

## **Private International Law as Global Governance\* : Beyond the Schism, from Closet to Planet**

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*Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distribution of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating 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. The explanation seems to lie in the development, under the aegis of the liberal separation of law and politics and of the public and the private spheres, of an « epistemology of the closet », a refusal to see that to unleash powerful private interests in the name of individual autonomy and to allow them to accede to market authority was to construct the legal foundations of informal empire and establish gaping holes in global governance. 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 on the balance of informal power in the global economy. Adopting a planetary perspective means reaching beyond the schism and connecting up with the politics of public international law, while contributing a specific savoir-faire acquired over many centuries in the recognition of alterity and the responsible management of pluralism.*

### *I. SCHISM : International Law and Global Private Power.*

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Increasing juridification of international politics<sup>1</sup> has situated public international lawyers as self-styled prime-movers in the design of a new normative ordering beyond the state<sup>2</sup>. The breaking of geo-political frames accompanying globalization heralds new functional and de-territorialized forms of sovereignty, points to alternative scenarios of global ordering, draws attention to the rise of fragmented functional regimes, points to hybrid actors and private rule-making, provides new opportunities for interdisciplinarity and breathes new life into the recurring debate on the real nature of international law as « law »<sup>3</sup>. Beyond international law's traditional « subjects »<sup>4</sup>, it conquers territories as 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 and transnational corporate actors and conflicting legal regimes<sup>5</sup>. Indeed, the « informal empire » that is currently unfolding in

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<sup>1</sup> The much heralded contemporary turn to law in the international arena (on its corollary, the multiplication of new supra-national law-makers : 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 »...). Moreover, even in the traditional field of relations between States, the core doctrines of legality and morality which underpin customary international law are 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 competition from political science and social theory in the field of new legalities beyond the state, see below, p.30.

<sup>2</sup> The rise of comparative constitutionalism and international federalism are emblematic of this trend : 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 Governance*, CUP 2009, p. 5 et s.

<sup>3</sup> 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. For a recent attempt 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. 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).

<sup>4</sup> 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).

<sup>5</sup> See M. Koskenniemi, *The Politics of International Law*, cited above FN 1, p.329, observing that public international law is invoked when multinational corporations wreak havoc on the environment, when States engage in religious wars, or when globalisation dislocates communities. These situations 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.

the shadow of global state-led politics, is the realm of the private<sup>6</sup>. Indeed, both « public » and « private » governance<sup>7</sup> of private economic authority<sup>8</sup> currently focuses intense pluri-disciplinary attention from politists, traditional, institutional and 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 contribute to thinking about power structures and legal change in a postnational context.

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<sup>9</sup>. As sovereign authority migrates to new sites in the informal global economy<sup>10</sup>, it appears to have

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<sup>6</sup> 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, 2<sup>nd</sup> Series, n°1 1953); comp. for the connection to (private) international law, v. M. Koskenniemi, « Empire and International Law : The Real Spanish Contribution », 61 *University of Toronto Law Journal* 1 (2011).

<sup>7</sup> Governance is defined by James Rosenau as « a more encompassing phenomenon than government. It embraces governmental institutions, but also subsumes informal non-governmental mechanisms whereby those persons and organisations within its purview move ahead, satisfy their needs, and fulfill their wants » (in Rosenau & Czempel (eds) *Governance without Government. Order and Change in World Politics*, CUP 1992). On the « governance turn » see Julia Black, « Constructing and contesting legitimacy and accountability in polycentric regulatory regimes », 2 *Regulation and Governance* 137 (2008). The term « governance » has been criticized as signaling the invasion of political science vocabulary and managerialism (Marty Koskenniemi, *The Politics of International Law*, cited above FN 1, 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 International Economic Law*, Hart Publishing, Oxford, 2011, p.240). 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 here, 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).

<sup>8</sup> See Claire A Cutler, *Private Power and Global Authority*, cited above FN 8, 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 FN 7; Graft-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.

<sup>9</sup> 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; Christopher A. Whytock, « Domestic Courts and Global Governance », 84 *Tulane Law Review* 67, 2009; Hannah Buxbaum, « Transnational Regulatory Litigation », 46 *Virginia JIL* 251; Andrew Guzman, « 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 Contemporary 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).

<sup>10</sup> See A. Claire Culter, *Private Power and Global Authority*, p. 36.

succumbed to some form of « post-national trauma »<sup>11</sup>, as if unable to survive the demise of the Westphalian<sup>12</sup> model<sup>13</sup> ? Despite the fact that the sovereign State's « loss of control »<sup>14</sup> is 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<sup>15</sup> with no further ado<sup>16</sup>. 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<sup>17</sup>. 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 Westphalian conceptual framework<sup>18</sup> 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, are the appearance of new sources of global 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. Indeed, in the eyes of some acute observers 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

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<sup>11</sup> David Kennedy, *The Methods and the Politics* », in Pierre Legrand & Roderick Munday, *Comparative Legal Studies : Traditions and Transitions*, CUP 2003, p. 345.

<sup>12</sup> 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 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.

<sup>13</sup> 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).

<sup>14</sup> Saskia Sassen, *Losing Control ? Sovereignty in an Age of Globalization*, Columbia Univ. Press, 1996.

<sup>15</sup> 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.

<sup>16</sup> In 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. And while the rise of human rights under the ECHR gives rise to heated debates over their scope and their universality, the specifically transnational element in the cases which come before the Court of Strasbourg is actually quite limited. 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 *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).

<sup>17</sup> 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.

<sup>18</sup> 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.

normativities<sup>19</sup>. 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 than ordinarily meets the eye<sup>20</sup>. 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<sup>21</sup> : 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 considerations of « conflicts » justice, community and harmony developed in that same field 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<sup>22</sup> - to step in at this point, focussing its energy on « polycentric regimes », which are at the heart of contemporary political science and social theory<sup>23</sup>. It might have made an essential contribution on those substantive issues which carry evident implications for global governance – issues as varied as the status of NGOs ; citizenship and immigration ; judicial use of secrecy in provisional injunctive relief ; the accountability of multinational corporate groups ; the impact of crossborder litigation (and the role of the courts) on the functioning of labour markets, financial markets or the environment ; the transnational dimensions of human rights violations ; ecology ; 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 epistemological challenges linked to the transnational expressions of private power ; to adapt its methodology so as to articulate the procedural standing of collective interests ; to link state action requirements with issues of extraterritoriality ; to make sense of « private » legal transfers or the multiplication of transnational functional regimes ; to question the extraordinary autonomy of international commercial and investment arbitration, and much more. 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

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<sup>19</sup> G. Teubner, « The Two Faces of Janus : Rethinking Legal Pluralism », (1992) 13 *Cardozo L Rev* 1443 .

<sup>20</sup> Robert Wai, « Conflicts and Comity in Transnational Governance », cited above FN 7, 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 » (cited above FN 6), 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.

<sup>21</sup> Martty Koskenniemi, *The Politics of International Law*, cited above FN 1, p. 352 observing that what appears to be at stake now in global governance arrangements is who (what institution, what regime) gets to decide.

<sup>22</sup> For a critical reflection the familiar concept of « conflicts justice » (as opposed to substantive justice »), see P. Picone, « Les méthodes de coordination entre ordres juridiques en droit international privé, RCADI, 2000, t.276, spec. p. 211 ; for a contemporary rehabilitation, 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.

<sup>23</sup> 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).

governance implications<sup>24</sup>. 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 new transnational legalities has disqualified it as too state-centered to be able to usefully contribute to the new needs of good governance on a global scale<sup>25</sup>. 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 above local constraints and defy the claims of the global commons.

This article aims to offer an explication as to why private international law has remained closeted<sup>26</sup> 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 transcendence<sup>27</sup>. It is suggested that, to a large extent, reinvesting or reinventing private international law as global governance relies upon a double paradox. On the one hand, de-closeting private international law in order to allow it to assert its own politics of global governance means not in some way « publicising » private international law<sup>28</sup> but, on the contrary, taking the « private » seriously : it implies addressing head on the expressions of private power, and mobilising the resources of - what may approximately be identified as - private law tools<sup>29</sup>. On the other hand, if it is to assert its planetary dimension, in the sense of being harnessed to a horizon of global good, it must not leave the local behind but must go about re-embedding governance in its social context.

Thus, 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<sup>30</sup> beyond the international political sphere and leaving it blind to the spread of private empire in the

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<sup>24</sup> This is not to say that there are not some outstanding 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. XXX (forthcoming) ; C. Kleiner, *La monnaie dans les relations privées internationales*, LGDJ 2009 ; Michael Karayanni, « Choice of Law under Occupation : How Israeli Law Came to Serve Palestinian Plaintiffs », 5 *Journ PIL* 2009.1 ; Jérémy Heymann, *Le droit international privé à l'épreuve du fédéralisme européen*, Economica 2010.

<sup>25</sup> See, again, Jacco Bomhoff & Anne Meuwese « The Meta-Regulation of Transnational Private Regulation », cited above FN 13.

<sup>26</sup> The reference here is to Eve Kosofsky Sedgwick'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 psychoanalytical metaphors in the field of global governance, see Gunther'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 « travelling theory », 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.

<sup>27</sup> On the loss of such a horizon – or of « secular faith » - in public international law, Martty Koskenniemi, « Informal Empire », cited above FN 6.

<sup>28</sup> However, this does not mean denial of its ongoing constitutionalisation in the European context, through human rights, or of the evident regulatory function it has already acquired in certain cases (see below p.48).

<sup>29</sup> For further analysis of the « private » in private law, see below p.30.

<sup>30</sup> From the Latin, *ancilla*, female servant.

unregulated normative space beyond the state. Hampered by the Westphalian premisses of modernity and territory<sup>31</sup>, it has not been able to tether unleashed private interests, make room for collective goods of planetary concern, nor grapple with the black holes opened by the confiscation of transnational adjudication and regulation by private entities. This does not mean, however, that private international law is condemned to remain in the closet and that it cannot assume its global governance implications. It has, in this sense, its own « private » history<sup>32</sup>. Perhaps counterintuitively, the liberation of the governance potential of private international law involves reconsidering the real significance of the much contested public /private divide, since the methods associated with private law may still be the most effective in the global arena in tethering private power and reconnecting fragmented sources of norms. Taking the private seriously may work to ensure the social reembedding of law, in the service of the planetary commons. We shall thus consider in turn, the schism (I), the closet (II), and the planet (III).

## I. SCHISM : International Law and Global Private Power.

Who 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 Alstom*, from the toxic trajectory of the *Probo Koala* to torture and murder as in *Kiobel*<sup>33</sup>, an autopsy of the recurrent humanitarian scandals and financial crises associated with late capitalism<sup>34</sup> show up the « gaping holes of global

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<sup>31</sup> 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 aggregation 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. too 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 Enlightenment 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).

<sup>32</sup> Alex Mills, *The confluence of public and private international law*, cited above FN 22, spec. Chapter 2, p.26 et s..

<sup>33</sup> 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.

<sup>34</sup> On crisis as the dark side of modernity, see Karl Polyani, *The Great Transformation : The Political and Economic Origins or four Time*, Boston, Beacon Press, 1944, reedit. 2001, stigmatising the consequences of « disembeddedness » ; 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 Differentiation*, Hart, 2011, p.3 et s.

governance »<sup>35</sup> as cases which fall between public and private sources of legal discipline<sup>36</sup>. Although the very concept of a global governance gap has been challenged, in view of the plethora of potentially relevant rules and norms<sup>37</sup>, the gaping holes are not necessarily the result of inaction on the part of states, nor indeed of the lack of specialised private regimes in various areas<sup>38</sup>. Rather, they often cover instances of abuse of power by non-state actors whose claim to private authority goes unchecked<sup>39</sup>, or the structural bias of international legislation whose content supports alliances of strong private interests<sup>40</sup>. 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 a source beyond the state, but that whatever rules there are appear to lack a transcendent 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 tether 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<sup>41</sup>, private international law might have been expected to

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<sup>35</sup> 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 Governance ? The Politics of Regulating Sovereign Debt Restructuring », in Walter Mattli & Ngaire Woods, *The Politics of Global Regulation*, Princeton Univ. Press, 2009, p. 89.

<sup>36</sup> For an excellent 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.

<sup>37</sup> 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.

<sup>38</sup> See Harm Shepels' description of « thousands upon thousands » of private standards, in *The Constitution of Private Governance*, cited above FN 7, p. 404. On the phenomenon of multiple legalities, see below p.34.

<sup>39</sup> 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 transnationales : 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.

<sup>40</sup> In the field of private international law, the example of international maritime conventions on the allocation of responsibility as among the cargo and the carriers, behind the equally conflicting interests 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 Definition 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 légitimité dans la gouvernance globale : le rôle et les mécanismes des acteurs non-étatiques dans les organisations internationales productrices de droit », PILAGG Workshop, Paris, Sciences po 2011 (forthcoming).

<sup>41</sup> 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 French translation, Santi Romano, *L'ordre juridique*, (par P. François et P. Gothot, Dalloz, 1975). For a critical analysis

contribute some of the tools needed in this « global disorder of normative orders »<sup>42</sup> 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 potential is clearly inhibited, and indeed, rarely articulated in contemporary accounts of private international law<sup>43</sup>. The explanation seems to lie in the separation which occurred when, under the aegis of international liberalism, 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, where it was managed distinctly by each national polity. At this point, when politics of the global legal order were constructed as separate from the transnational market<sup>44</sup>, and framed as the relationships between sovereign states, private international law was simultaneously disqualified and disempowered, leaving the informal economy to develop along its own path. 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*<sup>45</sup>.

Informal empire therefore results to a large extent from the schism within international law and the subsequent inhibitions affecting the sole source of governance which was fitted to apply to private, or non-state, power<sup>46</sup>. Private international law became curtailed-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<sup>47</sup>, and enthusiastically assertedly its own independence from politics and its correlative impotence to tether the private interests which gradually soared over the reach of national regulation. Although no doubt unorthodox in this context, the use of Queer theory<sup>48</sup> to understand the relationship between the two « bodies » of international law helps identify the symptoms of this inhibition of private international law's governance potential, showing it up as the result of a division of labour between the

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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.

<sup>42</sup> Neil Walker, « Beyond boundary disputes and basic grids : Mapping the global disorder of normative orders », *Int'l Journ Constitutional Law* (2008) 6, 373

<sup>43</sup> See however the contributions to a new thinking, cited above FN 9.

<sup>44</sup> 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.

<sup>45</sup> Martty Koskeniemi, « Empire and International Law » cited above FN 6.

<sup>46</sup> 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) : see on this point, below, p.25. 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.

<sup>47</sup> 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 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.

<sup>48</sup> See above FN 29

political and economic spheres, which liberalism keeps carefully distinct<sup>49</sup> while ostensibly subordinating the private to the public, the market to government. 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<sup>50</sup>. It is proposed here to look at the genesis of the schism<sup>51</sup> 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 Politics Became Severed from the Legal Order.**

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<sup>52</sup>. Since this apology required that the (Western) sovereign state should be the sole protagonist of international politics, such monopoly was then represented as an integral part of the Westphalian legal ordering<sup>53</sup>. Private actors, their status, transactions and conduct, previously regulated in the transnational sphere by the *ius gentium*, were accordingly excluded and relegated to private international law. Waning within the closet, its own private history repressed<sup>54</sup>, its apolitical neutrality became a dogma, attributed to its affiliation with natural reason<sup>55</sup>. This development was of course anything but the natural course of things !

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<sup>49</sup> As it does the public and the private, state and society, market and government. 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 FN 8, 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 Philippe Jestaz & Christophe Jamin, *La Doctrine*, Dalloz, 2004, p. 120 et s.).

<sup>50</sup> On the tragedy of the global commons from the perspective of private international law, see H. Muir Watt, « Aspects économiques » cited above FN 50, p.273 et s.

<sup>51</sup> The reference is to Lacan's psychoanalytical theory of the severance (« *la Schize* ») of the conscious and the unconscious. The image is used here to emphasise the split which took place within the body and psyche of international law, while emphasising the importance of language (the rhetoric of international law) in constituting its schizophrénia.

<sup>52</sup> 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 FN 6.

<sup>53</sup> On the mythology which has grown up around the concept of Westphalian legal order, see above FN 30.

<sup>54</sup> On the « private history » of (private) international law, see Alex Mills, *The confluence of public and private international law*, cited above FN 22, spec. Chapter 2, p.26 et s.

<sup>55</sup> The supposed « naturalness » of the principles of private international law owes a considerable 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 conflicts methodology. On the mythology involved, 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) . 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,

In an interesting twist, « private international law » was first coined as a name by Joseph Story in an effort to strengthen its governance pull in a political combat between violently conflicting societal policies in the emerging American Confederation<sup>56</sup>. Its political potential in mediating jurisdictional claims in the medieval world of multiple princedoms and city-polities, customary norms, and overlapping allegiances<sup>57</sup>, had however 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<sup>58</sup>. The conflict of laws then came to be invested with a largely political mandate in supporting the territorial framework of local power in pre-revolutionary France<sup>59</sup>, 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<sup>60</sup>.

However, this political function of private international law became « pasteurised » with the emergence of modernity<sup>61</sup>. 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, severally, territorially and exclusively, the regulation of local public goods. The promotion of the informal transnational economy was thereby deputized to private interests, which expanded unchecked, extra-territorially<sup>62</sup>. The essential consequence of this emergence of an autonomous legal ordering of sovereigns, and the subsequent 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 both as between princes, and as between

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Cheltenham, 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 FN 3. 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.

<sup>56</sup> 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).

<sup>57</sup> 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 2<sup>nd</sup> 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 overlapping authority and multiple loyalties) more than the more immediate organised world of national markets and nation-states.

<sup>58</sup> See Martty Koskenniemi, « Empire and International Law » cited above FN 6, 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.

<sup>59</sup> 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*.

<sup>60</sup> 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 », cited above FN 6, p.32.

<sup>61</sup> 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.

<sup>62</sup> On colonialism and private empire, see Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law*, Cambridge, Cambridge University Press, 2005.

merchants<sup>63</sup>. Indeed, the convergence between local economy and domestic polity, law and state, territory and market, the public and private, meant that beyond state borders and state control, international economic and financial relations, duly separated from the political, were no longer subjected to any common horizon of public values. 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)<sup>64</sup>.

The fundamental paradox of international law is that this supremacy of the public has led to an extraordinary empowerment of the private, demurely 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 exclusionary ethos of sovereignty and the imperious requirements of the public international legal ordering. In turn, doubly disempowered. It could neither provide an appropriate transnational regime to discipline actors beyond the state, nor subject private normative regimes<sup>65</sup> to principles of transparency and accountability. Its mimicry of public international law's exclusions actually facilitated expansion of informal empire<sup>66</sup>. 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<sup>67</sup> - a prescriptive monopoly in either sphere, the liberal model has induced a denial of private authority and law-making in the global arena<sup>68</sup>.

## **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<sup>69</sup>. Diagonal relationships (between private actors and foreign

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<sup>63</sup> 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 FN 6).

<sup>64</sup> 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 FN 3.

<sup>65</sup> 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.

<sup>66</sup> While private international law mimics its public counterpart in its apology of politics (on this apology, see Martty Koskenniemi, *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).

<sup>67</sup> 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.

<sup>68</sup> 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*, cited above FN 8, p.64.

<sup>69</sup> 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 Internat'l L J*, 2002).

states) defied classification in either category and were therefore off the legal map<sup>70</sup>. In many fields, the separate spheres were hardly differentiated, in the beginning, in terms of substantive content, since much of customary public international law replicated liberal contract theory. Tensions and contradictions in liberal international theory became apparent however, when « providential » public international law 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<sup>71</sup>. This new status of individuals as right-holders disturbed the rarefied atmosphere of public international law<sup>72</sup>, but instead of redesigning its boundaries so as to adjust public discipline to private sovereignty, the aftermath has been a series of outcomes which tend to work one-way only, to protect or liberate private economic power. Although there are many other possible illustrations of the internal inconsistencies of the classical theory of sovereignty<sup>73</sup>, 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

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<sup>70</sup> On the (legal acrobatic) 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 fédéralisme européen*, Economica, 2010.

<sup>71</sup> 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

<sup>72</sup> 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 FN 6), 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 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).

<sup>73</sup> Among other inconsistencies, there may be private champions behind the sovereign veil in international arenas such as the WTO or the UN. See Diego Fernandez Arroyo, « Private Interests in International Negotiations » (PILAGG workshop, Sciences po 2012, forthcoming). 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). 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.

principles applicable to states (a), while, conversely, states may find their sovereignty clipped in the name of public international law in private investment arbitration (b), or indeed may be called to heel 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 accountability or private responsibility<sup>74</sup>. Thus, 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 under the law of nations<sup>75</sup>. 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<sup>76</sup>. However, 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*<sup>77</sup> - for human rights violations abroad<sup>78</sup>. Beyond the

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<sup>74</sup> Claire A Cutler, *Private Power and Global Authority*, cited above FN 8, p 14; Dan Danielson, « How Corporations Govern : Taking Corporate Power Seriously in Transnational 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. 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 FN 8) denotes a lack of any specific claim to its exercise within the parameters of legitimacy as applicable to state-centered power.

<sup>75</sup> Traditionally, corporate liability is doubly derivative 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); then it is up to the defendant state to deal with the offending private actor. However, one of the potential avenues for change would be to institute state liability for corporate misconduct. 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 sociétés transnationales », in Isabelle Daugrueilh (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 » (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).

<sup>76</sup> 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.

<sup>77</sup> 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 “specific, universal, and obligatory,” 542 U.S. at 732.

<sup>78</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 142 n.44 (2d Cir. 2010).

politics<sup>79</sup> and the economics<sup>80</sup> of this refusal, its legal foundations are hotly contested in other Circuits<sup>81</sup> and currently under attack before the Federal Supreme Court<sup>82</sup>. Yet while the resulting impunity of multinational corporations has been widely criticised<sup>83</sup>, one of the strongest critiques of *Kiobel* seems to be methodological: 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<sup>84</sup>. 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!

On the other hand, the wider dissymmetry 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

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<sup>79</sup> 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.

<sup>80</sup> 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 constitutes 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.

<sup>81</sup> United State Court of Appeals for the District of Columbia Circuit, *John Doe Viii, v. Exxon Mobil Corporation*, January 25<sup>th</sup> 2011; United States Court of Appeals, Seventh Circuit, *Flomo v. Firestone Natural Rubber Co., Llc*, July 11<sup>th</sup> 2011.

<sup>82</sup> The plaintiffs in *Kiobel v. Royal Dutch Petroleum Co.* filed their petition for *certiorari* in June 2011.

<sup>83</sup> 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 ».

<sup>84</sup> 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).

- has stepped down. Outside the confines of competition law<sup>85</sup>, 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, and even then the victims may be disempowered through *forum non conveniens* or territorialist principles of choice of law<sup>86</sup>. 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 by international law in order to choose the location with the least share-holder regulation (within the great markets for corporate charters within the US or the EU), or the least costly stake-holder protection (in delocalized industrial sites)<sup>87</sup>. The plight of the many victims of industrial disasters in cases such as *Bhopal*<sup>88</sup> and *Lubbe*<sup>89</sup>, along with the many other helpless claimants under the *Alien Tort Statute* – whom the European Union has as yet done nothing to help<sup>90</sup> - bear ample witness to the governance void.

**b. Private power trumps public sovereignty.** Another instance of the public/private divide being turned on its head can be found in the context of international investment arbitration<sup>91</sup> – which will often concern private investment by multinational corporate actors in the field of natural resources such as oil and gas. These happen to be the areas which give rise most frequently to allegations of human rights violations and environmental damage. Here, attempts by the host state to regulate or reclaim natural resources in the name of the local public good<sup>92</sup> are neutralised through the liberal (private) contract law which international law is claimed to have absorbed<sup>93</sup>. The legal status of « State contracts » - contracts between private investors and sovereign states - has long given rise to legal acrobatics in order to by-pass the constraints of the Westphalian model. Private arbitrators designed to avoid state courts – unacceptable to the investor if they are the host state's, and unacceptable to the 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

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<sup>85</sup> For private law orthodoxy, competition law is not « law », but a (mere) form of economic engineering : see for an emblematic example of such a position, *Bruno Oppetit*, « Droit et économie », *Archives de philosophie du droit*, Sirey, 1992, p. 19-28.

<sup>86</sup> 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 » cited above **FN 50**, p.228 et s..

<sup>87</sup> 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 employeers, 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 dissertation, IUE Florence, September 2011.

<sup>88</sup> *In re Union Carbide*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 199 (1987).

<sup>89</sup> UK House Of Lords, *Lubbe and Others and Cape Plc.* [2000] UKHL 41 (20th July, 2000).

<sup>90</sup> 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.

<sup>91</sup> See José E. Alvarez, « Contemporary Foreign Investment Law : An Empire of Law or Law's Empire », 60 *Alabama L Rev* 943 (2008).

<sup>92</sup> 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.

<sup>93</sup> 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.

*Grundlegung*<sup>94</sup>, investors in foreign lands may hoist themselves by virtue of contract into the hospitable atmosphere of international law.

The ICSID Convention<sup>95</sup> and its network of bilateral investment treaties have 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 - through the liberal principles of contract law which remain staunchly in the lap of customary international law. While contract claims and treaty claims are theoretically distinct<sup>96</sup>, the use of « umbrella clauses »<sup>97</sup> 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. Thus, in the *Chevron saga*<sup>98</sup>, 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. That such award may well be 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

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<sup>94</sup> 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-subject 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.

<sup>95</sup>

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.

<sup>96</sup> Ivar Alvik, *Contracting with Sovereignty, State Contracts and International Arbitration*, OUP 2011, p. 177

<sup>97</sup> 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 clause de respect des engagements 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.

<sup>98</sup> See : Permanent Court of Arbitration at the Hague, Interim award of 9th February 2011 ; District Court, Southern District of New York, Orders of February 7th and 6th April 2011 ; Court of Sucumbíos, Lago Agrio, Ecuador, Judgment of February 14th 2011 ; Federal Court of Appeals for the Second Circuit, Judgment of 17th March 2011. On the whole saga see H. Muir Watt, *Rev crit DIP* 2011.339. The arbitration under the BIT here was an UNCITRAL arbitraion, but the legal devices used are those described in the text.

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. An illustration<sup>99</sup> taken from the field of sovereign debt shows how the same corporate actors (or their avatars<sup>100</sup>) 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 »<sup>101</sup> 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<sup>102</sup> : when states take advantage of the market, 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 *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 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 – a private act for which sovereign immunity is unavailable<sup>103</sup>.

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 exercise a rule-making authority analogous to private sovereignty, they should be subject by the same token to the discipline imposed by international law upon sovereign states. Apparently, however, the analogy does not work in that direction. One notable consequence is that

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<sup>99</sup> 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 FN 91).

<sup>100</sup> The examples that follow tend also to involve corporations involved in 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.

<sup>101</sup> *Republic of Argentina v. Weltover, Inc.*, 504 US. 607 (1992)

<sup>102</sup> 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 jurisdiction like France where the case law may not have closed the doors entirely to purpose (see Cass. Civ 1<sup>re</sup>, 25 févr. 1969, *Société Levant Express* JDI 1969.923, note Ph. Kahn, *Rev crit DIP* 1970.98, note P. Bourel).

<sup>103</sup> 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).

« vulture funds »<sup>104</sup> - are able to syphon off development aid allocated to highly impoverished countries<sup>105</sup>, having bought up distressed sovereign debt under the private law status 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<sup>106</sup>. 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 than \$55million by a British Virgin Island-based hedge fund against Zambia, such disputes must be approached as « legal questions » and not as « questions of morality or humanity»<sup>107</sup>.

Indeed, hold-out litigation by predatory hedge-funds paralyzes debt rescheduling agreements, and generates additional bounties provided by private contract law. Sufficient investment in adversarial litigation<sup>108</sup> can ensure that contractual clauses in international loan agreements are made to mean what they do not necessarily say. Thus, in *Elliott v Peru*<sup>109</sup>, a vulture fund obtained an *ex parte* order from the Court of appeals of Brussels to block a large

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<sup>104</sup> 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)

<sup>105</sup> For a clear account of the problems raised by vulture funds, with numerous references, see Human Rights Council, 14th Session, *Report of the Independent Expert Cephias Lumina on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and 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).

<sup>106</sup> 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.

<sup>107</sup> *Donegal v Zambia*, (2007) EWHC 197 (Comm)

<sup>108</sup> Vulture tactics have generated a wealth of precedents eroding sovereign immunity throughout the Western world. Does this prove 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) ?

<sup>109</sup> 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).

payment by Peru on its loan bonds to European holders via Euroclear. The ground was 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. 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<sup>110</sup>. Currently, although the case-law hardly encourages any optimism<sup>111</sup>, 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)<sup>112</sup>, 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 2010*<sup>113</sup>). However, this has not prevented a renewed air raid by vulture funds sweeping down in the past few months on Greek sovereign debt.<sup>114</sup> Moreover, were the courts to become less hospitable, international investment arbitration appears now to be ready to open its doors to holders of sovereign bonds. This new « Pandora's box »<sup>115</sup> is largely the consequence of the abdication of private international law, due to 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,

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<sup>110</sup> 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.

<sup>111</sup> 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.

<sup>112</sup> 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.

<sup>113</sup> 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. Consequently, 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)

<sup>114</sup> 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.

<sup>115</sup> Michael Waibel, « Opening Pandora's Box: Sovereign Bonds in International Arbitration », 101 *Am. J. Int'l L.* 711 (2007).

without the duties attached to statehood. However, not only has private international law been made impotent to rise to the challenge of private power, but it also became complicit in developing the very tools by which states « lost control »<sup>116</sup> and private actors engineered their own « regulatory lift-off »<sup>117</sup>. In other words, as a direct consequence of the schism between the two bodies of international law, the domestication of private international law led to its developing its own private, 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 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 axiological neutrality of its process-based focus<sup>118</sup>, 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<sup>119</sup>. Relegated to the « domestic » sphere<sup>120</sup>, where in the shadow of the Comity of princes<sup>121</sup> or the « clash of titans »<sup>122</sup>, its modest – decorous<sup>123</sup>, decorative<sup>124</sup> and homely<sup>125</sup> - 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 - responsibility, 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

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<sup>116</sup> Saskia Sassen, *Losing Control ? Sovereignty in an Age of Globalization*, Columbia Univ. Press, 1996.

<sup>117</sup> Robert Wai, « Transnational Liff-off And Juridical Touchdown: The Regulatory Function Of Private International Law In An Era Of Globalization », 40 *Colum. J. Transnat'l L.* 209

<sup>118</sup> 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*, cited above FN 57, n° 329 s.

<sup>119</sup> 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.

<sup>120</sup> 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.

<sup>121</sup> See Joel Paul, « Comity In International Law », 32 *Harv. Int'l L.J.* 1.

<sup>122</sup> 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).

<sup>123</sup> The ethos of private international law, expressed through a special concept of « conflicts justice », is traditionally considered to be harmony, coordination and order (see for example, Alex Mills, *The Confluence of Public and Private international Law*, cited above FN 22, p. 16 et s.).

<sup>124</sup> 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 initiative 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*, cited above FN 57, n° 360 s.

<sup>125</sup> 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 is an interesting case about 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 jurisprudence de droit international privé*, Dalloz, 5th ed, 2006, n° 1.

beyond the state. Here again, understanding how the closet came to be constructed (A), helps reveal the implications of its epistemological 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<sup>126</sup>. At the turn of the 20th century, the « gentle civilisation » of modern Euro-centric, colonial, public international law<sup>127</sup> 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 various conventions unifying the rules of conflict of laws. A worldwide network of « signpost » rules<sup>128</sup>, 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 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, only private interests (no policies, no politics) were supposedly involved in the design of the conditions of peaceful coexistence of world society. Sharing similar ideals and resolutely orientated towards the search for commonalities among legal systems<sup>129</sup>, comparative law would lend its resources to ensure uniform judicial interpretation of private law categories and concepts<sup>130</sup>. And when, accidentally, a source of international disagreement arose, benevolent liberal

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<sup>126</sup> 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 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.

<sup>127</sup> See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002).

<sup>128</sup> See above FN 114. Such rules were rejected by the US functionalist « revolution » of the 1960s, but have survived in European tradition, in a more flexible version (see Symeon Symeonides S, « The American Choice of Law Revolution in the Courts : Today and Tomorrow », RCADI 2003, t298, p.13; 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', *Tulane Law Review*, 82 (2008), 1741–99).

<sup>129</sup> 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).

<sup>130</sup> 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).

courts would act with regard for international Comity<sup>131</sup>, counting on the delightful intricacies of *renvoi* and incidental questions to help smooth the path towards harmony<sup>132</sup>. However, by the time that it was discovered that legal cultures were neither convergent<sup>133</sup> nor indeed converging<sup>134</sup>, the universalist ideal had been swept away in the wake of the nationalisms prior to the Great War.

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 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 »<sup>135</sup>. 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<sup>136</sup>. Shadowing these limits, private international law was equally indifferent to substantive outcomes, except when the foundations of civilisation were threatened ; such neutrality was justified by the reality, then

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<sup>131</sup> 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.

<sup>132</sup> On these devices (and their inherent methodological contradictions), see D. Bureau & H. Muir Watt, *Droit international privé*, cited above FN 57, n° 359 et s..

<sup>133</sup> 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 categorizations 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 ?

<sup>134</sup> 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.

<sup>135</sup> 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.

<sup>136</sup> International law required equality only as between the European states : see Martty Koskenniemi, *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. 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 : Conditions et limites de la tolérance. Essai sur le pluralisme juridique, Paris I, 2002*).

the fiction, of a commonality of private laws<sup>137</sup>. It may be 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<sup>138</sup>. The latter hypothesis certainly seems to play out in private international law. The sanctuarisation of the public sphere and the correlative domestication of the private led ultimately to the autonomy of the latter and to a complete reversal of the dominance of private interests over the public.

Politics, then, were squeezed out of liberal private international law, at the same time as its links were severed with public international law and the heritage of the *ius gentium*<sup>139</sup>. Beyond its supposed indifference to substantive outcomes, its proclaimed apoliticism, like that of public international law, served – and still serves, in the European tradition<sup>140</sup> - 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<sup>141</sup>. Deprived of any systemic vision, private international law settled down to a quiet and homely life, viewing the field of informal international economy through the 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 functionalism<sup>142</sup>. 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<sup>143</sup>. 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<sup>144</sup>. If anything, the impact of federalism (US) or quasi-federalism (EU) was to give greater attention

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<sup>137</sup> Von Savigny's « invention » of multilateral conflict rules (see above FN 54, 114) came accompanied with an explicit caveat that this methodology was workable only within the Romano-Christian cultural community composed of the various German princedoms.

<sup>138</sup> See Ugo Mattei and Luigi Rossi, « The Evil Technology Hypothesis : A Deep Ecological Reading of International Law », XXXX

<sup>139</sup> 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 Koskeniemi 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).

<sup>140</sup> 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.

<sup>141</sup> 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 Enlightenment tradition of the great Codes) or common sense (in the common law tradition). See D. de Béchillon, « L'imaginaire d'un code », t 27, 1998, p. 173; « Le discours du Code. Regard comparatiste », *Droits*, t42, 2005, p.49

<sup>142</sup> 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.

<sup>143</sup> On the regulatory nature of European private law, see F. Cafaggi & H. Muir Watt, *The Regulatory Function of European Private Law*, Elgar, 2009 cited above FN54 ; on the incidence of this regulatory perspective on choice of law, see H. Muir Watt, « Aspects économiques » cited above FN 50, §206 et s.

<sup>144</sup> 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. 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 » cited above FN 50, §134 et s.

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<sup>145</sup>, is largely reflected in its increasingly sophisticated methodological content. 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, harnessed to the conservative political ideal of spontaneous cultural ordering, became a song to positivism, through an extraordinary narrative of progress and enlightenment<sup>146</sup>. 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<sup>147</sup>: this meant that all legal institutions had to fit into Romano-Germanic categories, and were otherwise denied a voice in the international legal ordering<sup>148</sup>. As Pierre Gothot has pointed out, the Savignian mythology created a closed world<sup>149</sup>. The claims of different legalities were disconnected from their social context, then deviant institutions rejected beyond the pale. Indeed, 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...<sup>150</sup>.

The various doctrines elaborated under the mythological aegis of savignism barely disguised a set of « escapes » which had become necessary as the world became progressively 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 innocent order and reason. While the model was rejected in the United States in the sway of legal realism<sup>151</sup>, European methodology dealt with tensions within the classical vision by allowing

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<sup>145</sup> 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 *Hrv. L. Rev.* 173 (1933). The traditional methodology, dogmatic and mechanistic, 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).

<sup>146</sup> Pierre Gothot, « Simples réflexions à propos du saga des conflits de lois », *cited above FN 55*. 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!

<sup>147</sup> See on this point, the comparative work of Pierre Legrand, *cited above FN 126, 131*.

<sup>148</sup> 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.

<sup>149</sup> Pierre Gothot, « Le renouveau de la tendance unilatéraliste », *Rev. crit. DIP* 1971.1.

<sup>150</sup> See Didier's account of colonial interlegality in *L'ordre public: Conditions et limites de la tolérance* (*cited above FN 66*).

<sup>151</sup> See above, *FN 141*.

an increasing number of exceptions to the multilateralist scheme<sup>152</sup>. 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 derogatory substantive policies, « ordre public », or the international reach of fundamental rights protected by the ECHR<sup>153</sup>. Meanwhile, the increasing significance of jurisdictional conflicts, the systematic practice of forum shopping and the gradual emergence of a « global market for judicial services »<sup>154</sup> highlighted, by the end of the century, the overwhelming presence of private and political power in transnational litigation<sup>155</sup>. Curiously, nevertheless, the denial persists, and private international law is perceived not to be involved in the messy arena of global economics or politics, and is certainly ill-suited to affront the enormous regulatory void beyond the state.

## B. The Implications of Tunnel–Vision

Behind their « loss of control » over the inexorable forces of globalisation, therefore, states have been largely complicit in the development of the informal empire which now threatens to overwhelm them<sup>156</sup>. Private international law's denials have played an active part in this complicity. For example, while rating agencies are surely to blame for significant deleterious effects on interconnected markets<sup>157</sup>, private international law has done nothing to

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<sup>152</sup> D. Bureau & H. Muir Watt, *Droit international privé*, cited above FN 57, n° 518 s, on the progressive exceptions and adjustments which came to be derided by American functionalism as « escapes ».

<sup>153</sup> *Ibid*, n°540 s.

<sup>154</sup> 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).

<sup>155</sup> 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 responsibility : see on the notorious *Trafigura* case, H. Muir Watt, case-note, *Rev crit DIP* 2010.495

<sup>156</sup> 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 American 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*, cited above FN 7, p.406 et s.). Indeed, "markets have always obscured distributive issues and helped diffuse blame for negative economic consequences" (Louis W. Pauly, "Global Finance, political authority, and the problem of legitimation", in Bruce Hall & Thomas J. Biersteker *The Emergence of Private Authority in Global Governance*, cited above FN 8, 76, p.77.

<sup>157</sup> See 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, « Intermediaries Revisited. Is Efficient Certification Consistent with Profit Maximization ? », *University of Southern California Law and Economics Working Paper Series*, n°137.

prevent conflicts of interests from festering behind the « issuer-pays » principle<sup>158</sup>. Similarly, it has done little, as seen above, in taming multinational corporate misconduct. The domestication of private international law has produced a form of epistemological tunnel-vision in this respect, actively providing immunity and impunity to abusers of private sovereignty. Such lack of horizon has deprived it of an adequate theory of conflict, blinds it to distributional bias, attaches it to an inadequate geography of private economic activity, occults the rise of powerful new legalities beyond the state and causes it to lose sight of its own systemic consequences. These inadequacies are the direct result of the current apolitical politics of private international law, which moreover posit them to be inevitable and thus inhibit legal change :

*a. No theory of (public or private) conflict.* The misnamed « conflict of laws » has developed, if any, a very tame conception of conflict, which is hardly conducive to the identification and treatment of informal power. In the modern, state-centered European tradition, « conflicts » are reduced to the abstract availability of multiple laws<sup>159</sup>. The break with the pre-modern vision of colliding statutes involved a pasteurisation of conflict itself, in which clashes of public power were watered down<sup>160</sup> and private power became invisible through the lens of the principle of party autonomy. 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 liberalization of requirements relating to circulation of foreign judgments and arbitral awards<sup>161</sup>. By contrast, in the context of the US functional approach,

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<sup>158</sup> See Mathias Audit, « La responsabilité des agences de notation en droit international privé », *Rev crit DIP* 2011.XX (forthcoming), showing that private international law issues are both rife in this field and remarkably untended.

<sup>159</sup> 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.

<sup>160</sup> Policy-driven, preemptory norms (« lois de police ») are an embarrassment, 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 » (comp. « Rome II » article 16 : « Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation »):

*1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*

*2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*

*3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

<sup>161</sup> 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.

(« 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<sup>162</sup>. Likewise, transnational regulatory adjudication appeared at one point to be investing the US courts with a governance role in the global arena<sup>163</sup>, while 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<sup>164</sup>. 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<sup>165</sup> are designing their own normative space through contract with the approval of the courts. Illustrations 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<sup>166</sup>. Another notorious example is *Lloyds’* successful enforcement 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<sup>167</sup>. 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 preemptory 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<sup>168</sup>.

**b. Inadequate corporate geography.** Through its continued focus on territory, private international law adopts an entirely inadequate industrial geography, hindering its ability to

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<sup>162</sup> On this evolution, see Symeon Symeonides, ‘The American Choice of Law Revolution in the Courts: Today and Tomorrow’ *RCADI* 2003, vol 298, 13.

<sup>163</sup> 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).

<sup>164</sup> The overly cautious approach applied 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. This 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”.

<sup>165</sup> 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-off » according to Robert Wai’s term (see « Regulatory Liftoff and Jurisdictional Touchdown », cited above FN 117).

<sup>166</sup> On the *Chevron* saga, see above FN 95.

<sup>167</sup> 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).

<sup>168</sup> For a more detailed account, see H. Muir Watt, « “Party Autonomy” in international contracts », cited above FN 161; comp. Nils Jansen & Ralf Michaels, « Private Law Beyond the State », cited above FN 3, 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).

capture the effects of economic domination in contexts of dependance<sup>169</sup> whenever such domination occurs « extraterritorially ». In corporate geography based on the management of rates of profit on a global scale, the (dismal) sites of production migrate to countries where, behind the sovereign veil, international competition for investment pushes standards down. Private international law has been largely complicit in the bounding of corporate social responsibility, kept within the limits of compartmented, local law through *forum non conveniens*, and the *lex loci delicti*<sup>170</sup>. Whether formulated in terms of state action doctrine, conflicts of laws or the reach of rights<sup>171</sup>, territoriality has to a large extent curtailed the ambit of human rights<sup>172</sup>, of public economic regulation<sup>173</sup> or of constitutional provisions<sup>174</sup>. It is only recently that a certain questioning of territoriality has emerged in connection with corporate social responsibility, showing up « extraterritoriality » as merely a way of framing a problem rather than expressing intrinsic limits<sup>175</sup>. There is no reason why the state in which a corporate group is headquartered should not regulate that group's delocalised industrial activity elsewhere : it is certainly not territoriality – whatever that means - which prevents actions in tort before the courts of the parent company for harm suffered by stakeholders or third parties elsewhere<sup>176</sup>. This discovery has not, however, dethroned territory as a governing principle<sup>177</sup>.

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<sup>169</sup> While European law does much to protect consumers workers and insurance policy holders in contractual relationships with a professional party, its focus in cross-border situations is practically limited to EU citizens. Of course, 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.

<sup>170</sup> 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).

<sup>171</sup> On the striking similarities between these three problematics, see Jacco Bomhoff, « The Reach of Rights », cited above FN 9.

<sup>172</sup> On the extraterritoriality of international law under the Alien Tort Statute, see above p.13 ; on the reach of European human rights, see again, Jacco Bomhoff *id.*, p. 47 s

<sup>173</sup> See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Morrison v. National Australia Bank*, above FN 16.

<sup>174</sup> 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 Amendment to reach the conduct of US corporate employers abroad, see Tobias Barrington Wolff, « The Thirteenth Amendment And Slavery In The Global Economy », 102 *Colum. L. Rev.* 973 (2002).

<sup>175</sup> 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 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.

<sup>176</sup> Nor indeed does it prevent the home state from being held liable under international law, for the conduct of its own multinationals abroad. The horizontal effect of European human rights law will consolidate the same result.

<sup>177</sup> In the words of Justice Scalia, writing for the Supreme Court in *Morrison v. National Australia Bank Ltd et al* 2010 (cited FN 16 above), « The results of judicial-speculation-made-law...demonstrate the wisdom of the presumption against extra-territoriality ».

*c. Structural bias.* The liberal paradigm favours an approach to legal problems in terms of the individual - individual human rights, private property, discrete contracts. In addition, « private » law adopts a backward-looking perspective, providing the tools for solving interindividual 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.

Thus, 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 can create significant obstacles to the enhancement of the global good, or at least to the consideration of the planetary dimension of environmental protection, unless the steering potential of choice of law rules is unearthed from under the dogma of neutrality<sup>178</sup>. 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<sup>179</sup> – despite the reluctance of conflicts lawyers to accept that the purpose of the choice of law methodology is other than aiding the individual victim<sup>180</sup>.

Similar 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<sup>181</sup>. 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*)<sup>182</sup>. Articles 43 (now 49 TFEU) of the EC Treaty (freedom of

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<sup>178</sup> For the parallel example of crossborder pollution seen from the perspective of public international law and approached 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.

<sup>179</sup> 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”.

<sup>180</sup> 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 victime qu'on aurait donné le choix, c'est au juge ! »).

<sup>181</sup> Aff. C-341/05 (*Viking*) et C-438/05 (*Laval*), C-346/06 (*Ruffert*).

<sup>182</sup> 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

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.

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, neutralizing historical collective ownership<sup>183</sup>. It suffices to introduce the stolen object into a jurisdiction – the *lex situs* – which allows the rights of the current possessor to prevail over those of the rightful owner. Supranational legislation - Unidroit rules and EU Directive – has proved necessary to allow repossession by a given community of its cultural heritage<sup>184</sup>.

**d. No room for « private » rule-making.** The rise of « new legalities » in the global arena has drawn the attention of non-legal disciplines, whose insights contribute to a redefining of the features of law and authority once disengaged from state. Attention to this phenomenon induced by globalisation is all the more intense that it has come with the realisation of the structural disempowerment of states<sup>185</sup>. Gunther Teubner sees private governance to have become the center, and state authority at the periphery, of modern law<sup>186</sup>. Debate in social and political science has centered on the legitimacy of non-state transnational regimes, which, depending upon the disciplinary and ideological yardstick chosen, 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 private power<sup>187</sup>. Regime theory has been imported from international relations into social theory and international law in order to theorise « post-national rule-making », « colliding

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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 place of performance. In these cases, therefore, workers from Latvia or Poland 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.

<sup>183</sup> 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 aboriginal artefacts, *Winkworth v Christie Manson & Woods Ltd* [1980] 1 All E.R. 1121.

<sup>184</sup> 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.

<sup>185</sup> 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>.

<sup>186</sup> Gunther Teubner, « The Two Faces of Janus : Rethinking Legal Pluralism », (1992) 13 *Cardozo L Rev* 1443 (1992).

<sup>187</sup> For a sample of the most recent literature, 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 ; Graft-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.

social spheres » and « private authority in global governance ». The focus of regime literature is on the multifarious transnational normativities – codes of conduct, standards, usages, benchmarking - and hybrid authorships<sup>188</sup> – international court-like dispute deciders<sup>189</sup>, certifiers, rating agencies, NGOs, TNCs - which all contradict the liberal assumption of state monopoly on law-making and its orderly doctrine of hierarchised legal sources: there is no « real » law which is not produced directly or by delegation by the state.

In private international law, still tightly harnessed to positivism, the paradigmatic *lex mercatoria* debate<sup>190</sup> 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 state, and cannot entirely be explained away through traditional public or private categories of delegation and custom, or contract and trade usage. The combined result of the selective focus of public international law on state sovereignty, and the closed epistemology of private international law, 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<sup>191</sup> continued to develop outside formal legal discourse, sheltered and nurtured by the hidden crossings of the divide.

This debate also reveals the profound ambivalence that the « private » has come to mean in private international law<sup>192</sup>. 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 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<sup>193</sup>. 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 place now occupied by 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

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<sup>188</sup> 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. Norm-making may be separated from monitoring.

<sup>189</sup> See José E. Alvarez, *International Organisations as Lawmakers*, OUP 2005.

<sup>190</sup> 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 enforcement. A 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.

<sup>191</sup> On which see A. Claire Cutler, *Private Power and Global Authority*, cited above FN 8.

<sup>192</sup> See Nils Jansen & Ralf Michaels, « Private Law Beyond the State ? Europeanisation, Globalization, Privatisation », cited above FN 3.

<sup>193</sup> On the workings of legal entrepreneurship and the 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.

ear), to the detriment of more general principles<sup>194</sup>. 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 – tend either to overlap, or cancel each other out, with no regard for the consistency or content of the end result: an identical issue – such as whether pharmaceutical products may be tested by foreign manufacturers on children in developing countries<sup>195</sup>, 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<sup>196</sup> - might simultaneously and alternatively be approached, in transnational context, in terms of intellectual property, products liability, human rights, pharmaceutical standard-making, WTO... 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<sup>197</sup>. 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 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<sup>198</sup>, fragmented regimes lead to a nonsensical governance puzzle on a wider plane, when their interactions and economic consequences are ignored. 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<sup>199</sup>? How can international investment arbitration be allowed to soar beyond the reach of national law, while fundamental human rights or preemptory 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

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<sup>194</sup> 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.

<sup>195</sup> See the dispute in *Abdullah 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.

<sup>196</sup> 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.

<sup>197</sup> The example is Hugh Collins' (see "Flipping Wreck: *Lex Mercatoria* on the Shoals of *Ius Cogens*. », and below XXXX).

<sup>198</sup> There 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,

<sup>199</sup> 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

responsibility (such as ISO 26000) plausibly be decoupled from, or indeed violate, the WTO trade regime<sup>200</sup>? How can a jurisdictional regime designed to protect weaker parties credibly not extend to arbitration?<sup>201</sup> How can free choice of forum be justified by consent and then extend to unsuspecting third parties?<sup>202</sup> How can collective action by workers be both a fundamental right and a restriction to free movement of the employer?<sup>203</sup> In each of these instances, one regime undermines the other. The policy signals put out by private international law are characteristically ambivalent. The question, now, is whether this legacy of the closet condemns it forever to a back seat in global governance.

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

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<sup>204</sup> 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 of economic power<sup>205</sup>. 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.

Private international law's own « private history »<sup>206</sup> 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

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<sup>200</sup> 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-tariff 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 governmentality, Harm Schepel, « The Empire's Drains : Sources of Legal Recognition of Private Standardisation Under the TBT Agreement », in Christian Joerges & Ernst-Ulrich Petersmann, *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Hart Publishing, Oxford, 2011, p.397.

<sup>201</sup> 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 considered 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.

<sup>202</sup> 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.

<sup>203</sup> See the ECJ case-law, C-341/05 (*Viking*) et C-438/05 (*Laval*), C-346/06 (*Ruffert*), FN177 discussed above.

<sup>204</sup> See the discussion p. 30 and the references cited FN 175.

<sup>205</sup> At the same time, while considerable harm can be 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.

<sup>206</sup> Alex Mills, *The confluence of public and private international law*, cited above FN 22, spec. Chapter 2, p.26 et s.

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, all the while laying the foundations of informal economic empire in a fully systemic manner. As Robert Wai has suggested, private international law has always served as an interface between the local and the global<sup>207</sup>, allowing national cultures their place in the governance of situations beyond their own territorial 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 causes of global *mal-être*<sup>208</sup>. In order to overcome its current limitations and inhibitions, however, it will be necessary not only to reach over the schism<sup>209</sup> which has kept it apart from the politics of international law, and excavate past knowledge<sup>210</sup> in which it served not only to ensure that plural regimes coexist on terms of tolerance and non-interference, but also to correlate authority to responsibility through the resources of private law. Beyond the closet, the planetary<sup>211</sup> dimension of private international law resides in its capacity to rise to the new challenges of law beyond the state (A), and in its correlative aptitude to re-embed global governance into its changed social context (B).

### A. Rising to the Challenge of Pluralism.

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<sup>212</sup>, has sometimes led to the very concept of a governance gap being challenged<sup>213</sup>. 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<sup>214</sup>. Indeed, in some cases, private regulation may actually constitute

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<sup>207</sup> 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.

<sup>208</sup> 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 FN 33. 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.

<sup>209</sup> The Foucauldien-Lacanian neologism *la Schize*, denoting disjunction within the split subject, appears to be untranslatable.

<sup>210</sup> The excavation metaphor is taken from Foucault's *The Archeology of Knowledge* (1969) Routledge, 1970.

<sup>211</sup> The significance of planet is thus described by Hardt & Negri, *Empire*, p.41 : « the earth may be emerging as an immanent field upon which to relocate visceral exeriencies of identification traditionally reserved for the territorial nation. The earth becomes a rallying cry through which to fashion and tame capital ». For a Charter on the Protection of the Commons, see Ugo Mattei, [forthcoming](#).

<sup>212</sup> 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.

<sup>213</sup> 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

<sup>214</sup> 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 « 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 some 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

the governance gap that it purports to fill. For example, corporate codes of conduct may be superimposed upon human rights standards or apparently mandatory national or international regimes, which may be coopted, disactivated, held at bay, or simply deprived of adequate monitoring<sup>215</sup>. 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<sup>216</sup> 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<sup>217</sup>. By the same 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, the governance of private power requires leaving behind a purely process-based methodology often associated with legal pluralism, to excavate the potential of private international law to pursue a properly political agenda.

### (a) The legitimacy issue

If private international law has traditionally remained aloof from debates on the democratic legitimacy of the rules with which it deals<sup>218</sup>, it 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 states belonging to a closed « community of laws » cemented by common cultural (religious, linguistic and legal) tradition were actually able to participate in the allocation of prescriptive authority, since the model of such allocation was drawn up on the basis of shared and exclusive legal categories<sup>219</sup>. No « true conflicts » were conceivable here<sup>220</sup>. When the

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such as comitology where state-centered 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 control (see « Private Law Beyond the State », cited above FN 3, p.872).

<sup>215</sup> On the illusions and delusions of social corporate responsibility, 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).

<sup>216</sup> Harm Shepel *The Constitution of Private Governance*, cited above FN 7, p.3

<sup>217</sup> 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 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).

<sup>218</sup> Even the controversial issue of *lex mercatoria* is more about the frontiers of law than the requirements of democracy.

<sup>219</sup> For the analogous assumption of a like-minded community of European sovereign States in public international law, see above, p.10.

<sup>220</sup> With an exception (of course) in the form of « odious statutes », which did not belong to the community (the

ambit of savignian methodology was extended worldwide or « universally » to laws beyond the cultural pale, the lines of community were redrawn as between states and non-states, thus excluding infra-state and trans-state communities. This exclusion created undeniable tension in cases involving multiple religious communities, or non-recognised states, or claims by indigeneous people ; but by and large, while carving out exceptions, the positivist model remained intact<sup>221</sup>.

However, the challenge arising from the contemporary multiplicity of normative claims from diverse sources beyond the state<sup>222</sup>, is more unsettling, since such claims may no longer be disqualified as exceptions. Today, « private governance regimes produce law exerting validity far beyond the borders of single nation-states, controlling and sanctioning behaviour in trans-national markets »<sup>223</sup>. They constitute « an entire set of governance mechanisms within and without the state, generating new legalities and legitimacies »<sup>224</sup>. At the same time, their very number implies that the acceptability<sup>225</sup> of the norms involved in the governance of transnational private power can no longer be presumed without further scrutiny of their democratic pedigree<sup>226</sup>. 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<sup>227</sup>), 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<sup>228</sup>. However, while such a principle is easy to assert - if parties to an international contract have relied in good faith upon specific norms of the *lex mercatoria*, there seems little reason why it should not serve as the governing law<sup>229</sup>

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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.

<sup>221</sup> On the tensions within multilateralist methodology on this point, see Valérie Parisot, « Les conflits internes de lois », PhD Paris I (doctorat) 2010.

<sup>222</sup> 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).

<sup>223</sup> Harm Shepel, *The Constitution of Private Governance*, cited above FN 7, p. 21.

<sup>224</sup> Saskia Sassen, « The state and globalisation », in *The Emergence of Private Authority in Global Governance*, cited above FN 8, 91, p.94.

<sup>225</sup> Christian Joerges, « The Idea of a Three-Dimensional Conflicts Law as Constitutional Form », cited above FN 9, addresses the « acceptability » question as one of the legitimacy of norms in private international law.

<sup>226</sup> Julia Black, « Constructing and contesting legitimacy and accountability in polycetric regulatory regimes », 2 *Regulation and Governance* 137 (2008).

<sup>227</sup> On the functioning of certification by this 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.

<sup>228</sup> Comp. the problematic example of the self-regulating financial « OTC » market (discussed above FN 262). Or indeed, the self-regulating Lloyd's insurance market (discussed above FN163).

<sup>229</sup> Contrary to the position taken, or instance, in Regulation « Rome I » (see recital 13, merely authorizing the parties to incorporate non-state norms by reference : « *This Regulation does not preclude parties from*

–, it is far less easy to determine the cases in which 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<sup>230</sup>. What if in the above example of an issue of liability for environmental harm on which various state laws are also in conflict, a programmatic 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 ? Is pluralism merely a means of furthering the privatization of regulation in the world economy ? And if the relevant legalities are contradictory, which trump which ? 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 conflicting claims and then settling « true conflicts » ? Pluralism and deference, on the one hand, conflict settlement on the other, are an ontological contradiction (or an utopian ideal<sup>231</sup>).

A seemingly obvious path here, in order to assess this legitimacy, would be to turn to the resources, developed elsewhere - within global administrative law, or political and social theory - to formulate requirements of effectivity and transparency which compose « good governance ». As a meta-regulatory system, a procedural law « law of law production », would appear to hold most promise<sup>232</sup>. In other words, private international law, eclipsed by a constitutional approach to transnational regimes, would have little to offer at this stage, since the few attempts made by private international lawyers to come to terms with overlapping,

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*incorporat- ing by reference into their contract a non-State body of law or an international convention*”). On the strangeness of the latter on this point, see G.P. Romano, see G.P. Romano, ‘Règles internationalement supplétives et règles internationalement disponibles’, in *Regards comparatistes sur le phénomène contractuel* (PUAM, 2009); for a unilateralist-pluralist approach to party autonomy, see Pierre Gothot, « La méthode unilatéraliste face au droit international privé des contrats », *Trav. Comité fr DIP 1975-1977*, 201, for whom (p.208) a unilateralist approach means « (ne) rien faire d’autre qu’observer et prendre en considération les ordres juridiques libéraux tels qu’ils se sont constitués ».

<sup>230</sup> See again, on the issue of legitimacy and accountability of polycentric regimes, Julia Black, « Constructing and contesting legitimacy and accountability in polycentric 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 given organisation or regime may suffer « multiple accountability disorder » with deleterious effects. Hence, for example, increasing bureaucratization of NGOs to take account of accountability requirements formulated by state or international public actors, may lead to a decrease in acceptance by the communities that they seek to represent (p.154).

<sup>231</sup> Martty Koskeniemi, *The Politics of International Law*, cited above FN 1, 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 exercise »...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).

<sup>232</sup> See Jacco Bomhoff & Anne Meuwese « The Meta-Regulation of Transnational Private Regulation », cited above FN 7. The authors turn to good governance principles after dismissing the governance potential of private international law as excessively state-centered.

heterogeneous normative claims have been essentially process-based, occulting the politics of private power and depriving the forum of any guidance in tackling collisions of norms.

Unless the eclipse could be reversed? Christian Joerges proposes a « three-dimensional » system of conflict of laws as « constitutional form »<sup>233</sup>. The idea, which fully integrates 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<sup>234</sup>. 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 » collisions between EU law and that of Member states<sup>235</sup>. A similar allocatory mechanism could extend to the relationship, for instance, between WTO and private regulation<sup>236</sup>. 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<sup>237</sup>. 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 »<sup>238</sup> means that it appears more as an apology for the chaos of competing normative claims (or an « enchantment with the complex interplay of regimes »<sup>239</sup>) than as creating an opening for

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<sup>233</sup> 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 ; for an earlier model, see P. Hay, O. 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.

<sup>234</sup> The thesis is that « the ‘geolocal’ transformations that have been re-constructed within legal systems of constitutional democracies necessitate the development of a differentiated, three-dimensional conflicts-law approach with the *first* reflecting the interdependence of the formerly more autonomous jurisdictions, the *second* dimension 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)

<sup>235</sup> 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 supranationalisms* (Luxembourg, Office for Official Publ. of the European Communities, 1998), p. 155; Jérémy Heymann, *Le droit international privé à l'épreuve du fédéralisme européen*, Economica, 2010.

<sup>236</sup> On the interlegality of WTO and soft norms, see also, Joost Pauwelyn, « Non-traditional patterns of global regulation : is the WTO ‘Missing the Boat’ ? », in Christian Joerges & Ernst-Ulrich Petersmann (ed), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Hart Publishing, Oxford, 2011, p.199.

<sup>237</sup> H. Muir Watt, « Aspects économiques » cited above FN 50, §206 et s; Alex Mills, *The confluence of public and private international law*, cited above FN 22, p. 291 et s. , spec. p.295.

<sup>238</sup> *ibid* p.415.

<sup>239</sup> Comp. the criticism addressed by Martty Kokkenniemi to process-based approaches to pluralism as a stereotyped reaction to modernity : « Its theorists are so enchanted by the complex interplay of regimes and a

axiological choice. Because it claims political neutrality, it cannot explain how to sift between the acceptable and unacceptable among the expressions of private authority<sup>240</sup>. A more promising road seems to lie in excavating the potential of more marginal doctrines of private international law in order to integrate and reconnect plural norms.

### (b) Excavating repressed methodology and epistemology

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<sup>241</sup>. 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, repressed by positivist doctrine, it was described as « suffering from the worst defect that ever affected a methodology, its lack of positivity »<sup>242</sup>. The unsung song of private international law, self-named « unilateralism »<sup>243</sup>, was – counter-intuitively - 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 and reduction to own image, unilateralism worried about the violence implicit in the transposition of idiom and the recognition and tolerance of Otherness<sup>244</sup>. The first step towards reinventing a pluralistic version of private international law must therefore be to take the lessons of this - repressed - methodology seriously, and ensure that the starting point of any 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), insights are to be garnered from its own tools for assessing the relevance (ii) and legitimacy of conflicting norms (iii).

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positivist research for an all-inclusive vocabulary that they lose the political point of their exercise » (*The Politics of International Law*, p353).

<sup>240</sup> For a severe judgment on the claims of pluralism as a « stereotypical reaction to modernity », see Martty Koskenniemi, *The Politics of International Law*, cited above FN 1, p.355.

<sup>241</sup> 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), *Epistemology and Methodology of Comparative Law*, Hart, 2004, 271.

<sup>242</sup> Pierre Gothot, « Le renouveau de la tendance unilatéraliste », cited above FN 149.

<sup>243</sup> 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 Interests Analysis », RCADI 1989, t216, p.9).

<sup>244</sup> 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, 2<sup>nd</sup> ed., Paris, PUF, 1993.

(i) **The hidden imprint of pluralism:** The minoritarian methodology known in European terminology as « unilateralism »<sup>245</sup> was elaborated in its most sophisticated form in Italy by Quadri<sup>246</sup>. It finds contemporary support in Europe in the work of Pierre Gothot<sup>247</sup> and Didier Boden<sup>248</sup>, while its *Doppelgänger* is easily identified in American functionalism<sup>249</sup>. 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<sup>250</sup>. 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. It is only when, towards the end of the century, 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 and a choice became necessary. Unilateralism was about tolerance and opening the legal order to other normativities on their own terms<sup>251</sup>. Multilateralism was about fitting the foreign into « monist » categories<sup>252</sup>.

The multilateralist version carried the day, borrowing 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 the expanding world of the turn of the 19th Century, there was necessarily a risk of legal misfit – « true conflicts » - between the conceptions which inspired the categories of the forum's conflicts rule and those of the

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<sup>245</sup> On the contemporary avatars of this doctrine, see Pierre Gothot, « Le renouveau de la tendance unilatéraliste », *cited above FN 149*. 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).

<sup>246</sup> 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 discontinuité », *AFDI* 2004.1.

<sup>247</sup> Pierre Gothot, « Le renouveau de la tenace unilatéraliste en droit international privé », *cited above FN 149*.

<sup>248</sup> Didier Boden, *L'ordre public : Conditions et limites de la tolérance* (*cited above FN 136*).

<sup>249</sup> For a comparison, see D. Bureau & H. Muir Watt, *Droit international privé*, *cited above FN 57*, n° 358)

<sup>250</sup> 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 divided 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).

<sup>251</sup> 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.

<sup>252</sup> Didier Boden, on the analogies between unilateralism/pluralism, and multilateralism and monism : *L'ordre public : Conditions et limites de la tolérance* (*cited above FN 136*).

applicable law<sup>253</sup>. In the United States, such misfit led, in the end, to the functionalist turn<sup>254</sup>. In Europe, these difficulties were either denied, at the price of deforming foreign law<sup>255</sup>, or, in a more de-centered methodology, dealt with at later stage in the choice of law process with 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 mainstream doctrine, unilateralism left a significant imprint on dominant methodology. The more such multilateralism called for monism and approached difference in 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<sup>256</sup>.

**(ii) Unearthing forgotten methodological tools :** One specific resource that private international law has to offer to global governance is a methodology of linkages<sup>257</sup>. The whole discipline is traditionally about « linking up » legal issues to the most adequate source of 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 » in assessing liability or reliance<sup>258</sup>. 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, is disconnectedness. Indeed, on either side of the public/private divide, in the race to redefinition and primacy, various specialised regimes occult the whole picture – with the risk of leaving the governance holes untended<sup>259</sup>. The resource that unilateralism has to offer here is known as « incidental application » (or « prise en considération »), which constitutes a formidable tool for reconnecting heterogeneous norms. It is frequent that a non-

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<sup>253</sup> See FN 129 above.

<sup>254</sup> 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 methodologies, may have, to a certain extent, missed 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).

<sup>255</sup> 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.

<sup>256</sup> 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...).

<sup>257</sup> 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).

<sup>258</sup> For Santi Romano (id), « relevance » is the key methodological tool for reconnecting diverse normative orders.

<sup>259</sup> In public international idiom, this is « fragmentation » through the rise of functional regimes, with its resulting incoherence and power politics (Marty 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)

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<sup>260</sup>), to give effect to commercial custom or usage (which may be « incorporated » into the applicable law<sup>261</sup>), 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<sup>262</sup>, this tool allows for the recognition of the relevance of norms originating in another legal order, and otherwise deprived of any official currency<sup>263</sup>.

For instance, a corporate code of conduct does not qualify formally as law-making under a state centered methodology<sup>264</sup>. However assertive it is of the rights of sub-contractors 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. The cases of Nike's spontaneous code of conduct for its own (or its sub-contractors') factories, or Total's voluntary vetting process for its sea-bound oil-tankers, show how self-regulation can be given teeth by harnessing it to private law<sup>265</sup>. In these cases, the advantage of this methodology is that the coordinating forum retains control over the applicability of the self-regulating norm, which might otherwise decline to regulate. 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<sup>266</sup>. An excellent counter-example has been highlighted by Hugh Collins<sup>267</sup> in the context of the legal

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<sup>260</sup> 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.

<sup>261</sup> As suggested by Recital 13 of EC Regulation Rome I, cited above FN 224.

<sup>262</sup> 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.

<sup>263</sup> 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 homogeneous conflicts (as suggested by Estelle Fohrer-Dedeurwaerder, *La prise en considération des normes étrangères*, LGDJ, vol 501, 2008).

<sup>264</sup> Within the meaning given by Julia Black, « Constructing and contesting polycentric regimes » cited above FN 7. 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.

<sup>265</sup> 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.

<sup>266</sup> See above, FN 195.

<sup>267</sup> See H Collins, « Flipping Wreck: *Lex Mercatoria* on the Shoals of *Ius Cogens*. » (LSE conference paper, forthcoming).

aftermath of the financial collapse of Lehmann Brothers<sup>268</sup>. 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 was 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<sup>269</sup>. 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 identified by systems theory<sup>1</sup>. Be that as it may, the legitimacy issue remains. How can effect be given to a norm that lacks consensus or that has been adopted through an opaque or unaccountable process? The examples examined above lead to suppose that the legitimacy issue may need to be reframed in this context.

(iii) **Reframing the legitimacy issue: the teeth of private law.** Digging up the resources of unilateralism suggests that the most promising avenue towards resolving of the legitimacy dilemma is by 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 by the « new global rulers »<sup>270</sup>, 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<sup>271</sup>. The idea has already been convincingly canvassed by Harm Shepel in respect of standard-setting. Thus, for Harm Shepel, 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 link with « private law » needs to be elaborated. In the first place, the idea of compensation is not the monopoly of the private law of tort but exists in administrative law too; 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. Moreover, the privateness of competition law is certainly 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 »

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<sup>268</sup> 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 t H. Muir Watt, *Rev crit DIP* 2011. **XXX (forthcoming)**.

<sup>269</sup> 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.

<sup>270</sup> See Tim Büth a Walter Mattli, *The New Global Rulers, The Privatization of Regulation in the World Economy*, Princeton 2011.

<sup>271</sup> Harm Shepel uses this idea in the context of private standard-setting (*The Constitution of Private Governance*, cited above FN 7). More generally, there is a clear a renewal of interest in the governance potential of private law, essentially sparked developments in private law in the EU context: see Fabrizio Cafaggi and Horatia Muir Watt, *The Making of European Private Law* cited above FN 54; Roger Brownsword, Hans Micklitz, Leone Niglia and Stephen Weatherill, *The Foundations of European Private Law*, Hart, 2011.

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<sup>272</sup> – the exercise of sovereignty beyond the state, in the forms of standard-setting, or certifying, 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*<sup>273</sup>.

In order to better understand how such an approach might be implemented, social theory provides a helpful taxonomy. Thus, Talia Fisher distinguishes two different ontologies of non-state authority, according to whether it corresponds to the idea of community or market<sup>274</sup>. 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.

Thus, on the one hand, private international law has the resources to take account of community 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<sup>275</sup>. As has been shown in connection to issues relating to the very « public » question of citizenship<sup>276</sup>, 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 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

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<sup>272</sup> 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.

<sup>273</sup> See below [p.47 et s.](#) for the ways in which the allocation is to be done.

<sup>274</sup> Talia Fisher, « A Nuanced Approach to the Privatization Debate », *5 L. & Ethics of Human Rights* 71(2011).

<sup>275</sup> Paul Schiff Berman, « The Globalization of Jurisdiction » cited above FN 30. 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](#).

<sup>276</sup> 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).

context<sup>277</sup>. 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.

On the other hand, claims based on functional regimes are usually framed as questions of *applicable law*<sup>278</sup>. Here, private international law will 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<sup>279</sup>. 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 exercise 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 voluntary 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<sup>280</sup>. In such cases, private international law seeks to bring to bear 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<sup>281</sup>.

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 Lloyds' exercise of overweening market authority 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 international 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 repairable harm transnationally<sup>282</sup>. In doing so, it goes a long way in resolving the legitimacy problem, all the while preparing the ground for a re-reading of the politics of private international law in terms of « re-embedding » the global.

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<sup>277</sup> See for instance, *Schwebel v Ungar* [1964] 48 DLR (2d) 644 (Supreme Court of Canada) ; *Moatti*, Cass civ 1<sup>re</sup>, 15 June 1982, *Rev crit DIP* 1982300, note J.M. Bischoff, JDI 1983.595, note R. Lehmann (France, Cour de cassation).

<sup>278</sup> Martty Koskemmieni disparagingly describes the current state of international law as induced by regime competition to provide the applicable law, a « politics of redefinition » (*The Politics of International Law*, p.67).

<sup>279</sup> Harm Shepel, *The Constitution of Private Governance*, cited above FN 7, p. 384 ; Gerald Spindler, « Market Processes, Standardisation and Tort law », 4ELJ 316 (1998).

<sup>280</sup> 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.

<sup>281</sup> On the « effects » test in comparative perspective, see H. Muir Watt, « Aspects économiques du droit international privé », cited above FN 50, §251.

<sup>282</sup> 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 ; positivism is full of « implicit permissions ». See A. Claire Cutler, *Private Power and Global Authority*, cited above FN 8, p. 33 ; Duncan Kennedy « Form and Substance in Private Law Adjudication », 1976 *Harv. LR* 1685.

## B. Re-Embedding the Global

If private international law is to contribute to a re-embedding of the global, it must be 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 (b).

### (a) Mediating between the global and the local

Social « disembeddedness » 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<sup>283</sup>. 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 »<sup>284</sup>. Similarly, Saskia Sassen observes « the incipient formation of a type of authority and state practice that entails a partial denationalizing of what had been constructed historically as national »<sup>285</sup>. 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 lead to a disconnection between socially accepted and legally required behaviour », and, ultimately, to the degradation of the public good<sup>286</sup>. 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

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<sup>283</sup> 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 Survive 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.

<sup>284</sup> *The Great Transformation, The Political and Economic Origins of our Time*, (1944) Boston, Beacon Press, p.57. 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.*

<sup>285</sup> Saskia Sassen « The state and globalization », cited above FN 221, 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.

<sup>286</sup> Harm Shepel, *The Constitution of Private Governance*, cited above FN 7, p.22.

harm caused by domestic policy on the market<sup>287</sup>, 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<sup>288</sup>. Private actors argue that they are merely surfing on the tide of inevitable evolution of the world economy.

However, growing awareness of the dangers of disembeddedness 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<sup>289</sup>, 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<sup>290</sup>. 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<sup>291</sup>. In a similar turn, social theory now works towards the constitutionalisation of reflexive social systems<sup>292</sup>, 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<sup>293</sup>. In cases of outsources

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<sup>287</sup> 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 imprisoned 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).

<sup>288</sup> On the example of the private lobbying in international maritime treaties, see above FN 36.

<sup>289</sup> 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.

<sup>290</sup> 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.

<sup>291</sup> 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 Leader, « Risk management, project-finance and rights-based development », in Sheldon Leader and David Ong, *Global Project Finance, Human Right and Sustainable Development*, Cambridge 2011, p. 107.

<sup>292</sup> See Gunther Teubner on reflexive law as response to disembeddedness : « Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct », Galf-Peter Calliess (ed), "Governing Transnational Corporations - Public and Private Perspectives", 18 *Indiana Journal of Global Legal Studies* 17 (2011).

<sup>293</sup> 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).

industry, labour lawyers plead for responsive regulation of the workplace<sup>294</sup>. 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”<sup>295</sup>.

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 visible in other areas of global governance 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. Convincing illustrations can be found in the European context, on the one hand, in the progressive integration of human rights into private international law methodology, and, on the other, in the primacy of functional, policy-driven analysis in areas where parties are endowed with freedom to choose. Both of these allow a sifting process in which the claims of preemptory norms can be weighed in context, and priorities clearly set out. Thus, through the doctrine of horizontal effect<sup>296</sup>, individual rights consecrated in the European Convention have acquired a specifically transnational dimension, sweeping away the results reached by national conflicts systems if - and only when - they stand in the way of the fulfillment of a normal family life, privacy, or due process in a cross-border context<sup>297</sup>. Another example of the turn to re-embeddedness in private international law is the rise of functionalist methodology, both in and beyond the sole area of international mandatory norms or « lois de police »<sup>298</sup>. 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<sup>299</sup>. An observation made by Harm Shepel

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<sup>294</sup> 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.

<sup>295</sup> 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).

<sup>296</sup> On the relationship between state action, horizontal effect and conflicts of laws, see Jacco Bomhoff, « The Reach of Rights », cited above FN 9.

<sup>297</sup> There is significant case-law from the ECtHR (in the field of transnational adoption), which requires that the receiving court set aside its own private international law rules - the ones it would use if called upon to create a « new » situation (such as pronouncing an adoption itself) - in order to protect the relationship which has previously become effective in another jurisdiction (see ECtHR, 28 juin 2007, *Wagner et J.M.W.L. c. Luxembourg*, 28 June 2007, requête n° 76240/01). 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).

<sup>298</sup> 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 I » et le choix de loi dans les contrats internationaux*, CREDIMI, Dijon, 2010, p. 341.

<sup>299</sup> 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).

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 »<sup>300</sup>.

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

It may be that the time has come for embeddedness to replace proximity, which famously captured the 20th century paradigm of private international law<sup>301</sup>. 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. Embeddedness 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 »<sup>302</sup> by extending their social and environmental responsibility 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. 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 »<sup>303</sup>.

(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 feel the impact of the effects of such decisions outside the state<sup>304</sup>. 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 »<sup>305</sup>. 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<sup>306</sup>. Furthermore, an emerging « methodology of

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<sup>300</sup> Harm Shepel, *The Constitutionalization of Private Governance*, cited above FN 7, p.401.

<sup>301</sup> On proximity as a paradigm, see Paul Lagarde, « Le principe de proximité », RCADI 1986, t.196, p.9 et s.

<sup>302</sup> Robert Wai, « Transnational Liftoff And Juridical Touchdown », cited above FN 117.

<sup>303</sup> Robert Wai, «Transnational Private Litigation and Transnational Governance», cited above FN 7.

<sup>304</sup> 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.

<sup>305</sup> 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 », 26 *Vand. J Transnat'l Law* 975 (1994), p. 985.

<sup>306</sup> 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

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<sup>307</sup>. 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<sup>308</sup>. 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 responsibility 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 boundaries », Paul Schiff Berman develops the idea of jurisdiction as assertion of community membership<sup>309</sup>, entailing rights or interests<sup>310</sup>, 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<sup>311</sup>, can sometimes be found in judicial dicta : a notable example is the assertion by the US Court of Appeals for the Second Circuit in the *Wiwa v. Royal Dutch Petroleum Co*, according to which the extraterritorial conduct of

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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 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 » cited above FN 50, §219 s.

<sup>307</sup> 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 H. Muir Watt, «European Federalism And The New Unilateralism», cited above FN 297.

<sup>308</sup> While the sweeping effect of human rights before the recognizing court has been principally illustrated 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).

<sup>309</sup> « The Globalization of Jurisdiction », p.354, p.429

<sup>310</sup> See John Hart Ely, « Choice of Law and the State's Interest in Protecting its Own », 23 *William & Mary L Rev* 173 (1981).

<sup>311</sup> B. Stern, «Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit », *A.F.D.I.* 1986, pp. 7-52.

corporations is « our responsibility »<sup>312</sup>. 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 jurisdiction as involving responsibility<sup>313</sup>. He observes very rightly that « the absence of the issue of responsibility from conflicts thinking may be an important source of the field's internal confusions. The discipline's focus on authority and jurisdiction may have contributed to an undervaluation of the theme of responsibility, duty, and positive obligation towards those who are in some way outsiders to the forum's legal order »<sup>314</sup>. 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<sup>315</sup>, 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 »<sup>316</sup>. 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. In addition, companies need to consider how particular country and local contexts might shape the human rights impact of their activities and relationships »<sup>317</sup>. While non-state actors attempt to gain « lift-off » from local mandatory rules, ensuring « touchdown » is ensuring that they are accountable to third parties within their circles of influence. Here, of course, under the approach outlined above, responsibility is determined in the light of state but also non-state norms, giving effect through private law tools to private codes of conduct or imperfectly constitutionalised soft-norms. Focussing analysis on private sites of domination leads to widening the circles and extending the reach of the norms under which corporate activity is answerable to the circles touched by its influence.

## 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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<sup>312</sup> 226 F 3d 88 (2<sup>nd</sup> Cir 2000).

<sup>313</sup> « 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 Contemporary Problems* 39 (2008).

<sup>314</sup> *Ibid.* p.70.

<sup>315</sup> Within the meaning defined by Talia Fisher, in « A Nuanced Approach to the Privatization Debate », cited above FN 267.

<sup>316</sup> 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.

<sup>317</sup> 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 within the informal economic empire and work to fill the holes created either by excluding or denying non-state authority. 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. 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<sup>318</sup> - to the merely facilitative. Used to enable but not to discipline, it was prevented from identifying and regulating private economic power, which it helped unleash from collective constraints.

In the words of Hannah Arendt, politics is the emergence of a plural public space for deliberation and emergence of power without domination<sup>319</sup>. The politics of private international law may now resemble 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<sup>320</sup>. Asserting its political dimension, law is not disqualified as law; on the contrary, law can be seen as a process of construction of the political community<sup>321</sup>. 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, its implementation may not actually require any more than 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 dismantled and de-constructed.

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<sup>318</sup> 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.

<sup>319</sup> 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.

<sup>320</sup> Robert Wai, « Conflicts and Comity in Transnational Governance » (cited above FN 7), p.250

<sup>321</sup> See Emmanuelle Jouannet, « Koskenniemi, A Critical Introduction », in Martty Koskenniemi, *The Politics of International Law*, p.31.



