Global Governance and Private International Law: Bridging or Widening the Gap? New Debates in Transnational Private Law

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If the often-denounced legal gaps in global governance are (at least partly) due to the "structural governance deficit" (Newell) of the global economy –the impotency of international law through its captured agenda (look at sovereign financial failure...)- and the intrinsic incapacity of national regulation to reach beyond the territorial or the domestic (look at the systemic effects of financial crisis...), what better way to fill them –one might ask- than to turn away from these Westphalian horizons towards Transnational Regulation, in an attempt to fill them? Straddling the public-private/municipal-international divide, Transnational Regulation may of course come in many forms or may convey diverse concepts. Here, we are focusing on the emergence of non–state substantive rules which make a claim to normativity in fora (origin) and over issues (reach) that are *beyond the state*.[1] Some may arise in settings which are self-designed for transnational model rule-making, often with a generalist or extensive agenda (UNCITRAL, UNIDROIT, and currently even the more traditionalist Hague Conference on private international law). Others may be the normative production of specialized bodies whose main livelihood or functionality is deciding disputes and producing a sort of case-law (ICC, ICSID arbitration) or providing rules to the private settlement of disputes (IBA Rules and Guidelines). Others, now designated under the label "Transnational Private Regulation",[2] are regimes which may not come equipped with autonomous courts, but which may involve standard-setting in highly specialized areas (protection of forests or food safety or indeed financial rating).

In such matters that seem to be self-contained in so far as they intend to achieve a transnational level, private international law sometimes appears to have disappeared from the playfield. However, private international law engages with these enterprises in various ways. Transnational model rules have traditionally been seen as being within the province of private international law (or sometimes competing it), or at least functionally germane to this field, no doubt because their subject-matter has been "private law" (in the main, commercial contracts). Private international law also embraces a debate about the empowerment of private, generally corporate, actors, to be governed by law-beyond-the state, usually in the context of a combined choice of non-state law and arbitral forum (*le contrat sans loi*). However, attempts to link these questions to issues of global governance have been limited. The global governance literature ignores private international law issues in

[1] And not *above* -although of course, we might arguably have included here, supranational courts' case-law and the normative production of specialized international organizations, such as the WTO and all those described by Jose Alvarez in *International Organizations as Law-Makers* (OUP, 2005). On the other hand, "private law beyond the state" in Michael & Jansens's definition (in "Private Law Beyond the State? Europeanization, Globalization, Privatization") might include national "private" law of public (or state) origin, which we also leave aside here, although it is of course traditionally the main focus of private international law.

[2] See F Cafaggi, "New Foundations of Transnational Private Regulation ", (2011) 38 *Journ. Law & Soc.* 20-49.

the main. And while there have been some attempts by insiders to frame it in a "meta-regulatory" role, it is often considered to be either so profoundly embedded in mainstream doctrine or so clearly harnessed to private corporate interests to be worth any more analytical trouble. However, the contention of this stream is that the links between private international law and global governance may be worth a more sustained effort in deconstruction. Here are, among many possible avenues, two contemporary issues:

I. The manufacture of soft-law in public institutional settings: autonomy or confusion?

II. "Transnational Private Regimes": multiple levels of regulatory capture

Readings:

- **On the emergence of TPR**: F. Cafaggi, "The New Foundations of Transnational Private Regulation", 38 *Journ. Law & Soc.* 20-23, 31-38 (2011)

- **On the role of "private entrepreneurs" in global regulation**: Mattli & Woods, "In Whose Benefit? Explaining Regulatory Change in Global Politics", in Mattli & Woods, *The Politics of Global Regulation*, Princeton (2009) 42, 43

- **On the paradox of a state-focused non-state governance:** R. Michaels, "The Mirage of Non-State Governance", *Utah L. Rev.* (2010) 31-45 (34-37)

- **On the need to integrate market-based regulation in public regulatory policies at national and international level**: D. Vogel, "The Private Regulation of Global Corporate Conduct", in Mattli & Woods, *The Politics of Global Regulation,* Princeton (2009) 184-188

- **On the possible meta-regulatory function of private international law**: J. Bomhoff & A. Meuweuse, "The Meta-Regulation of Transnational Private Regulation", 38 *Journ. Law & Soc.* 149-155 (2011)

- **On the use of private autonomy to stave off public regulation (a case-study)**: *comp.*: M. Heillener, "Filling A Hole in Global Financial Governance? The Politics of Regulating Sovereign Debt Restructuring", in Mattli & Woods, *The Politics of Global Regulation*, Princeton (2009) 105-120; *with* M. Waibel, "Opening Pandora's Box: Sovereign Bonds in International Arbitration", 101 *AJIL* 711 (2007)