences-po, March 16th 2012 (publication forthcoming).

378 See John Hart Ely, « Choice of Law and the State's Interest in Protecting its Own », 23 *William & Mary L Rev* 173 (1981).

379 B. Stern, «Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit », *A.F.D.I.* 1986, pp. 7-52. On the emerging principle of home country control over corporat e conduct abroad in the context of foreign investment, see M. Sornarajah, *The International Law on Foreign Investment*, p.155-157.

in judicial dicta : a notable example is the assertion by the US Court of Appeals for the Second Circuit the *Wiwa v. Royal Dutch Petroleum Co*, according to which the extraterritorial conduct of corporations is « our responsability »[380]. In the same vein, Jacco Bomhoff has proposed to integrate the separate idioms of private international law, state action and human rights, so as to frame questions of « reach of rights » and jurisidction as involving responsibility[381]. He observes very rightly that « the absence of the issue of responsibility from conflits thinking may be an important source of the field's internal confusions. The discipline's focus on authority and jurisidction may have contributed to an undervaluation of the themse of responsibility, duty, and positive obligation towards those who are in some way outsiders to the forum's legal order »[382]. All these ideas work together to correlate the scope of duties to spheres of influence of a given community.

But while the above examples concern public or ontological communities[383], a strikingly similar idea appears in respect of private actors in John Ruggie's proposal, contained in his report to the UN Human Rights Council on the issue of human rights and transnational corporations and other business enterprises, to correlate social responsibility for human rights violations with the corporate « sphere of influence »[384]. The duty to ensure compliance would thus extend along the chain of production to the sub-contractors in « widening circles of accountability ». Thus, "the scope of corporate responsibility for the respect of human rights is defined by the *actual and potential human rights impacts* generated through a company's own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents"[385]. While non-state actors attempt to gain « lift-off » from local mandatory rules, ensuring « touchdown » is making them accountable to third parties within their circles of influence. Here, of course, under the approach outlined above, responsibility is determined in the light of formal but also non-state norms, giving effect through private law tools to informal codes of conduct or imperfectly constitutionalised soft-norms, when they have shaped reliance or caused harm.

Conclusion

Lacking in horizon, private international law, like its public counterpart, has been largely apologetic of existing informal power structures and complicit in the inadequacies affecting the governance of private economic power through various denials, exceptions, implicit permissions and myths. Informal empire has largely benefited from the inhibitions of private international law and the correlative unleashing of private actors. However, none of the dogmatic foundations on which the expansion of private economic power has relied is irreversible. Contrary to the assumptions of the liberal-positivist model, there is no reason in

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380 226 F 3d 88 (2nd Cir 2000).

381 « The Reach of Rights : The Foreign and the Private in Conflict of Laws, State Action, and Fundamental Rights Cases with Foreign Elements », 70 *Law and Contemorary Problems* 39 (2008).

382 *Ibid.* p.70.

383 Within the meaning defined by Talia Fisher, in « A Nuanced Approach to the Privatization Debate », cited above FN 267.

384 John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2010.*

385 Ruggie Report, §57-58.

law that economic power beyond the state should not be disciplined, that private rule-making authority should not be made accountable, or indeed that the global commons be constantly abused. However, reversal of current trends on all these points means that private international law may and must come out of the closet and reappropriate its political function.

Reaching beyond the schism between the public and private spheres of international law, private international law should reclaim its governance potential and work to fill the holes created either by excluding or denying non-state authority. Paradoxically, when domesticated and thus reduced to dealing with the « private » sphere, it was actually disabled from taking the « private » seriously. To a large extent, « privatising » international law meant reducing its status – like that of classical private law[386] - to the merely facilitative. Used to enable but not to discipline, it was prevented from identifying and regulating private economic power, which it was complicit in unleashing from public contraints. By taking the 'private' seriously, its participation in the politics of international law could ensure that interests beyond the state – of which some require tethering while others strive for recognition - work towards the planetary good. It is contended here that private international law possesses the inner resources to respond appropriately to the challenges of private authority in the global arena.

In the words of Hannah Arendt, politics is the emergence of a plural public space for deliberation and emergence of power without domination[387]. There is hope that the politics of private international law may now ressemble this ideal, pursuing ways in which to recognize and tether private authority in a world in which state and non-state rule-makers coexist - in a (hopefully) « more mature international society », where « more oversight » is exerted[388]. By asserting its political dimension, law need not be disqualified as « law »; on the contrary, it can be seen as a process of construction of the political community[389]. However, it does mean that private international law as the constitution of private transnational governance needs to abandon the conceit of political neutrality – to the extent that neutrality is understood as an apology or a screen that prevents it from dealing head–on with the global expressions of non-state power -, and harness its tools to the protection of the planetary commons. Private autonomy should be concerned with responsibility as much as it means freedom from parochialism; voice should be given to affected communities ; multiple legalities should be re-anchored; process-based methodology should give way to clear preferences. The program may look ambitious if not utopian. However, as shown here, its implementation can start with an additional dose of self-awareness and some loosening-up of the tools which are already in place, once the walls of the closet are dismanteled and de-constructed.

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386 For this conception of private law, Anthony Ogus, « Competition Between National Legal Systems *:* A Contribution of Economic Analysis to Comparative Law », (1999) 48 *Int'l & Comp. L.Q.* 405.

387 Hannah Arendt, *La nature du totalitarisme.* Paris, Payot, 1990. Comp. Bernard Quelquejeu, « La nature du pouvoir selon Hannah Arendt », *Revue des sciences philosophiques et théologiques* 3/2001 (vol. 85), p. 511.

388 Robert Wai, « Conflicts and Comity in Transnational Governance » (cited above FN 7), p.250

389 See Emmanuelle Jouannet, « Koskenniemi, A Critical Introduction », in Martty Koskenniemi, *The Politics of International Law,* p.31.