The Ambiguous Relations between Corporate Compliance and Sovereignty

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INTRODUCTION

Is compliance redefining the notion of sovereignty as we know it in public international law? At first, the question may seem incongruous, given that corporate compliance has, to some extent, stood away from the realm of international law. It is not so much that corporate compliance does not have a transnational dimension; it is rather that they both have their own instruments and methods, as well as ways of looking at the world. A closer examination reveals nonetheless that confronting corporate compliance and the international law understanding of sovereignty proves useful in shedding a light on the relatively ambiguous relations between them.

The starting point of the analysis reveals a certain dissonance. At first sight, the notion of sovereignty seems quite incompatible with that of corporate compliance. While sovereignty traditionally endorses a territorial approach to jurisdiction, corporate compliance has used methods and instruments which largely ignore borders and which do not take due account of their compatibility with international law. Indeed, if corporate compliance is perceived as a new form of regulation,(1) this new kind of

(1) M.-A. Frison-Roche, "Du droit de la régulation au droit de la compliance," *in* M.-A. Frison-Roche (dir.), *Régulation, supervision, compliance*, Paris, Journal of Regulation & Compliance/Dalloz, 2017, p. 12.

imperium seems to unfold with international law rules on State jurisdiction remaining in a blindspot as well as with international law not necessarily able to detect how and to what extent corporate compliance may infringe international law.

This largely silenced dissonance between corporate compliance and sovereignty must be assessed in light of the objectives and "monumental goals" that corporate compliance seeks to pursue. (2)

Most of these "monumental goals" reflect imperatives that have been defined in a multilateral framework (fight against corruption, money laundering or terrorism financing, etc.). This has implied a convergence between international norms and the objectives of corporate compliance. This convergence does not however imply a perfect continuity and harmony between both frameworks. Indeed, if corporate compliance seems to unfold as a mere declination of what has been jointly defined by sovereign States, it operates nonetheless with its own mechanisms and set of rules. (3)

The situation is actually more complex given that some "monumental goals" collectively recognised as legitimate goals by States do not necessarily translate into a similar set of rules in each national legal system (or regional for the European Union). This is the case, for example, of international human rights law and the due diligence obligations in global value chains, data protection or the exchange of information for tax purposes. In such situations, the risks of tension between corporate compliance and sovereignty are even more amplified.

The situation can be even tenser when the "monumental goals" of corporate compliance follow a strictly unilateral approach. Economic sanctions provide an interesting case in this regard. States can jointly adopt, under the auspices of the United Nations, multilateral economic sanctions that will eventually be complied with by economic actors. Some States have also developed a practice of unilateral economic sanctions, in view of pursuing global objectives (such as human rights protection, protection of democracy, *etc.*). Some of these sanctions, in particular US ones, may have an extraterritorial reach which possibly exposes economic actors to

(2) M.-A. Frison-Roche, "Legal Approach to Compliance Tools," *in* M.-A. Frison-Roche (ed.), *Compliance Tools*, Paris/Bruxelles, Journal of Regulation & Compliance/Bruylant, 2021, p. 35.

(3) Regarding anti-corruption law, some illustrations may be found in: R. Bismuth, J. Dunin-Wasowicz and P.N. Nichols (eds), *The Transnationalization of Anti-Corruption Law*, Transnational Law and Governance, Abingdon/New York, Routledge, 2021.

considerable conflicts of obligations. This has been particularly the case with the EU blocking regulation prohibiting EU businesses from complying with US extraterritorial sanctions. The US strategy could be more insidious when in some specific situations (for example, in sanctioning Iran), it amalgamated unilateral sanctions with multilateral disciplines relating to the fight against terrorism financing and money laundering. (4)

Corporate compliance seeks to ensure the effectivity of a nuanced range of objectives, from authentically multilateral "monumental goals" to strictly unilateral goals. But corporate compliance expands through methods and instruments (risk mapping, codes of conduct, internal investigations, negotiated justice settlements, etc.) that one may consider as "neutral" since they can be deployed interchangeably, for multilateral or unilateral objectives. Once corporate compliance internalises those different objectives, this distinction between multilateral or unilateral dimensions quickly fades out, and the company has to choose between different options on the basis of various factors (sector of activity, exposure to the US market, *etc.*). This has subsequently amplified the existing tensions between corporate compliance and sovereignty. Indeed, corporate compliance tools tend to habituate the company to arbitrate between conflicting obligations in a transnational context (complying with economic sanctions or with a blocking regulation, transferring data to a foreign authority or complying with the requirements of data protection, *etc.*). This has fed a progressive shift from corporate compliance as a process of norm implementation to a process of norm generation.

In this sense, the ambiguous relations between corporate compliance and sovereignty seem to have three dimensions, which are non-mutually exclusive: extension, confrontation, and transformation. Compliance may first and foremost be conceived as a tool enabling States to indirectly extend the limits of their territorial sovereignty (I). But corporate compliance as a tool can nevertheless lead to several frictions, or even conflicts, with the notion of sovereignty. An illustration of this can be found when the "monumental goals" of corporate compliance are not defined in a multilateral fashion. This characterises the confrontational dimension (II). Finally, by accustoming companies to methods and instruments reminiscent of sovereign functions, corporate compliance has the potential to

(4) On the US Treasury's strategy, see J.C. Zarate, *Treasury's War – The Unleashing of a New Era of Financial Warfare*, New York, PublicAffairs, 2013.

facilitate the emergence of a corporate sovereignty, beyond State sovereignty. This is the transformational dimension that we will discuss in our conclusion (III).

I. EXTENSION: PUSHING THE LIMITS OF SOVEREIGNTY THROUGH CORPORATE COMPLIANCE

State action is constrained by international law and, in particular, its principles on prescriptive, adjudicative and enforcement jurisdiction.(5) Leaving aside cases of universal jurisdiction (for instance, for international crimes) and protective jurisdiction when the fundamental interests of the State are at stake (for example, for currency counterfeiting), the State cannot, in theory, extend the applicability of its regulation (prescriptive jurisdiction) or the jurisdiction of its courts (adjudicative jurisdiction) to situations taking place in a foreign country and not involving its nationals, whether natural or legal persons. Nor can the State, in principle, extend the enforcement of its decisions (enforcement jurisdiction) outside its territory, even where the situation concerns a national. This is the basic framework upon which the discourse on the extraterritoriality of law has been constructed over the past years.(6) Of course, this framework does not allow us to grasp all social realities, in particular those where territoriality appears to be more elusive. This is the case for internet and data regulation for which location cannot fully be based on an objective territorial basis, and which may give rise to competing claims or conflicts of jurisdiction.(7)

The limits set by international law on prescriptive, adjudicative or enforcement jurisdiction can, almost silently, be circumvented by corporate compliance. This is not an issue of the extraterritoriality of US law (anti-corruption, economic sanctions, etc.) on the basis of which non-US corporations (and in particular European ones) have been sanctioned by US authorities.(8) It is rather a discussion about the ways through which

(5) C. Staker, "Jurisdiction," *in* M.D. Evans (ed.), *International Law*, 5th ed., Oxford, OUP, 2018, p. 289.

(6) R. Bismuth, "Pour une appréhension nuancée de l'extraterritorialité du droit américain – Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas," *Annuaire Français de Droit International*, 2016, p. 785.

(7) J. Daskal, "Borders and Bits," *Vanderbilt Law Review*, 2018, Vol. 71, p. 179; R. Bismuth, "Le Cloud Act face au projet européen e-evidence: Confrontation ou coopération?," *Rev. crit. DIP*, 2019, No. 3, p. 681.

(8) R. Bismuth, "Pour une appréhension nuancée de l'extraterritorialité du droit américain – Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas," *op. cit.*, p. 795.

instruments and methods of corporate compliance have themselves generated some forms of extraterritoriality. Three instruments deserve to be analysed here: negotiated justice settlements, corporate monitorship, and risk mapping.

Negotiated justice settlements have been a new instrument for sanctioning corporate misconduct.(9) If they have led in certain cases to criticisms regarding their extraterritorial dimension,(10) it is precisely because such mechanisms may silence any debate relating to the issue on jurisdiction. The prosecuted company is faced with an alternative: either it chooses to benefit from all procedural guarantees in a criminal trial that can lead to a maximum financial sanction and market restrictions, or it waives these guarantees by agreeing to conclude a settlement with the prosecuting authorities, which will determine the facts and result in a negotiated sanction, usually a financial penalty. Choosing the negotiated solution makes the sanction more predictable, which is essential in terms of risk management. But this option nonetheless neutralises any room for discussion regarding the question of legitimacy of the competence of the prosecuting State. States generally rely on their "doing-business jurisdiction"(11) which in most cases would have made it possible to assert their competence in the context of a criminal trial. The corporation's consent to the negotiated procedure allows the authorities to avoid complex discussions in situations where the jurisdictional nexus is more debatable. Such consent is also useful to the extent that it facilitates the implementation of the settlement. Negotiated justice has thus enabled the United States to use in economic sanction cases – and without explicitly admitting it – a US-dollar jurisdictional nexus when targeting transactions concluded outside the country between foreign persons, as long as they are concluded in dollars and cleared through the US financial system. This dollar-based competence lies on a very extensive interpretation of territorial jurisdiction, which has been adamantly criticised since there is no substantial connection between the targeted transaction and the US territory and given that the clearing transaction is merely incidental.(12) It is therefore

(9) L. d'Avout, "L'entreprise et les conflits internationaux de loi," *RCADI*, 2021, Vol. 397, p. 470.

(10) *Ibid.*, p. 476 (translated by the author).

(11) *Ibid.*

(12) R. Bismuth, "Pour une appréhension nuancée de l'extraterritorialité du droit américain - Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas," *op. cit.*, p. 796; S. Emmenegger and T. Döbeli, "The Extraterritorial Application of U.S. Sanctions Law", *in* A. Bonomi and K. Nadakavukaren Schefer (eds), *US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?*, Geneva/Zurich, Schulthess, 2018, p. 231.

not surprising to see that, to date and to our knowledge, only individuals – not facing the same constraints as corporations in negotiated justice settlements – have chosen to challenge the legality of this jurisdictional nexus. (13) In any case, by hindering any possible discussion on the issue of jurisdiction, negotiated justice settlements have enabled States – in particular, the US – to adopt a very extensive conception of their jurisdiction.

What has just been pointed out concerning negotiated justice can be extended to what is commonly referred to as corporate monitorship. Negotiated settlements can give rise to sanctions with a retrospective dimension (for instance financial penalties) and others with a prospective dimension (behavioural remedies). (14) This type of sanctions can lead the prosecuting authorities to appoint a corporate monitor who is in charge of controlling the implementation of the company's commitments. This practice emerged in the United States. Corporate monitors are deemed to be independent from both the authorities and the sanctioned company. They are endowed with extensive prerogatives and conduct investigations and assessments of the company's compliance programs. They have to issue periodic reports to the company's management and to the prosecuting authorities. Corporate monitors are independent but with a somehow public function when it comes to controlling the internal management of the company. (15) It would of course be inconceivable for the States in which the sanctioned corporations operate that foreign public agents could freely exercise their *imperium* on their territory without their consent, for example, by conducting investigations to control the implementation of negotiated settlements. This precisely constitutes the exercise of enforcement jurisdiction on the territory of a foreign State, which is in principle prohibited under international law. We can apply a similar analysis to the context of corporate monitorship. Indeed, while being independent from the appointing State, corporate monitors remain nonetheless a State agent from an international law perspective, as they exercise by delegation "elements of governmental authority" under the international law rules on State responsibility. (16) The monitorship programs implemented in highly sensitive cases offer compelling evidence of the problems that the monitor's functions raise. Some of these programs

(13) S. Emmenegger and T. Döbeli, "The Extraterritorial Application of U.S. Sanctions Law," *op. cit.*, p. 231.
(14) L. d'Avout, "L'entreprise et les conflits internationaux de loi," *op. cit.*, p. 479.
(15) *Ibid.*, p. 480.
(16) J. Crawford, *State Responsibility: The General Part*, Cambridge, Cambridge University Press, 2013, p. 126.

have led to intergovernmental agreements in view of facilitating the transfer of information to prosecuting authorities which would have been otherwise contrary to domestic blocking statutes. This happened for instance in the Alcatel-Lucent case. (17) However, to our knowledge, such a practice remains rare. It is generally recommended that corporate monitors first identify any thorny issues raised by the blocking statutes, and make sure that their activity does not blatantly breach them. (18) This is another example of how, at the margins of international legality, corporate compliance tools allow prosecuting authorities to extend the spatial boundaries of their executive competence, when relying on mechanisms based on the consent of the targeted company and involving private persons in the monitoring process.

Risk mapping constitutes another instrument of corporate compliance which facilitates risk assessment for companies. Risk mapping must not be simply conceived as a way for a company to meet a legal obligation (in data protection, the fight against corruption, human rights protection, *etc.*). It also constitutes an instrument through which the company may adjust its internal processes *ex ante* (19) so as not to be held liable, in an *ex-post* approach, for failures to comply, for instance, with a due diligence obligation. In this respect, it is interesting to note that risk mapping and due diligence obligations lead the company through compliance processes to extend the application of the rules of the regulating State at the corporate group level, therefore with cross-border effects. The French statute on the *devoir de vigilance* (20) provides an interesting illustration. It applies exclusively to certain French companies and requires them to carry out risk mapping in order to take reasonable vigilance measures to prevent severe violations of human rights or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls as well as from the operations of the subcontractors or suppliers with whom they maintain an established business relationship. French law does not however require subsidiaries, suppliers and subcontractors located abroad to comply with certain standards. This would

(17) L. Cohen-Tanugi, "The Independent Corporate Monitor: Who, What, When and How?," *Revue internationale de la Compliance et de l'Éthique des Affaires*, 2019, No. 1, p. 8.
(18) G.M. Soffer, N. Bunick and J. Hodge, "US-Ordered Cross-Border Monitorships," *Global Investigations Review*, 2020, p. 148.
(19) N. Guillaume, "Compliance Risk Mapping: First Insight into the Challenges, Limits, and Best Practices," *in* M.-A. Frison-Roche (dir.), *Compliance Tools*, Brussels, Bruylant, 2021, p. 68.
(20) Law No. 2017-399 of 27 March 2017 on the duty of care of parent companies and contractors, *JORF*, No. 74 of 28 March 2017.

constitute an extraterritorial exercise of prescriptive jurisdiction. Rather, it indirectly requires French companies to use their economic leverage to ensure that these actors comply with certain standards stemming from the risk mapping process. In this sense, this duty of vigilance obligation involves a cross-border regulation of global value chains.(21) One may argue that the extraterritoriality of this mechanism is "potentially wider than what the letter of the law would have suggested."(22) To some extent, the French statute on the *devoir de vigilance* builds on corporations' compliance tools to extend its territorial reach.(23)

In all of the above cases, such compliance tools largely fall outside the radar of international law because most of the key decisions have not been formally taken unilaterally by States but by companies. This also leads to some form of normative pluralism, as companies must not only implement the rules resulting from their compliance processes but also those required by domestic law. And these two categories of rules are not necessarily compatible.

II. CONFRONTATION: COMPLIANCE *VERSUS* SOVEREIGNTY

As previously shown, there is a risk that one of the corporate compliance tools (namely monitorship) may in practice violates the laws (namely the blocking statutes) of the States in which the investigations of the monitor are conducted. This allows us to delve deeper into the processes of corporate compliance and how they may conflict with domestic regulations. In this regard, the conflict arises not only because corporate compliance processes implement a foreign law (referred to as the law of the "home State") or an international standard, which may contradict the law of the State where it is implemented (referred to as the law of the "host State"), but also because they may go beyond the law of the home State or the international standard, and generate their own set of rules, which in themselves may clash with those of the host State.

(21) M.-A. Frison-Roche, "Approche juridique des outils de la compliance," *op. cit.*, p. 30.

(22) A.-S. Epstein, "La portée extraterritoriale du devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre," *Cahiers de Droit de l'Entreprise*, 2018, No. 4, p. 48 (translated by the author).

(23) R. Bismuth, "Au-delà de l'extraterritorialité, une compétence économique," *in* SFDI, *Extraterritorialités et droit international*, Paris, Pedone, 2020, p. 118.

Corporate compliance operates as a "delegation of normativity."(24) The company implements the "public" standard through its "private" compliance processes, which may then apply beyond the home State's territory. The potential conflict between the public standard (whether foreign or international) implemented by the company and the host State's domestic law has already been contemplated, for instance, in the field of corporate social responsibility. The key instrument in this regard, the United Nations Guiding Principles on Business and Human Rights (UNGPs) – adopted in 2011 by the UN Human Rights Council(25) and which have inspired the French statute on the *devoir de vigilance* – provide that if businesses must comply with domestic law, they must "seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements."(26) The Commentary to the UNGPs adds that "where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard."(27) This situation is also contemplated by the OCDE Guidelines on Multinational Enterprises, with a similar recommendation.(28) Such conflicts are not hypothetical and are likely to deal with highly sensitive topics. This is the case, for example, of a domestic law that would prohibit women from accessing senior positions.(29) We can feel some form of discomfort when reading the UNGPs or OECD Guidelines since they oscillate between an imperative to respect and protect human rights, on the one hand, and the required compliance with domestic rules (which is commonly referred to as the "When in Rome Approach"), on the other hand. This could lead to embarrassing accommodations within compliance procedures (e.g., allowing remote work for an employee facing discrimination in the host State).(30)

(24) J.-B. Racine, "Geographical Dominance in the Choice and the Use of Compliance Tools," *in* M.-A. Frison-Roche (dir.), *Compliance Tools*, *op. cit.*, p. 158 (translated by the author).

(25) Guiding Principles on Business and Human Rights, HR/PUB/11/4, 2011.

(26) Principle 23(b).

(27) Guiding Principles on Business and Human Rights, HR/PUB/11/4, 2011, p. 28.

(28) OECD, *OECD Guidelines for Multinational Enterprises*, 2011, I(2), p. 19.

(29) See e.g. BIICL, *When National Law Conflicts with International Human Rights Standards: Recommendations for Business*, 2018, pp. 16-17, available on the website: https://binghamcentre.biicl.org/documents/26_when_national_law_conflicts_with_international_human_rights_standards.pdf.

(30) *Ibid.*, p. 26.

We have just envisaged how a conflict between the law of the host State and corporate compliance processes materialises and where the former overrides the latter. In some cases, a company may choose to implement, at its own risk, its own standards without even taking into consideration the possibility of a violation of the law of the host State. It should be noted in this regard that the compliance standard may be specific to the company and not simply dictated by the law of the home State. Indeed, compliance processes are not a mere mechanical transposition of legal obligations. The company can devise its own compliance process on the basis of the different rules or requirements it must take into account and according to its own risk assessment. (31) If the rules of the home State offer a wide margin of appreciation to the prosecuting authorities and if the risk of financial sanctions is significant, the company will be tempted to embark on a maximalist compliance policy aimed at eliminating any possible risk of non-compliance. This compliance policy is known as "de-risking" or "overcompliance."

The implementation of US economic sanctions regularly gives rise to this type of behaviour. This was the case some time ago when Wal Mart's Canadian subsidiary, fearing US sanctions, removed Cuban-made pyjamas from sale (32) and when the Hilton Group's subsidiary in Norway rejected hotel reservations made by Cuban officials for the same reason – the latter situation gave rise to protests given that it was likely to constitute discrimination based on nationality. (33) These practices of overcompliance have taken an excessive dimension within financial institutions in the face of significant financial penalties that some of them have faced. As a result, several banks have adopted a de-risking policy, choosing to reject any transaction involving Iran or Cuba regardless of whether they were specifically falling within the scope of US sanctions.

This overcompliance policy can also lead to particularly grotesque situations. This has been the case, for instance, in the field of international tax cooperation. In the wake of tax scandals involving Swiss banks, the United States adopted in 2010 the FATCA statute (Foreign Account Tax Compliance Act), which requires all foreign financial institutions to transfer to the US tax authorities information regarding financial assets held by US persons

(31) J.-B. Auby, "Le dialogue de la norme étatique et de la compliance," *in* M.-A. Frison-Roche (dir.), *Régulation, supervision, compliance*, Paris, Dalloz, 2017, p. 103.

(32) M. Rathbone, P. Jeydel and A. Lentz, "Sanctions, Sanctions Everywhere: Forging a Path through Complex Transnational Sanctions Laws," *Georgetown Journal of International Law*, 2013, Vol. 44, p. 1120.

(33) *Ibid.*, p. 1121.

abroad. Given that transferring this information would have been, for banks, in blatant breach of domestic blocking statutes, more than a hundred States have agreed to enter into bilateral agreements with the US to allow such a transfer. Under this framework, financial institutions are obliged to identify US taxpayers by using indicia of US citizenship, including a place of birth in the US. This has led several foreign banks not willing to deal with the implications and bear the cost of these requirements to simply refuse US-born clients – including those who have no ties to the US other than their place of birth and who have a second nationality that of their State of residence. (34) This discrimination on grounds of nationality is another evidence that compliance processes can lead to corporate conducts conflicting with the domestic law of the host State. Besides, such overcompliance practices sometimes spread into market practices without raising any concerns about their legality. What is even more disconcerting is the institutionalisation of such discriminatory practices against US-born persons in boilerplate clauses found in EU Commission's bond issue contracts (35) – the same Commission that intends to neutralise the extraterritorial reach of US laws.

Both examples, of FATCA and economic sanctions, eventually show that overcompliance does not necessarily aim at preventing risks of non-compliance with legal obligations. Companies seem inclined to no longer pursue a wide range of activities considered too risky and costly from a corporate compliance perspective. (36) Although some institutions have already identified and started addressing the overcompliance issue, including the Financial Action Task Force (FATF) in the fight against money laundering and terrorism financing, (37) others are fully aware of it and have proven to anticipate an overcompliance based on companies' risk aversion to extending the reach of their regulations. In that regard, the US Treasury official in charge of designing the US strategy on economic sanctions, fight against money laundering and terrorism financing, noted that "the ultimate application of American financial power

(34) R. Bismuth, "L'extraterritorialité du FATCA et le problème des 'américains accidentels'," *JDI*, 2017, Vol. 144, No. 4, pp. 1197-1261.

(35) R. Bismuth, "Emissions obligataires européennes: La Commission participe-t-elle à une entreprise de discrimination fondée sur la nationalité?," *Revue internationale des Services financiers*, 2021, Nos. 1-2, p. 3.

(36) D. Artingstalli *et al.*, *Drivers & Impacts of Derisking*, Financial Conduct Authority, February 2016, available at https://www.fca.org.uk/publication/research/drivers-impacts-of-derisking.pdf.

(37) FATF, "Drivers for 'De-Risking' Go Beyond Anti-Money Laundering/Terrorist Financing," 26 June 2015, available at https://www.fatf-gafi.org/publications/fatfrecommendations/documents/derisking-goes-beyond-amlcft.html.

extraterritorially [...] relied on the decisions and actions of the private sector" (38) and predicted that financial institutions would go way beyond what was prescribed under US law.

III. TRANSFORMATION: COMPLIANCE AND THE LEGITIMISATION OF "CORPORATE SOVEREIGNTY"?

Corporations, more particularly those of a certain size or those operating in certain sectors, are the addressees of an increasing number of obligations to reach specific "monumental goals" that States are no longer able to assume on their own in an increasingly complex transnational context. Vesting companies with missions of general interest – for instance ensuring the proper functioning of the market – is hardly new. We have indeed witnessed this trend with the so-called "gatekeepers" in the area of financial regulation and corporate governance (rating agencies, auditors, *etc.*). (39)

Corporate compliance, whether due to its instruments or methods or the objectives it seeks to pursue, has moved corporations into a whole new dimension that entirely redefines how they deal with rules. Companies are no longer the mere addressees of regulations, they have become an essential part of their interpretation and implementation: "the legal subject has become the agent of legality [...] because of its position and its power." Besides, as it has been highlighted, corporate compliance processes may lead companies to devise their specific standards in a normative environment where they are subject to several (and sometimes conflicting) obligations.

These processes of norm creation, interpretation and implementation actually echo the classification of State competences under international law principles of State jurisdiction (prescriptive, adjudicative and enforcement jurisdiction). It is thus not a surprise to witness an emerging discourse on "corporate sovereignty" which would compete or coexist with State sovereignty. Since the beginning of this century, some literature on the issue has been published, (40) underlining in some cases the necessity

(38) J.C. Zarate, *Treasury's War - The Unleashing of a New Era of Financial Warfare*, *op. cit.*, p. 302.

(39) J.C. Coffee Jr, *Gatekeepers: The Professions and Corporate Governance*, New York, OUP, 2006.

(40) A.D. Chandler and B. Mazlish (eds), *Leviathans - Multinational Corporations and the New Global History*, New York, Cambridge University Press, 2005; J. Barkan, *Corporate Sovereignty: Law and Government under Capitalism*, Minneapolis, University of Minnesota Press, 2013.

to constitutionalise this form of private power. (41) This literature on corporate sovereignty has also more recently relied on the development of digital giants. Not only are these digital actors establishing their own transnational supreme courts, like the Facebook Oversight Board, suggesting that even managerial decisions are also judicially reviewable by internal corporate courts. (42) But States have also recognised their quasi-sovereign functions by appointing so-called "digital ambassadors" so as to initiate a dialogue on an equal basis with the giants of the Silicon Valley. (43) We may not yet be at the stage to recognise immunities and privileges for these corporations, but using the vocabulary of diplomatic relations nonetheless has an undoubted symbolic dimension.

Corporate compliance may not be at the source of all these evolutions, but it has nonetheless significantly facilitated and legitimised these changes.

(41) L. Catá Backer, "The Concept of Constitutionalization and the Multi-Corporate Enterprise: From Body Corporate to Sovereign Enterprise," *in* J.-P. Robé, A. Lyon-Caen and S. Vernac (eds), *Multinationals and the Constitutionalization of the World Power System*, Abingdon, Routledge, 2016, pp. 171-189.

(42) K. Klonick, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression," *Yale Law Journal*, 2020, Vol. 129, p. 2418.

(43) A. Satariano, "The World's First Ambassador to the Tech Industry," *New York Times*, 3 September 2019, available at https://www.nytimes.com/2019/09/03/technology/denmark-tech-ambassador.html.