Global regulatory governance : an outsider's perspective

by Horatia Muir Watt
University of Paris I (Panthéon-Sorbonne)

This closing seminar will be drawing on an outsider's perspective – doubly so, because it will be both European and private-international - on the transnational regulatory debate[1].

Private international lawyers have been grappling for the past decade with profound changes in the world order – changes affecting the nature of sovereignty or the significance of territory – and have been attempting to measure the methodological impact of political and technological transformations on traditional ways of thinking about allocation of prescriptive and adjudicatory authority as between states[2]. Myriads of issues arise in this respect within the new global environment, such as the extraterritorial reach of regulatory law, the decline of the private/public divide in the international field, the renewed foundations of adjudicatory jurisdiction (particularly in cyberspace), the implications of individual access to justice in the international sphere, the impact of fundamental substantive rights on choice of law, the ability of parties to cross regulatory frontiers and the subsequent transformation of the relationship between law and market.

With particular reference to the topic of this seminar, it is increasingly clear that the paradigm of a private international order resting solely on private interest dispute resolution within the courts, is fast disappearing. There is increased recourse to transnational cooperation of administrative agencies in the private law sphere (the first example being the Hague Conventions on child abduction or adoption, which use cooperation between "central authorities" to enhance the efficiency of judicial procedures[3]), while the pursuit of various goals perceived as common to the

---

[1] I refer to the debate as defined by the various papers produced by this seminar at NYU and by: Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 Va. J. Int'l L. 1 (2002) ; A.M. Slaughter, *A New World Order* (2004). In this context, global regulatory law involves a paradigm shift from 'government' to 'governance,' whereby public functions are exercised by sub-governmental officials, operating through transnational cooperative networks and perhaps more generally the emergence of public-private or domestic/transantional hybrids which do not fit in the traditional conceptual frameworks through which the world order is perceived.

[2] For one interesting example among many: Paul Schiff Berman, « The Globalization of Jurisidiction », 151 *U Pa L Rev* 311 (2002).

[3] Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction; Hague Convention of of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption.

international community, such as international repression of financial fraud or protection of personal data, requires intense transnational coordination in terms of access to information, or administrative action. Subgovernmental agencies may enter transnational contracts – not treaties! – involving conflits of public law[4], while the action of private attorneys general in the international sphere mingles public and private interests in an unprecedented way, which traditional categories are powerless to address[5].

All these issues are of particular concern to private international lawyers working within the European Union, which has emerged as a regulatory state since the completion of the internal market in 1992. As Anne-Marie Slaughter rightly puts it, "in response to the challenges of trying to harmonize or at least reconcile the regulations of its diverse and growing members, the EU has developed a system of "regulation by networks," located in the Council of Ministers and closely connected to the complex process of "comitology" that surrounds Council decision-making. The question now confronting a growing number of legal scholars and political theorists is how decision-making by networks of national regulators fits with varying national models of European democracy"[6]. From a private international lawyer's perspective, traditional understandings of state sovereignty and territoriality have had to adjust to greater possiblities for transnational judicial and administrative cooperation, uniform allocation of presciptive and adjudicatory jurisdiction, and even extraterritorial enforcement procedures[7]. Perhaps more radically, the whole landscape of the conflict of laws is transformed by the economics of the internal market, whether in the wake of widespread harmonisation of substantive private law, or by reason of the highly controversial "country of origin principle", which is thought to provide "hidden" choice of law rules[8].

Whatever the impact of these changes for traditional theory, it has been apparent for some time that the one of the most significant evolutions, for private international law purposes - induced by the new quasi-federal environment in Europe, is the extraterritorial effect of national public or regulatory law, particulary through mutual recognition; the appearance of independant regulatory authorities with a duty to cooperate transnationally; and elaborate schemes of allocation of regulatory

[4] Mathias Audit, *Les conventions transnationales entre personnes publiques*, LGDJ 2002, préf. P Mayer.

[5] Hannah Buxbaum, « The Private Attorney General in a Global Age : Public Interests in Private International Litigation », 26 *Yale J Int'l L* 219 (2001)

[6] Anne-Marie Slaughter, "Global Government Networks, Global Information Agencies and Disaggregated Democracy", 24 MIJIL 1041(2003).

[7] Among the most important texts: Jurisdiction and Judgments Regulations "Brussels I" (CE 44/2001) and "Brussels II bis" (CE 2201/2003), the Evidence Regulation (CE 1206/2001), the Insolvency Regulation (CE 1346/2000) and the European Enforcement Order Regulation (CE 805/2004).

[8] Fuchs, Pataut & Muir Watt, *Les conflits de lois et le système juridique communautaire*, Dalloz, Thèmes et commentaires, 2004.

authority among the Member States. In particular, in the field of securities regulation, the 2001 Lamfalussy Report, which bore a searing indictment of the inadequacy of the harmonised structure in Europe, provided considerable impetus for transnational cooperation between regulatory agencies. Borrowing on the Admission Directive[9], which has served as a model for securities regulation as a whole, the Community has established a complete system of decnetralised supervision and enforcement of the harmonised regime, supported by cooperation between administrative authorities[10]. For a branch of the law which was epistemologically harnassed to the public/private divide – or rather, the public law taboo – in the true civilian tradition, this is all something of a landslide[11].

Although the concerns of European private international lawyers tend, in general, or at least ostensibly, to focus less on political issues - such as the constitutional legitimacy of transnational norm-making, or the democratic deficit in crossborder administrative cooperation - than those of their public (administrative/international) counterparts, it may be that some of the recent debates on the more technical aspects of the cross-border activities of regulatory agencies could throw some light on the public law discussions. For instance, cooperation may give rise to legitimacy issues insofar as it may involve conceding part of a decision-making process to a foreign administrative agency. A private international law approach may be helpful if it can show how, in the course of this cooperative process, such an agency may take account of the regulatory intersts of foreign states through application of foreign regulatory law. In this respect, cross-fertilisation between the public and private spheres of transnational governance "fits" methodologiocally with the contemporary view of the transnational legal order as a system of countervailing networks and systems[12]. Indeed, exchanges and dialogue between the private international and global administrative spheres seem all the more natural – and necessary - that it is becoming increasingly clear, particularly under the influence of Community law, that private law and regulatory techniques are largely interchangeable, and that private law frequently assumes a regulatory function which was previously the preserve of managerial public regulation or indeed social welfare law[13].

---

[9] Consolidated Directive 2001/34 EC coodinating the condtions for admission of securities to official stock exchange listing.

[10] See Niamh Moloney, *EC Securities regulation Oxford EC Law Library*, 2002, p.100. There now exists a complex set of Community directives which impose cooperation between administrative agencies (including the very important 2004 Public Tender Directive, currently in the process of being transposed by Member States into their national laws).

[11] On the epistemological dimension, see G. Samuel, "English Private Law in the Context of the Codes", in Van Hoecke & Ost (ed), *The Harmonistion of European Private Law*, Hart 2000, p. 47.

[12] In this spirit, see Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society", 46 Harv. Int'l L.J. 471 (2005).

[13] See F. Cafaggi (ed), *The Institutional Framework of European Private Law*, OUP 2006.

Similarly, and particularly on the Community level, rules of private international law may well be pursuing goals which belonged traditionally to the public or political sphere and were thus rarely implemented other than unilaterally, through uncoordinated administrative means and policies. Examples of the investment of regulatory goals by private international law rules range from the protection of displaced workers to the prevention of cross-border pollution or the avoidance of market failures[14]. This means that courts themselves can no longer ignore foreign public law any more than is sustainable the myth that "private" international law governs only situations involving private interests. A whole new field relating to transnational regulatory litigation is opening up, in which a shared interests of the global community of states appear to be identifiable[15]. It makes little sense therefore either to continue to hamper the extraterritorial reach of foreign public law by hiding behind the "revenue rule" or to consider public interest goals indifferent to transnational dispute resolution between private parties. In the same vein, it would be misplaced for private international to persist in focusing exclusively, as it once did, on the crossborder activity of the courts, to the exclusion of that of administrative agencies whose decisions impact equally deeply and frequently upon the lives of private actors.

This is why the confrontation between private international law and global administrative governance may in fact represent as much a contribution to private international law than the other way round. Courts solving private disputes may be viewed as part of a complex regulatory network in which private law appears as an instrument of governance. Indeed, this seems to be the idea put forward recently by Robert Wai, who sees "private law as a venue for the contestation and regulation of private action by private action in the contemporary global system. With its distinctive strengths and weaknesses, transnational private law is viewed as one alternative among many regimes of global order and is understood to perform a social--indeed, "public"--function in the embedding of private behavior and relationships within a broader social order". His article attempts to identify "the function of transnational private law as not simply facilitation of transactions, but also compensation for harms and social regulation of transnational conduct"... "Transnational private law in national courts may be able to leverage its role as a necessary "touchdown" point for international economic transactions into a transantional regulatory role"[16].

So, to what extent can a private international law perspective contribute to the global governance debate? The focus of this paper will not be on the legitimacy or the international legal status of norm-production by sub-governmental entities -

---

[14] H. Muir Watt, « Les aspects économiques du droit international privé », RCADI vol 307 (2004).

[15] Hannah Buxbaum, "Transnational Regulatory Litigation", 46 Va J Int'l L 251 (2006).

[16] Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society", 46 Harv. Int'l L.J. 471 (2005)

although one could indeed imagine that a debate similar to the familiar private-international-discussion sparked by claims to normativity (or at least, to the status of governing law in international contracts) of the "new law-merchant" or *lex mercatoria,* might arise in the field of transnational subgovernmental transactions, particularly as these appear to have frequent recourse to arbitration[17]. It seems to me that the usefulness of looking to private international expertise must start (at least...) with the cases in which regulatory agencies exercise powers of decision as regards private actors whose activities have created a connection between the various spheres of national adminsitrative action. These decisions may be made *ex ante*, in the form of an authorisation or supervisory approval for a future transaction or other relationship (such as a take -over bid or an intercountry adoption) or may be quasi-adjudicatory, when they involve applying sanctions *ex post* to private parties engaged in transnational activities (such as fines, or an exclusion from the market for violations of regulatory economic law).

Public law publications on positive transnational comity between agencies or allocation of public authority beyond the state, concentrating on the (indeed fascinating) political aspects of regulatory globalization as the process in which, for instance, regulatory agencies might be exporting norms in order to extend their reach internationally[18], tend not to delve into the technicalities of the duty to cooperate insofar as it involves conceding jurisdiction to decide to foreign authorities; applying or at least taking account of foreign regulatory law or policy; or indeed enforcing foreign regulatory decisions. But where private activity crosses several regulatory spheres, it requires adressing (classical - to a private international lawyer) issues of allocation of regulatory authority as between administrative agencies, and questions of applicable law, rarely considered in the transnational governance literature.

These are the two questions with which I shall now attempt to deal.

I. – *Allocation of supervisory or decisional authority among administrative agencies*

Which regulatory authority has jurisdiction to supervise a public tender targeting a foreign company, when its securities are offically listed on several exchanges? Which administrative agency may authorise a project of adoption concerning a child from a foreign country? Although allocation of supervisory or quasi-jurisdictional authority

[17] See Mathias Audit, *Les conventions transnationales entre personnes publiques*, LGDJ 2002, preface by P. Mayer.

[18] Jonathan Macey," Transnational Federalism: Problems and Propsects of Allocating Public Authority Beyond the State", 11 *Ind. J. Global Legal Stud*. 31 (2004)

as among regulatory agencies might appear at first glance to raise entirely similar issues as defining adjudicatory jurisdiction over private litigation before the courts, it becomes rapidly clear that these issues cannot be approached in the same perspective[19]. At least three differences emerge, which represent as many opportunities to design principes of governance for the allocation of regulatory authority among administrative agencies in a global environment. Thus, allocation of supervisory authority between national administrative agencies is policy–driven, not territorially based (1). It is cooperative not exclusive (2). And it must leave room for coordination with other levels of governance (3).

1. ***Allocation of power is functional or policy-driven***. Probably the most significant difference between traditional criteria for delimiting international jurisdiction to adjudicate private litigation *ex post* and parameters for the international exercise of *ex ante* supervisory power by administrative agencies, lies in the fact that such parameters are necessarily functional or policy-driven. The reasons lie in the very transformations of sovereignty to which transnational networks contribute.

Whatever the philosophical foundations of international adjudicatory jurisdiction, criteria for its definition are linked to three important, intertwined, characteristics.

The first is a territorial conception of sovereignty. In the civilian tradition, these translate into geographical links between the court and the litigation designed to facilite the administration of the judicial process (particularly in view of the fact that it is the court, not the parties, which conducts the preliminary fact-finding stages of the procedure), whereas under the common law way of thinking, service of

---

[19] It might be important to emphasise at this stage that perspective on international judicial jurisdiction is in itself a very relative matter. Different cultural approaches to adjudicatory jurisdiction crystallised in a territorial - pre-global - world, where conceptions differed radically according to philosophical constructions of the law. The result is a clear opposition between, on the one hand, a common law culture of international jurisdiction linked to the territorial assertion of sovereign power – which paradoxically justified the exercise of judicial jurisdiction in cases where there was in fact little geographical or indeed any other connection between the source of the litigation ort the parties themselves and the forum, and led ultimately, at least in the United States, to radical constitutionalisation of jurisdictional criteria and, throughout the common law world, to the development of a sophisticated doctrine of forum non conveniens, under which courts use discretion to entertain a claim or not, in consideration of various public and private factors. On the other hand, civilian legal culture, deeply distrustful of judicial discretion and historically wedded to the idea that the courts are merely the "mouth of the written law", developed a "merely" technical, procedural approach to international jurisdiction, from which considerations of politics or power were carefully excluded, and which jurisdiction was allocated according to geographical nexus, exactly as if the issue was no different from identifying venue in the domestic sphere. The conventionalisation of access to justice udner article 6 of the European Convention of Human Rights may serve to eliminate the occasional exorbitant fora but does not seem likely to influence these conceptual differences. Within the European Community, the recent saga of the *Gasser-Turner-Owusu* case-law highlights the profound incompatibilty between the two approaches.

process within the territory brings the defendant within the coercive power of the court, whose assertion of jurisdiction may then be dependant upon due process requirements or *forum non conveniens* considerations.

The second characteristic lies in the fact that litigation is, at least, traditionally, designed to implement private rights *ex post*, so that functional emphasis is on due process and convenient administration of the judicial process. Of course, the contemporary transformation of private law as a regulatory tool sits less well with this approach. When access to justice is in fact instrumentalised in the service of a public policy pursuing protection of the environment or regulation of intersystemic competition, the various fora involved tend to respond to criteria which are not solely procedural, private-interest considerations. For instance, when the European Court of justice interprets article 5-3 of the Brussels Convention as opening an option in favour of the claimant in an case of environmental pollution[20], this interpretation is clearly driven as much by environmental policy as a desire to protect the victim of a harm[21].

The third idea which commands international adjudiciatory jurisdiction is that courts are all-purpose state agencies. Of course, their function is to resolve or encourage the settlement of disputes, which are typically perceived as conflicts of private rights or interests. Their jurisdiction in international cases may to a certain extent be dependant upon the particular categories of interests involved and such adjustments may be introduced either into the design of jurisdictional rules (for instance, the Brussels I Regulation provides different, optional, fora for contract, tort, trust etc), or case by case, through the doctrine of *forum non conveniens*, but the functional considerations involved always pursue a similar end – ie, they attempt to ensure a convenient and fair forum. To a certain extent, at least in a traditional conception of litigation as concerning only conflicts of private interests, the definition of international jurisdiction to adjudicate posits that courts are interchangeable - they all do the same job and, as long as due process requirements are satisfied in respect of the parties to the litigation, it matters little which court decides (nor indeed, how it decides, but this is another question: on the applicable law, see below).

By contrast, regulatory agencies act in a world in which territoriality is disappearing or at least is being de-emphasised. Indeed, more significantly, their very action actually contributes to the transformation of soeverignty. In the new world order, sovereignty is instrumental, not territorial. Examining the architecture of transgovernmental networks, Kal Raustalia points out their "sovereignty-strengthening" virtues[22]. In turn, theorising sovereignty as status within the

---

[20] *Bier v. Mines de Potasse* , Case n°21/76 ECR 1735, concl. Capotorti.

[21] Indeed, Court has said on other occasions that the forum is *not* protective of the claimant/victim as such: see *Dumez,* C.. 220/88, ECR I-49 concl. Darmon.

[22] Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 Va. J. Int'l L. 1 (2002).

international community, Hannah Buxbaum observes that the functioning of these administrative networks involves "a choice by state agencies to cede exclusive power over territory in order to gain instrumental power over forms of conduct subject to regulation"[23]. Thus, participation in global processes at all levels of state architecture ensures a certain balance of power in the world order.

This is clearly why regulatory supervisory authority must itself be instrumental and policy-driven. The criterion for administrative authority is not based on geographical connection, but on functional efficiency in view of the policy objectives pursued. Regulatory power in the global arena is not about *ex post* all-purpose adjustment of private rights, due process or procedural convenience. It is not about territoriality. Allocation of authority in cases where several national agencies might be involved, must be designed to enhance the regulatory objectives for which those administrative agencies exist, whether it be protection of fair competition in the market or preventing international trafic in children. For instance, supervisory authority in the world banking system might be claimed by the administrative agency which is best placed to prevent or regulate undesirable systemic effects[24]. This of course is formulated as a purely normative proposition as to how it would be desirable that regulatory authority should be allocated, and therefore posits some form of international cooperative agreement as to who regulates when. However, before looking at cooperative efforts which actually exist, two examples may help show the extent to which policy considerations command assertion of regulatory authority.

*Within the European Union, a 2004 Take-Over Directive harmonises takeover regulation in Member States. However, any attempt to harmonise such a field is clearly dependant upon the existence of a network of supervisory authorities competent to ensure that the implementing rules are respected[25]. Under article 4 (1), each Member State designates an authority competent to supervise the entire course of the bid. Interestingly, this supervisory agency may either be a public authority, or a private body specifically empowered by national law, or a self-regulatory authority (such as the UK Takeover Panel). Then, article 4(2) sets out (fairly complex) steps for determining which national authority is competent to supervise a particular bid. Allocation of supervisory authority is based on a grouping of contacts (reminiscent of conflict of laws methodology) as between the place of the seat of the corporation and the place in which the offeree is admitted to trading. To simplify, the guiding principle is that the competent supervisory authority is that of the Member State in which the offeree is admitted to trading, which will usually be the place of its registration or corporate seat. If these two places are different, then the place of

---

[23] Hannah Buxbaum, "Transnational Regulatory Litigation", 46 Va J Int'l L 251 (2006) at p 308.

[24] Similarly, in the field of securities regulation, supervision should be allocated so as to induce efficiency etc... (for example, M. Fox, "Regulation ED and foreign issuers: globalisation strains and opportunities", 41 Va Int L R 653 [2001]).

[25] Niamh Moloney, *EC Securities Regulation*, Oxford EC Law Library, 2002.

trading prevails – if the securities are is multi-listed, then the initial place of trading prevails. The underlying idea which drives this principle is that the place of trading is the pilot-market of the securities, best and most appropriately able to exercise supervison over a cross-border bid[26]. Its soundness is borne out by national pre-Directive administrative practice. For instance, in the recent takeover bid initiated by Dutch Mittal Steel over Arcelor (itself a conglomerate resulting from a merger between French, Spanish and Luxembourg groups), the various national financial agencies involved, including the French AMF, which had initially claimed an interest in regulating the bid, conceded authority to the Luxembourg financial authority, where Arcelor was first admitted to trading. This principle, which draws on policy considerations linked to the functioning of financial markets, contrasts interestingly with the criteria used in the field of corporate law to justify adjudicatory jurisdiction over litigation linked to corporate affairs, which is largely exercised by the courts of the State of registration (or corporate seat).

* In a completely distinct field, intercountry adoption is now to a large extent subject to the transnational administrative action of agencies. Under the 1993 Hague Convention, each Contracting state (of which there are now impressively 71) designates a "central authority" whose task is to supervise the adoption process from the outset until the completed project is put into the hands of the courts, at least in States where adoption requires a judicial decision. The various agencies work in cooperation to "fit" the adoptive couple's project to a particular child, ensure that the child's family or guardian consents freely to the project and check that the respective requirements of the applicable laws are met. In any given case, the agency entrusted with establishing that the child is adoptable, that the family of guardian has been properly counselled and has freely consented, etc, is the agency in the state of origin of the child, whereas conditions appertaining to the adopted family are checked by the authority in the host state, which is best fitted to carry out further superversion of the new adoptive family. Once again, the actual court decision on adoption may be made in the country of which the child is a national – criteria which prevail for more traditional reasons in the area of judicial jurisdiction disappear in favour of the functional yardsticks which command efficient adminsitrative action.

2. ***Allocation of power is concurrent, not exclusive***. Clearly, as the above examples already suggest, one of the distinct characteristics of administrative action on a transnational level is the room left to negociation and dialogue between agencies, and to the sharing of supervisory regulatory authority in a given case. Here again a comparison with adjudicatory jurisdiction may help underscore the extent of the

---

[26] See Aline Tenebaum, « La compétence intenrationale des autorités de surviellance des amrchés finaciers en matière d'offre publique », *Rev crit dr int pr* 2006.557, at p. 571.

paradigm change involved in the very idea of a transnational network, which by defintion implies cooperation.

Courts, on the other hand, do not indulge traditionally in transnational dialogue[27]. Of course, things may now be changing radically here, and an interesting question would be to ask to what extent the network paradigm induced by the practice of non judicial agencies now actually includes the courts, which could equally be conceptualised as agencies within a larger policy-driven frameworks. Robert Wai even suggests that transnational private law might be a kind of "jurisdictional interface." [28]. Attempts have been made to pin down instances of inter-court negotiation (insolvency cases, condtional forum non conveniens, informal agreements over provsional measures...)[29], and élite members of the judiciary incraasingly tend now to cultivate informal links as a transnational class. However, it remains nonetheless that traditional criteria for international adjudicatory jurisdiction point not to sharing and dialogue but to exclusivity and, in some case, aggressive protectionism. In the common law tradition, the identification of the "natural forum" is central to the understanding of the architecture of jurisdictional rules and explains the defensive practice of anti-suit injunctions, which guarantee monopolistic adminsitration of litigation. In the civilian tradition, various procedural mechanisms (such as connexity or lis alibi pendens), introduced in exacerbated form within the European judicial space created by the Brussels Convention, ensure the absolute primacy of the court first seised.

By contrast, under the instrumental, policy-driven approach which characterises the allocation of regulatory authority, cooperative sharing of decision-making power is functionally necessary, inherent in the architecture of the network and often expressly codified in the form of a duty to cooperate in the various texts governing transnational administrative action. Such cooperation may signify refraining from acting when a foreign agency seems better equipped or better situated to ensue the implementation of a particular goal, or of supporting or relaying the action of a neigbouring authority when efficiency so requires. As it has been aptly described in the field of antitrust: " The Justice Department and FTC know they can rarely win transnational antitrust cases on their own. The obstacles go well beyond establishing jurisdiction to prescribe under some version of the effects doctrine. The additional hurdles include: service of process; personal jurisdiction; battles over discovery, admissibility of evidence, and availability of witnesses; special international defenses; and the difficulty of fashioning meaningful relief. For the United States, the cumulative effect of these difficulties suggests that taking on foreign companies

---

[27] In the notorious *Turner v Grovit* case(C-159/02, ECR I-3565, 2004) why did the English and Spanish courts not speak to each other ? Is there a due process issue here?...

[28] Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society", 46 Harv. Int'l L.J. 471 (2005), at p. 485.

[29] Jay Westbrook, "International Judicial Negotiation", 38 Tex. Int'l L.J. 567 (2003)

against the wishes of their home countries is a thing of the past. Despite its official bluster, the United States has pinned its hopes on antitrust cooperation as a way to circumvent these problems and maintain an effective international enforcement policy. The recent experience of investigating jointly with Canada transnational cartels suggests that cooperation between authorities can produce results beyond the practical reach of any competition authority acting by itself"[30].

Once again, an institutional illustration of such cooperative exercice of concurrent authority can be found (one among many) in the European Community Take-Over Directive. When the targeted corporation is admitted to trading in a country other than its state of registration, then article 4 (2) b distributes market issues to the former (such as the price of the offering, procedure of the bid), while matters of corporate law (such as disclosure to employees, voting rights) are left to the (home) state of registration. Both authorities are subject to duties to supply information and, correlatively, to secrecy. According to the Commission, this allocation of regulatory authoriy "corresponds to economic realities"[31]. Whatever these may be exactly, this form of sharing does indeed appear to correspond to transnational administrative practice. In the Arcelor bid, for instance, transnational negotiation between the financial market authorities involved led the French AMF to concede the supervision to the Luxembourg authority, but, with the agreement of the latter, it retained competence to supervise certain aspects of the operation, and then made known publicly the specific French regulatory provisions (on transparency and information) it intended to implement.

The Hague intercountry adoption Convention organises, similarly, a distribution of roles between the central authorities in charge of supervising the adoption process. As we have already seen, while the agency in the future residence of the adoptive family is in charge of matters concerning the eligibility of the prospective parents, the authority acting in the place where the child resides before it is displaced in view of the adoption carries out the necessary steps which require proximity with the child or its family (for instance, in ascertaining unfettered consent). Here again, the functional arrangements reached in the preparatory stages of the adoption process constrast with the often exclusive assertion of jurisdiction by the courts of the child's home country.

3. ***Allocation of authority takes account of multiple levels of decisional authority***. Where the conduct of private persons is affected by administrative activity, there is always the possibility that they will wish to turn to the courts for back-stop review. Indeed, judicial review of administrative activity is no doubt a principle of

---

[30] Spencer Weber Waller, "The Internationalization of Antitrust enforcement", 1. 77 B.U. L. Rev. 343 (1997) at p.376.

[31] Commission Communication to Parliament concerning the Common Position, SEC (2000) 1300, §3.3.

governance with relevance in the international field, allowing foreign persons or entities access to the competent courts of the authority's home state (outside of which the question of sovereign immunity for public instrumentalities arises). For instance, Such reveiw may however be limited to cases in which the agency makes a negtive decsion (for instance, refusing a right to admission of securities on an official listing[32]). However, judicial review also clearly creates a "litigation risk" which may hamper the transnational activity of administrative agencie. Such a risk is particularly sensitive when the authority involved is itself self-regulatory. For instance, in the course of the (laborious) negotiations which led to the EC Take-Over Directive, one of the particular concerns of the British Takeover Panel was that judicial review would delay process and prejudice the activity of the panel. In the end, the Community authorities designed a solution which was intended to exclude rights *inter partes* (article 4.6): the directive "does not affect the powers of Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities in the bid procedure".

That lack of proper coordination between judicial and adminsitrative action can create unwelcome frictions and incoherence in the international arena has been amply demonstrated by Hannah Buxbaum in the field of anti-trust, in the (different) situation where court action does not take the form of judicial review of administrative decisions but the exercice of adjudicatory jurisdiction over (ostensibly private) tort litigation [33]. This author shows how, before deciding to bring an enforcement action in cases of antri-trust violations involving foreign actors, the market authorities use criteria to define the scope of federal regulation which – at least until *Empagran*[34], have been very different to those used by the courts entertaining actions by private attorneys general. Of course, such interference is particularly visible when private tort actions assume a regulatory function designed to supplement public administrative action. But the same incoherence appears in cases where courts are called upon to validite forum-selection clauses in international contracts. Whereas guidelines issued by the Antitrust Division and the Federal Trade Commission set forth a list of factors not unlike those included in the Third Restatement , including considerations of comity, in the sense of sensitivity to foreign interests, case-law tends to reveal "a focus on private-law values rather than on the strength or character of the public interest asserted. This focus manifests itself in judicial unwillingness to insist on the application of domestic regulatory law in the

[32] See for instance, the Admission Directive, article 15(1) provides for a right to apply to the couts when an aplication is rejected. The more radical suggestion to allow court reviw against any decision was rejected.

[33] Hannah Buxbaum, "The Private Attorney General in a Global Age: Public Interests in Private International Litigation", 26 *Yale J. Int'l L.* 219 (2001).

[34] *Empagran SA v F Hoffmann-La Roche* Ltd, 542 US 155 (2004).

face of private contractual arrangements"[35]. It again points to a particular need for multi-level coordination between administrative authorities and the courts - including courts exercising adjudicatory jurisdiction (not judicial review) in cases where the acting administrative agency belongs to another state.

If coordination is properly orchestrated, then, as Robert Wai suggests, complementarity between private law litigation, judicial review and transnational administrative actions may be the best way to fight against regulatory "gaps"[36]. Obviously, the burden would be on the courts and agencies to consider what is happening in the different levels of political process. Interestingly, referring here to various models through which the multi-level complexity of transnational cooperative processes can be understood, the author evokes the conflict of laws as a framework to better apprehend "the relation between multiple normative systems... the reality of the policy stakes of each system's norms, the need to avoid reducing the complex nature of the conflict of among system norms, and attention to the legitimacy of the different systems"[37]. The idea is clearly promising. Among other things, it emphasises the fact that the allocation of authority between administrative agencies is only part of the issue. What, then, of the governing law?

*II. – **The choice of governing regulatory provisions.***

There is a commonly shared idea, at least in Europe, that an administrative authority can only ever apply its own law. It may actually come as a surprise on this side of the Atlantic that there have been previous, sophisticated attempts by private international lawyers to design a methodology relating specifically to the international regime of administrative acts. This typically European perspective is in fact linked to the existence of the "Latin Notariat" – not to be confused with the American version of "public notaries" - according to which public officials play a prominent role in the administration of private law. Notaries draw up deeds, administer successions, register corporate acts, supervise the sale of land, give advice on matrimonial property and much more...In most cases, the intervention of the public officer commands the validity of a given transaction, although in some cases, it may serve merely evidentiary or publicity purposes. The term 'conflicts of authorities' was invented to cover issues relating to issues such as when a public official should act, what law it should apply, and whether its act could be enforced or recognised internationally. Until fairly recently, it was generally thought that because administrative agencies are depositaries of state sovereignty, instituted to implement

---

[35] (p.237).

[36] "Transnational Private Law and Private Ordering in a Contested Global Society", 46 Harv. Int'l L.J. 471 (2005), in particular at p. 487 et s.

[37] Wai himself refers here to Christian Joerges' work on " diagonal" conflicts in a European setting: see Ch. Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective", 3 EUR. L.J. 378, 396-407 (1997).

specific legislation (for instance, regulation of succession or the sale of immovables), and being neither interchangeable nor multi-purpose like the courts, they could only ever act territorially and apply local law (*auctor regit actum*), and their acts were deprived of any effect beyond the frontiers of the state. Today, increased interconnectedness in the various fields of private law in which these public authorities are called upon to act, has lead to a more flexible approach. It is now thought that sovereignty considerations require only that the public authority, like the courts themselves, follow its own procedural rules, but that nothing prevents it from acting in accordance with foreign law on matters of substance (for instance, a notary may draw up an act by which a married couple modifies its matrimonial property regime, even if its own law does not allow such a change). More importantly, the cases in which a public authority is required to act is now understood to be dependant upon the (perhaps foreign) substantive law applicable to a given transaction, while its acts either accede to free movement for enforcement purposes, like judgments, or benefit from privileged evidentiary status elsewhere[38].

While the type of public authority and action we are thinking about here concerns the regulatory sphere and therefore raises very different issues, nevertheless this previous reflection provides an important starting point, according to which there is no obstacle to an administrative authority as such applying foreign law. But what if the governing law is public law? Does the foreign revenue rule not come into play here to exclude foreign law for sovereignty reasons?[39] Is there any reason for which the courts should be hampered by the public law taboo more than administrative agencies? Basically, the exclusion of foreign public law before the courts is based on the idea that the (judicial) agencies of the forum state should not be put at the disposal of the presumably antagonistic interests of foreign sovereigns. Claims based on foreign public law coulmd not therefore be entertained by the courts of the forum, whose interchangeability concerns only the a-political private sphere, where there is no threat for the sovereignty of the forum state. Of course, this justification contains the seeds of destruction of the whole doctrine. First, when state intersts are not antagonistic but share common goals, there is no reason to disallow courts to pursue them. Whereas in the famous *Spycatcher* case, the High Court of Australia refused to entertain a Brish claim based on the Official Secrets Act, sinced it would mean "enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government", the New Zealand judiciairy took a different stance: "in a shrinking world, it seems anachronistic for the Courts to deny themselves any power to do what they can to safeguard the security of a friendly foreign state." Second, the new understanding of sovereignty as instrumental rather than territorial may actually require cooperation and exchange of applicable laws between

[38] For instance CE Regulations Brussels I and Brussels II bis both provide specifically for the recognitionand/or enforcement of public acts.

[39] The vitality ofn teh foreign revenue rule.

administrative agencies rather than an attitude of exclusion or indifference, since such cooperation is actually empowering and not the reverse. This realisation leads to three sorts of consequences.

1. ***Positive comity may go beyond deference***. Even before the courts, where traditional approaches tends to linger, there are signs that transnational litigation in regulatory fields is actually throwing up evidence of common state interests, so much so that one author has suggested that such litigation, albeit subject to domestic economic law, may bring substantive regulatory benefits to the international community[40]. That positive comity is at work here, too, is also evidenced by various recent cases[41]. However, a look at transnational regulatory litigation shows that while such comity before the courts will take the form of judicial abstention and deference to foreign interests, favoring rejection of claims which would lead to too intrusive an application of domestic regulation, the public law taboo still prevents the active application of foreign regulatory law. Technically, of course, at least in the United States, the cause of the taboo resides here in subject-matter jurisdiction requirements of the federal courts.

But the point is that the administrative duty to cooperate, which justifies negociation and dialogue when it comes to deciding upon the shared exercice of regulatory authority, may also lead to applying foreign regulatory law. Administrative practice tends first to reveal a spontaneous tendancy of regulatory agencies at least to take the content of foreign law into account when exercising supervisory authority. Examples can be found once again in the area of securities regulation. The SEC has frequently been willing to ease up the heavy disclosure requirements laid down by federal law when the issuer has complied with foreign regulation which pursues similar ends and reaches a functionally equivalent result. An author has characterised this attitude as a new methodology based on "attenuated" or bilateral public policy[42]. More disappointingly, however, in Europe, while the Community Take-Over regime provides for cooperation between market authorities, it does not provide for the application of foreign regulatory law, as if *forum* and *ius* were inevitably linked[43].

2. ***Mutual recognition may imply implementation of regulation by foreign agencies***. The dissociation between the national origin of the administrative agency and the applicable regulatory law may be more apparent under mutual recognition regimes. In their paper given in a previous seminar, "Transnational Mutual Recognition Regimes: Governance without Global Government", Kalypso Nicolaidis and Gregory Shaffer describe (and advocate) horizontal systems in which one state recognizes

---

[40] Hannah Buxbaum, Trnaantional Regulatory litigation, 48 Va J Int'l L 251 (2006).

[41] Spectacularly, of course, *Empagran SA v F. Hoffman-La Roche Ltd*, 542 US 155 (2004).

[42] Xavier Boucobza, *L'acquisition internationale de société*, LGDJ 1998, preface by Ph Fouchard.

[43] On this point, see the critical analysis by Aline Tenebaum, *Rev crit dr int pr* 2006.557, at p.573.

(usually on a reciprocal basis) the applicability and adequacy of the standards or conformity and certification arrangements used in another state in order to trade in goods and services[44]. Within Europe, the generalisation of mutual recognition in the market for goods and services, whether directly on the basis of the EC Treaty or aided by measures of harmonisation (as in the banking sector and financial services) was perceived as the only way to eliminate regulatory barriers and duplication of of rules obstructing access to the internal market.

The design of mutual recognition has, however, given rise to much debate within Europe. Briefly, first, because in the field of services, it is unclear whether mutual recognition extends to private law aspects (for instance contract and tort rules). Second, as far as goods are concerned, the European Court's case-law has at least in some instances obliged the importing (host) state to mutually recognise the marketing rules of the home state. Including the home state's private law (particularly tort) rules in the mutual recognition of services is likely to induce a race to the bottom, whereas extending mutual recognition of goods to the marketing rules of the home state is economically counter-productive. The latter case raises the spectre of the exporting state having to recognise the importing host state's production rules[45]. In this respect, it has been shown that, at least within the internal market, enhancing regulatory competition requires a different design for mutual recognition according to the categories of rules (marketing or production; quality standards or tort; professional qualifications or contract) involved. Marketing rules and production rules should not, therefore, be subjected to an identical regime.

Whatever the design of this regime, however, it is clear that the essential requirement of mutual recognition in the field of substantive rules is abstention. The importing state will refrain from imposing a double burden of, say, quality standards or administrative authorisations concerning products and services manufactured or provided in another Member State. It is to this extent that norms of public law accede to passive extraterritorial effect. But as Kalypso Nicolaidis and Gregory Shaffer have shown, mutual recognition may extend beyond substantive regulatory equivalence to certification procedures or standards of another country. In this context, the certifying agency may therefore be called upon to implement foreign standards. Similar situations can be found the host state is called upon to implement the product standards of the state of origin. To take one example from Europe, in the field of investment services, the Commission's policy is to remove host-state-control over conduct-of-business rules[46]. This means that the home state (or state of origin's) conduct-of-business rules must apply, wherever the service is offered. It also measn that that host state will be called upon to monitor compliance (through it own

[44] "Transnational Mutual Recogintion Regimes' 68-AUT LCPR 263.

[45] Jukka Snell, *Goods and Services in EC Law. A Study of Relationships between the Freedoms*, Oxford, 2002.

[46] See Niamh Moloney, *EC Securities Regulation*, Oxford Library in EC Law, 2002, at p.405.

agencies or indeed throigh the courts. Such a situation implies a strong degree of mutual trust.

3. ***Party choice of regulation may be an alternative to global adminstrative law***? The final idea is to some extent a paradox. It is an academic proposal on the regulation of global capital markets through regulatory competition[47], which actually builds on the mutual recognition theme - while rejecting administrative cooperation as insufficient, time-consuming and overly costly in terms of monitoring compliance. Since "the existing global regulatory regime is far from perfect.... a better system would encourage regulatory competition among different regimes, which would provide choice to issuers and investors in how they should be regulated". For the authors, regulatory competition is likely to lead to a variety of regulatory regimes across the board, catering to different categories of issuers. "As countries seek to establish a niche for themselves in the international competition for securities issues, a spectrum of regulations may emerge". At the same time it would provide a remedy for the overbroad reach of American securities laws. Taken literally, Section 5 of the Securities Act extends American jurisdiction over all offerings anywhere in the world that have some connection, no matter how remote, with the United States – even though, as we have already seen, the SEC has not sought to push the jurisdictional limits of Section 5, choosing instead to adopt a more restrained approach (through Regulation S, according to which issues made "outside" the United States are exempt from the registration requirements of Section 5)[48] .

The authors point out that under normal reciprocity or bilateral mutual recognition regimes, countries agree to honor one another's substnative laws, at least with respect to certain specified transactions. "Parties are freed from having to learn and comply with a new set of laws when they enter a new jurisdiction. Rather, parties may continue to follow their own domestic laws regardless of the jurisdiction in which transactions take place". Bilateral recognition regimes therefore imply a certain amount of "portability". To a certain extent, they separate the choice of a capital market where securities are issued and the choice of a securities regime. Portable reciprocity as conceived by the authors goes one step further, since it would allow issuers to select the law of any participating country regardless of the physical location of the securities transaction. It thereby extends the concept of reciprocity to include multiple countries, diverse regulations, and greater issuer choice. "Rather than simply allowing issuers to engage in transactions abroad on the

---

[47] S. Choi & A. Guzman, « Portable reciprocity : Rehtinking the International reach of Securities Regulation », 71 S. Cal. L. Rev. 903 (1998). Interestingly, this proposal is considered by the largest treatise on EC Securities Regulation (Niamh Moloney, *EC Securities Regulation*, Oxford EC laW Library, 2002, p.12).

[48] S. Choi & A. Guzman, , « Portable reciprocity : Rehtinking the International reach of Securities Regulation », 71 S. Cal. L. Rev. 903 (1998), at p. 917.

basis of compliance with the requirements of their home jurisdiction, portable reciprocity allows issuers to choose any of the regimes of participating countries regardless of where the securities are issued". It also works to de-link the choice of regulatory regime from the choice of capital market. The only problem would be the particular care required in the design of an effective enforcement regime to ensure efective enforcement of the laws of one country in the territory of another. The authors preference goes here for efficieny reasons to the regime state with a possibility of opting out though choice of forum.

Although this remains a purely academic proposal, and invites some scepticism at least on the other side of the Atlantic, where there is less faith in the regulatory virtues of party freedom, it is extremely interesting, first, because it emphasises the radical change in the relationship between law and market in a global environement, where party mobility (whether through free choice or exit) is already a reality. Second, because it includes in this reversal the activity of regulatory agencies, which to some extent would function on a delocalised basis. If one links these ideas to equally intriguing recent proposals to delocalise the adjudicatory activity of the courts in order to enhance global efficiency with the cooperative consent of states, the vision of the global world it projects is quite startling. Paradoxically, although it is in some ways the antithesis of this seminar, in that its starting point is the inefficiency of transnational administrative cooperation, it contributes in exactly the same way to the dis-location of traditional understandings of sovereignty. It suggests that the future of good global governance lies in the articulation or interface of multiple policy regimes and methods - which bodes well for interdisciplinary dialogue !