Dossier - The New Habits of Imperialism
The Geopolitics of American Law: Recent News from the Foreign Front

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France does not know it, but we are at war with America. Yes, a permanent war, a vital war, an economic war, a war without death. . . apparently. Yes, they are very hard, the Americans, they are voracious, they want undivided power over the world. (. . .) It is an unknown war, a permanent war, a war apparently without death and yet a war to the death!" These words were said by François Mitterrand towards the end of his life.[1] Even before his reelection in 1988 he had predicted: "It is time, in fact, to address the situation. Consider the global economy: it is nothing but a battlefield where businesses are engaged in a war with no quarter. No prisoners are taken. Those who fall, die. (. . .) Attacks on enemy territory mean that to survive, you cannot stay where you are. The conquest of exterior markets protects the interior market (to export, to implant oneself in a foreign land). As for reliable allies, they are in short supply. Let us not forget that this war is a total, general war. (. . .) Relaxation is unforgivable. The fate of the nation is at stake."[2]

The President of the Republic deliberately chose hawkish language, no doubt because he felt it was the most appropriate way to express a reality that he had been aware of for a long time, and which has intensified since then.

The fall of the Soviet Bloc effectively allowed the United States to shape what George H. W. Bush called a "New World Order." The American Empire accordingly spread its ideal of "doux commerce," to use Montesquieu's famous phrase. The year 1991 was supposed to draw the curtain on the "short twentieth century"[3] with the victory of the so-called liberal world, a unipolar system covering the entirety of the globe. Its expansion was particularly clearly expressed in the Treaty of Marrakech that founded the World Trade Organization (WTO), signed on April 14, 1994. Almost all the world's nations are now members of the WTO. It was intended to be the sole international authority for economic and commercial (de)regulation, with a focus on free trade, and more generally, the free circulation of goods, people, services, and cash flows. More recently, the WTO appears to have reached the limits of it power with

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[1] Georges-Marc Benamou, Le dernier Mitterrand (Paris: Plon, 2007).

[2] François Mitterrand, "Lettre à tous les français, § La guerre économique mondiale" (letter addressed to the French people, April 6, 1988).

[3] Begun in 1914 with Europe's collective suicide that led to the consolidation of the USA's industrial and then financial power.

the Doha Development Cycle, which has stalled while its member states are unable to come to an agreement.

Meanwhile, a parallel reality was taking shape as the BRICS nations emerged onto the international stage. The paradigm shift from a unipolar to a multipolar world is changing power relations and strategies profoundly and, no doubt, permanently. The United States has had to imagine new scenarios.[4] For Pascal Boniface, Director of IRIS (the French Institute for International and Strategic Affairs), "the unipolar world was an illusion that took George Bush and the United States into the Iraq War, a fiasco that weakened American power. (. . .) The emergence of other powers led to the United States, and the Western world more generally, losing its monopoly on power. The excessive use of violence by the United States made American power more unpopular, and so less powerful."[5]

The dwindling of American power is clear. However, it is only a relative decline that by no means implies the USA's withdrawal from its traditional zones of influence, unless Donald Trump's stance deliberately increases the temptation of isolationism. The United States has up until now tried to maintain its dominance, or advantage, over Europe, and at the very least to weaken the old continent in order to establish its own position of power more firmly. It understands the need to be strongest when dealing with the weakest. This article will try to decipher the main driving forces behind its actions.

Extraterritoriality or the Ascendency of American Law

To paraphrase von Clausewitz, who stated that "war is the continuation of politics by other means," we suggest that "law is the continuation of economic warfare by other means." The United States sees itself as the bearer of a messianic, evangelical mission, and as such claims universal judicial competence. In this spirit, it has recently undertaken several initiatives aimed at extending its judicial hegemony even further, some of which are discussed below.

The Foreign Corrupt Practices Act (FCPA) is a federal law adopted in 1977 and intended to combat corruption in the business world. It can be enforced by the Department of Justice (DOJ), but also by the Federal Bureau of Investigation (FBI), the National Security Agency (NSA), or the Securities and Exchange Commission (SEC). The investigative resources available to these bodies are extremely wide-ranging. They can access any business-related information or documents they want, however confidential such information might be.[6] They are authorized to conduct interrogations with no lawyers present. Thanks to the generally broad approach taken

[4] *Le monde en 2030 vu par la CIA* (Paris: Editions des Equateurs, 2013).

[5] "Le monde occidental a perdu le monopole de la puissance." Interview with P. Boniface in *Libération*, April 5, 2016.

[6] For further information, see Olivier de Maison Rouge, "Procédure participative & discovery, faux amis ou vrais jumeaux de justice négociée?," Village de la Justice http://www.village-justice.com/articles/procedure-participative-discovery,19153.html (accessed April 18, 2017).

by the American tribunals, the FCPA can target a foreign company regardless of whether there is any link between it and the United States. The word "extraterritoriality" refers precisely to this phenomenon of the criminal law of a state, having been adopted by its national representatives, being used to wield power over an economic actor outside the borders of that state.

In the same spirit, the Sarbanes-Oxley Act (SOX), which came into force on July 30, 2002, is intended "to increase corporate responsibility, to make financial disclosures more reliable and to combat deviant and fraudulent behavior on the part of companies." SOX directly impacts foreign companies insofar as it applies to all companies listed on the New York Stock Exchange (NYSE). Numerous French and European companies are affected. SOX imposes heavy sanctions on French companies listed in the United States. If CEOs do not meet financial reporting requirements, they risk 20 years in jail and a fine of €5 million.[7]

The case involving BNP Paribas, which culminated in the French bank paying a record fine to the American administration,[8] is a good illustration of this assumption of the power to impose American laws. The justification for the fine was a transaction denominated in dollars connected to an investment in Iran, a country that the United States had placed under sanctions prohibiting any economic exchange. The only link to the United States was that the financial compensation had been processed through American accounts. No transactions were carried out on American soil.

It is important to emphasize that this case did not take the form of a legal proceeding before a tribunal with rules allowing for adversarial exchange, but rather of a dossier handled directly by an authority[9] to which BNP Paribas had no choice but to submit. It pleaded guilty to avoid a trial that would have been long and costly, and that could have had an even worse effect on its reputation.[10] Under pressure, it agreed to a financial deal: intimidation triumphed over the principle of open justice.

For the same reasons, and in a similar context, Crédit Agricole was fined $787 million as punishment for transactions carried out—and paid for in American currency—in Iran, Sudan, Myanmar, and Cuba between 2003 and 2008.[11] This amicable solution allowed the financial institution to retain its banking license and avoid any criminal sanctions. Negotiated justice of this type works in favor of the American treasury. The American authorities used the same embargo laws to order Peugeot to withdraw from Iranian territory in 2012, only to replace it with General

[7] Alexandre Moustafa, "Ces lois américaines qui font frémir les entreprises françaises," *Portail de l'IE* (November 21, 2015), http://portail-ie.fr/article/1308/Ces-lois-americaines-qui-font-fremir-les-entreprises-francaises (accessed April 18, 2017).

[8] Antoine Garapon and Pierre Servan-Schreiber, eds., *Deals de Justice, le marché américain de l'obéissance mondialisée* (Paris: PUF, 2013). See also Anne de Guigné and Pierre-Yves Dugua, "BNP Paribas tremble et implore la clémence des Américans," *Le Figaro*, May 13, 2014, or Mathilde Damgé, "La chambre de compensation, la clé de l'amende BNP," *Le Monde*, June 3, 2014.

[9] The Department of Justice (DOJ).

[10] The negotiated fine was raised to seven billion US dollars.

[11] Pierre-Yves Dugua, "Amende de près de 700 millions d'Euros pour le Crédit Agricole, *Le Figaro*, October 20, 2015.

Motors (although when the boycott was lifted, Peugeot had maintained its position and was able to come back even stronger with Citroën).

These examples show the Americans trying overtly, and not without brutality,[12] to use blackmail during trials (the outcomes of which are still effectively unknown) in order to control economic actors. Clearly, the United States has passed from soft law—the choice of economic and legal systems that are non-binding but derived from its model (OECD, WTO, and transnational treaties)—to hard law. Its aim is to enforce its own economic and commercial rules, backed up by a formidable and combative judicial system, in order to reduce competition for its own interests—even to the point of generating blatant distortions of competition. This asymmetrical war, in which the extraterritoriality of law has become the principal weapon, is a new conflict. The DOJ is its military arm. "Far from being an end in themselves, these sanctions have enabled the United States to preserve, or even develop, markets for their domestic companies by weakening their competitors under the guise of respect for the environment (BP, VW) or for democracy (PSA, BNP)."[13]

The Accusation of Corruption, Vice's Tribute to Virtue?

"Corruption is the cancer at the heart of so many problems we need to tackle in our world," announced David Cameron on May 10, 2016. It is impossible to disagree with the sentiment, even if the scale of the problem is arguable. The Americans, however, animated by the moralizing spirit inherited from their original messianic role—confident that the United States is justified in prohibiting and stigmatizing reprehensible activities, but not acknowledging that its economic violence is a blameworthy act in itself—have elevated corruption to the status of absolute evil.[14] This helps them oust competitors from, or at least destabilize, certain markets. In the process, local traditions and cultures are often disregarded or misinterpreted as being corrupt.

Corruption may have been commonplace for large contracts until a few years ago, and indeed several multinationals have been publicly condemned for it, but it has become significantly less widespread since then. And yet, rightly or wrongly, it is still not uncommon to see an American company discredit and/or stigmatize a competitor by insinuating that it engages in wrongdoing, even if the allegations are unfounded.

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[12] During the Alstom case, senior executives' passports were confiscated while travelling in Asia. They were interrogated and placed in solitary confinement, with no legal guarantee, in violation of the rights of the defence. Jean-Michel Quatrepoint, ALSTOM scandale d'Etat (Paris: Fayard, 2015).

[13] Angéline Steinbach, "Sanctions américaines records: un moyen pour les Etats-Unis de controller leur environnement concurrentiel économique?," Portail de l'IE (October 27, 2015), https://portail-ie.fr/analysis/1293/sanctions-americaines-records-un-moyen-pour-les-etats-unis-de-controler-leur-environnement-concurrentiel-economique (accessed April 18, 2015).

[14] "Accusation de corruption, l'arme atomique," Intelligence Online 678. https://www.intelligenceonline.fr/renseignement-d-affaires/2012/12/12/accusation-de-corruption-l-arme-atomique,107936003-EVE (accessed April 18, 2017).

When the accusation of corruption becomes anathema and can be used to drive out competitors, the crime itself becomes a commercially attractive tool.

At a time when France is strengthening its anti-corruption legislation,[15] it is important to understand what corruption actually means in practice. To do so, we need to turn to the main NGO working in this area, Transparency International. It publishes a global corruption perception index (CPI) every year. The CPI measures a perception, and not an objective fact, something that has been picked up on by *Le Monde*.[16] Elsewhere, the Fondation Prometheus regularly highlights the fact that Transparency International is not an independent organization, which casts some doubt on the NGO's real motives.[17]

Transparency International understands corruption as follows:

> "Generally speaking as 'the abuse of entrusted power for private gain.' Corruption can be classified as grand, petty, and political, depending on the amounts of money lost and the sector where it occurs.
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> Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.
>
> Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.
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> Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth."[18]

In French law, Article 432-12 of the Penal Code defines corruption as:

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[15] The law known as Sapin 2.

[16] Benjamin Bruel, "Comment mesure-t-on la corruption dans le monde?," *Le Monde* (May 13, 2016), http://www.lemonde.fr/les-decodeurs/article/2016/05/13/comment-mesure-t-on-la-corruption-dans-le-monde_4919107_4355770.html (accessed April 18, 2017).

[17] "Transparency International: une éthique à géométrie variable," last modified December 2012. http://www.fondation-prometheus.org/wsite/publications/a-la-une/transparency-international-une-%c3%a9thique-%c3%a0-g%c3%a9om%c3%a9trie-variable/ (accessed April 18, 2017).

[18] "FAQs on Corruption." https://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/ (accessed April 18, 2017).

> "The direct or indirect request or acceptance, unlawfully and at any time, of offers, promises, donations, gifts or advantages of any type, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, whether for his or any other person's benefit, where such advantage is requested or accepted:
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> 1) as an inducement to carry out or abstain from carrying out, or as a reward for having carried out or abstained from carrying out, an act relating to his office, duty or mandate, or facilitated by his office, duty or mandate;
>
> 2) as an inducement to abuse, or as a reward for having abused, his real or alleged influence with a view to obtaining from any public body or authority any distinction, employment contract or any other favorable decision."

And again, under article 433-1 of the same Code:

> "Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or advantage, to a person holding public authority or discharging a public service mission, or holding a public electoral mandate:
>
> 1) to induce him to carry out or abstain from carrying out, or to reward him for having carried out or abstained from carrying out, an act pertaining to his office, duty or mandate, or facilitated by his office, duty or mandate;
>
> 2) to induce him to abuse, or to reward him for having abused, his real or alleged influence with a view to obtaining any distinction, employment, contract or any other favourable decision.
>
> The same penalties apply to yielding before a person holding public authority or discharging a public service mission, or holding a public electoral mandate who, unlawfully and at any time, solicits offers, promises, donations, gifts or advantages of any type, for himself or for any other person, as a reward for carrying out or abstaining from carrying out any act specified under 1), or for abusing his influence under the conditions specified under 2)."

Wikipedia (French version) suggests this definition: "Corruption is the perversion or misappropriation of a process or interaction involving one or several

individuals with the aim, on the part of the corrupter, to gain specific advantages or prerogatives, and on the part of the corrupted, to gain a reward in exchange for his or her compliance. It generally results in the personal enrichment of the corrupted person or the corrupting organization (mafia gang, business, club, and so on). It is a practice that may be considered unlawful depending on the domain concerned (commerce, business, politics, etc.)."

However, it is important not to use these definitions to judge the traditional cultural practices found in some social systems as corrupt. Doing so would make such cultures liable to be sanctioned and could undermine ancestral organizational structures, if not whole ecosystems.

The convergent definitions presented above are convincing, but imperfect unless we say that corruption refers equally to intellectual submission, even when no financial aspect is present. In this form, it could be described as "using influence to colonize the mind." Blaise Pascal wrote: "How difficult it is to submit anything to the judgement of another, without prejudicing his judgement by the manner in which we submit it." In the same vein but more prosaically, corruption could be considered to include any action that extends a person's or entity's economic, legal, financial, or commercial influence over a state or over foreign companies by means of economic violence, fear, or ostensibly moral obligations. . . and the identity of the corrupt might not be the same as before. There is no doubt that the United States would be accused of corruption using such a definition.

NGOs, Disarming Military Arms

"Nowadays, war has disappeared as a feature of relations between developed countries. The classic elements of power are less important than the capacity to act as part of a network, to be at the center of systems of exchange and information, to master sophisticated technologies, and especially to shape the world according to an ideology and methodology that guarantee the wellbeing of a nation's population and the security of its territory. 'Coercive power relations' are less important than 'indirect structural power.'"[19]

To extend this analysis, it is worth looking in more detail at the role of groups that work to cleanse the business world and to denounce commercial activity that violates moral and ethical norms. There can be no nobler, more sacred goal. But are all the actors in this field as angelic or philanthropic as they claim? The work of the Fondation Prometheus has raised interesting questions about Transparency International,[20] which is largely funded by the Open Society, itself a project of the

[19] Jean-Michel Boucheron and Jacques Myard, *Rapport d'information parlementaire sur les vecteurs privés d'influence dans les relations internationales* (Assemblée Nationale, 2011), 29.

[20] "Dossier: ONG petit guide méthodologique à destination des journalistes… et des citoyens curieux," Lettre Prometheus (April 2016), http://www.fondation-prometheus.org/wsite/publications/newsletter/avril-2016/dossier-ong-petit-guide-m%C3%A9thodologique-%C3%A0-destination-des-journalistes/ (accessed April 18, 2017).

ultraliberal billionaire George Soros, who claims to have declared war on Old Europe.

Although there is no legal definition of what an NGO is, according to the UN Economic and Social Council[21] an NGO should not be established by a public entity or an intergovernmental agreement, and its financial resources should be mainly derived from its members' contributions. It goes without saying that it should have a nonprofit-making aim of international utility.[22] For François-Bernard Huyghe, "[NGOs'] capacity to challenge political or economic agents, but also to impose norms and to shape the agenda of public debate, gives them unprecedented power. They also have other political and economic strategies with which they seek to influence governmental decisions and to guide public opinion in ways that serve their material or ideological interests. Lobbies, think tanks, and pressure groups all also play an increasingly important role."[23]

For that reason, it is crucial to be able to separate the wheat from the chaff when it comes to these organizations—to be able to distinguish between which are acting sincerely and which serve other masters. French lawmakers have previously conducted a parliamentary inquiry into their actions.[24] One of the directors of the inquiry was Jean-Michel Boucheron, who also runs the Fondation Prometheus. It publishes an annual survey of how transparent NGOs are, judging them, gratifyingly, by the same criteria they themselves brandish at their targets. One thing that stands out from that 2011 parliamentary study is that while early NGOs (those registered with the League of Nations after 1920) did hold genuine moral principles—and often religious ones, like the Red Cross or the CCFD (Catholic Committee Against Hunger and For Development)—since the 1990s, increasing power has been wielded in the name of human rights, the environment, or the criminalization of business, by institutions with political or ideological goals. Even as far back as the 1970s, NGOs like Médecins du Monde claimed to have a "right to intervene" and preached a form of "borderlessness."[25]

The active role the NGOs have assumed is due in large part to the fact that the economy has become globalized, and that consequently states and borders have become weaker. NGOs have taken partial control of this now vacant space, clad in good intentions but profiting from the "phenomenon of the progressive secularization of charitable acts."[26] Some of the sincere ones even unwittingly play the role of "useful idiots," as in the Cold War. Their influence is considerable thanks in part to the advisory role given to them by international institutions, but also thanks to their major success stories, which with the help of a sympathetic media often achieve widespread fame.

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[21] ECOSOC, resolution 1996/31 of July 25, 1996; see also article 71 of the 1945 UN Charter.
[22] Article 1, Convention 124 of the Council of Europe, April 27, 1986.
[23] François-Bernard Huyghe, "Influence, ONG, lobbies et réseaux,"(December 6, 2013), http://www.huyghe.fr/actu_477.htm (accessed April 18, 2017).
[24] Boucheron and Myard, Rapport d'information parlementaire.
[25] Philippe Ryfman, *Les ONG*, 3rd ed. (Paris: La Découverte, 2009), 13.
[26] Ibid., 7.

A detailed study of these organizations shows that 1,931 of the 6,846 registered NGOs (or 28.2%) are based in North America.[27] Hubert Vedrine, the former French Foreign Minister, declared in 2009 that, "only a blind person or a fool could fail to see that American and British NGOs are part of American or British soft power. . . and that they are often de facto hostile, under various pretexts, towards French influence, policies or language."[28] It is also worth noting that the top 20% most powerful NGOs receive 90% of funding.[29]

Among the most well-known NGOs that exert their influence in a wide range of ways are Transparency International, Greenpeace, Human Rights Watch, and Sherpa, but other, less familiar ones work even harder to affect deciders' choices. That was what happened at COP 21 in Paris in December 2015, when the famous WWF, accompanied by Corporate Europe Observatory, Women for a Common Culture, 350.org, Oxfam, and Les Amis de la Terre, among others, launched a direct attack on the nuclear industry. They also indirectly attacked EDF, ENGIE, and AREVA, which is majority-owned by the French state (apparently forgetting that 20% of global CO2 emissions come from American territory).[30]

In other regions, NGOs meticulously stigmatize the methods of a given company (certainly not an American one) in order to prevent it winning public contracts. This tactic is particularly beloved of United Against Nuclear Iran (UANI), which is directed by the former American ambassador to the UN. UANI works by exposing companies to public condemnation, or exerting pressure directly on Iranian company directors. Air France, Renault, Total, Engie, and Vinci are among the companies who have paid the price.[31] The tactics used leave no doubt about UANI's goal. The ultimatums they deliver to their targets never fail to mention the amounts they owe as part of deals involving American companies and/or conducted on American territory. . . we are far from Adam Smith's "invisible hand" and its distant descendants, and even further from an innocent hand. On the contrary, it shows all the signs of being a military arm.

TAFTA, or the Strategy of Containment

As for other forms of threat, the United States has seized opportunities to end bilateral treaties, in which economic agreements substitute for defense pacts, in an attempt to bypass the WTO's stalemate.[32] Just as in Asia, where the September 2015 Trans Pacific Partnership (TPP) was intended as the economic version of the military

[27] "Dossier: ONG petit guide méthodologique."
[28] Boucheron and Myard, *Rapport d'information parlementaire*, 20.
[29] Ryfman, *Les ONG*, 55.
[30] "COP 21: derrière l'écologie, la pression des ONG anglo-saxonnes," interview with Bernard Carayon in *Le Figaro*, September 10, 2015.
[31] Vincent Lamigeon, "L'étrange ONG américaine qui fait la chasse aux groupes français en Iran," Challenges. (August 29, 2016), https://www.challenges.fr/monde/l-etrange-ong-americaine-qui-fait-la-chasse-aux-groupes-francais-en-iran_416530 (accessed April 18, 2017).
[32] See F. Munier, "Les traités bilatéraux américans, l'autre voie de la puissance," Conflits 7 (October–November–December 2015).

ASEAN, TAFTA (Transatlantic Free Trade Agreement, also known as TTIP—Transatlantic Trade and Investment Partnership), was to be the economic counterpart of NATO, enabling its members to further increase the predominance of one economic system.[33] The economist and essayist Hervé Juvin talked of "a colonization of law" in this context.[34] It is a new American policy of containment, no longer political or military but economic. Having locked down Asia, with the notable exceptions of China and India, the United States is attempting to consolidate its economic and financial clout by imposing its own legal and commercial standards, pulling business relationships westwards so as to detach Europe more completely from what is taking place in the East. The strategy is completed by the rollback currently being inflicted on Russia. Frédéric Farah, Professor of Economics at Paris III, believes the future treaty will "definitively dilute the EU in a vast zone of free-trade, making any European political project even more difficult. I call it the ruse of history. (. . .) It is important to understand that TAFTA is intended to counteract China's rise in power."[35]

If France proved rather lackluster in negotiations, despite its volte-face in August 2016, in Germany anti-TTIP movements had already been an active force for some time. They are expertly decoded on the website infoguerre.fr, which contains reflections on the economic war.[36] The protesters' reasons for opposition included the fear that food hygiene and environmental requirements would be reduced to fall in line with the lowest existing standards, a highly sensitive subject for German environmentalists. They also denounced the way in which the negotiations were conducted. The European Commission had to be pressured before it would reveal the contents of the mandate that led to talks being established. French politicians' access to the documents was subject to draconian conditions, increasing the sense of opacity.

That this sort of international commercial act, if it ever saw the light of day, would have represented another erasure of Romano-Germanic law to the benefit of Anglo-Saxon common law is only too clear when we consider the dispute resolution mechanism that would have formed part of the treaty, known as ISDS (investor-state dispute settlement). ISDS is a disposition that would have given companies the option of taking a case to an arbitration court (that would sit in Washington and be conducted according to the American procedure and in English) to claim compensation for damages caused by national laws deemed contrary to the principles of the free trade treaty. In other words, and this cannot fail to alarm anyone who sincerely objects to the treaty, a commercial company can sue a state to claim compensation for laws that work against its economic interests, or even get those laws annulled, as has happened in the past. Other concerns include the effects on environmental and social laws or on the precautionary principle, even if such effects were constitutional. Judges would no

[33] "Dossier: le Traité transatlantique, un piège?" *Lettre Prometheus* (July 2015).
[34] Hervé Juvin, *Le mur de l'Ouest n'est pas tombé* (Paris: Pierre Guillaume de Roux, 2015).
[35] Interview in *Libération*, April 25, 2016.
[36] "Pourquoi la campagne anti-TTIP est-elle plus efficace en Allemagne qu'en France?" Last modified October 28, 2015, http://www.infoguerre.fr/culture-et-influence/pourquoi-la-campagne-anti-ttip-est-elle-plus-efficace-en-allemagne-quen-france-5748 (accessed April 18, 2017).

longer make judgments based on the public good, which is the principal criterion in European law, but based on commercial benefits that had allegedly been restricted by sovereign legislation.

"It is clear that economic, but also social and intellectual globalization is shaping law, and not just international law but also domestic laws."[37] The adoption of the Anglo-Saxon legal system by the European continent represents "the deployment of law as a weapon in the war of influence currently being fought by different regions, all trying to assert their own claim as the pivotal location or benchmark for business transactions."[38] During the sessions at Brussels, at which the author was a participant, it was revealed that one important element had been omitted from TAFTA: services. TAFTA's goal is the free circulation of goods, but services were quickly excluded from the negotiations because of apparently insurmountable obstacles to do with the principle of public service, a European concept that is foreign to American liberal principles. However, the Americans would not back down, and services were placed at the heart of another treaty already under discussion: the Trade in Services Agreement (TiSA). Negotiations for TiSA are as opaque as those for TAFTA, but recent revelations show that its participants are working to further liberalize all services, including non-competitive services, by imposing a blanket rule of "non-discriminatory treatment."

Taxation Cannot Escape the Economic War: Tax Havens, Foreign Account Tax Compliance Act, and Dutch Sandwiches

The revelations of the Panama Papers media scandal, when documents containing the names of private individuals who had hidden their financial assets using offshore loopholes were leaked, were bound to unleash criticism of opportunities and methods for avoiding tax. After all, is tax avoidance not simply the other side of the globalization coin and its associated practice of dumping, whether social or fiscal? Following on from this thought, it would be useful to look at tax havens in a more geopolitical light. Wherever ethics takes priority, the reality of the facts teaches us once again that we must read events within an appropriate analytical framework.

The Global Europe Anticipation Bulletin (GEAB) remarks that the United States tends to turn a blind eye to the emergence of these sorts of free tax zones, especially as certain federated states, such as Puerto Rico, are currently facing serious budgetary debt, the only way to repay which is to resort to fiscal dumping.[39] The lack of American names in the Panama Papers also makes it clear that U.S. taxpayers prefer to use tax havens within their own federal territory rather than looking further afield. Delaware can be treated as symptomatic in this respect. Its situation exposes the indulgence of the federal government, which allows one of its states to function as a tax haven within federal territory while at the same time criticizing Switzerland,

[37] Bertrand du Marais, "Guerre du droit, Paris brûle-t-il?," *l'ENA hors les murs* 445 (2014): 16–18.
[38] Ibid.
[39] *GEAB* 105 (2016): 27.

Monaco, or Andorra.[40]

Vincent Piolet's work in this area is extremely instructive. He shows how the implementation of legislation designed to combat tax havens (which are denounced as non-cooperative states), and the suspension of banking confidentiality on the European continent, both lead in practice to the transfer of capital to the American continent, to the benefit of fiscally lenient U.S. states. Taxation has undeniably become another weapon in the economic war.[41]

More specifically, the Foreign Account Tax Compliance Act, known as FATCA, is an extraterritorial regulation along the same lines as SOX and the FCPA (see above). As the American lawyer Stanley Ruchelman says, "the global legal system is undergoing a transformation, driven by the United States. FATCA is our weapon against tax evasion. It is the weapon of choice for democracies who want to take back control of their own revenues by making cheats pay their fair share. Countries must pick a side." Under the pretext of such ostensibly virtuous arguments, more than a hundred countries and a hundred thousand financial organizations have signed the FATCA agreement since June 2014.[42] The legislation obliges foreign banks to tell Washington the identities of any American citizens who evade the IRS.[43] While the principle of fiscal sovereignty is certainly not in itself a bad thing, the consequence of this sort of imposition on the banks is nevertheless the retention of capital within American territory, or at least its repatriation by means of fiscal procedures in order to drain currency out of the country where it was originally held.

That being the case, perhaps Europe's retaliation will take a fiscal form, following the example of Al Capone, the notorious Chicago mobster who was eventually brought down by tax evasion charges. To understand the issues at stake, we must first understand that nowadays there are two different worlds: the real economy and the financial (or digital) economy. The temptation for international corporations is to exploit the imbalance between the two by comparing different fiscal policies and choosing the most profitable. So while a product may be bought and ordered through a website in France, the shipper will be based in a more fiscally welcoming territory (like Ireland). This mechanism is even more beneficial for services (Facebook and Google) that have low material logistics requirements. Actors in the digital sector, particularly the GAFA companies,[44] take advantage of this asymmetrical situation to get around the principle of fiscal territoriality.[45] The favored process consists of a combination of two techniques, the Dutch Sandwich and the Double Irish. It works by transferring all royalty payments through a Dutch company that acts as an intermediary

[40] Alexandre Moustafa, "Les États-Unis, ce nouveau paradis fiscal," *Portail de l'IE*. (April 6, 2016), http://portail-ie.fr/article/1397/Les-Etats-Unis-ce-nouveau-paradis-fiscal (accessed April 18, 2017).
[41] Vincent Piolet, "Le paradis fiscal, une construction géopolitique," *Conflits* 7 (October–November–December 2015): 19–21.
[42] In France, Act 214-1098 of September 29, 2015.
[43] The US tax authority.
[44] GAFA stands for Google, Amazon, Facebook, Apple.
[45] Article 218 A of the French "Code general des impôts."

between a company based in Ireland and its parent company based in a tax haven. The accumulation of advantages available under Irish and Dutch law means that all the profits of the multinational company, which is based in Europe, can be transferred to the tax haven, where the corporate tax rate is very attractive.

On April 28, 2014, the G5 nations (France, the United Kingdom, Germany, Spain, and Italy) met to decide the fiscal fate of the Internet giants, particularly Google. Their decision was implemented in the form of increased tax audits targeting companies that are perhaps slightly too efficient at exploiting disparities in national legislation between the member states. Google was subjected to a significant tax audit in France, the result of which was that it was ordered to pay a billion euros in extra tax. Amazon, Facebook, and Apple are undergoing similar procedures.[46] The OECD, for its part, has initiated discussions about how to tax the digital economy as part of its BEPS (base erosion and profit shifting) plan.

Since 2014, Margrethe Vestager, European Commissioner for Competition, has made it her personal mission to utilize the sanction procedure provided for cases where a company abuses a dominant position. A notable instance was the case against Google's Android system.[47] This almost unforeseen turn of events forced Amazon to alter its structural fiscal policy, which it centralized in Luxembourg. In future, the distributor will account for the profits it makes in each member state separately. Finally, there was a serious showdown between the European Union and Facebook regarding the use of personal data.

Cyberspace, A New Sphere of Confrontation and Sovereignty

In this area too, the response came from the European judges. The Court of Justice of the European Union (CJEU),[48] enjoying what amounted to an unexpected retrieval of power, delivered a judgment that represented a slap in the face to the American authorities. After the revelations of "digital spying" that came to light during the Snowden scandal, an Austrian Internet user became worried that American antiterrorism laws[49] could authorize the NSA or the FBI to examine personal data collected through his Facebook account. Although Facebook's European headquarters are actually in Ireland for the tax reasons discussed above, the data it collects are exported, saved, and processed through data centers based in the United States, and are thus under the jurisdiction of the American authorities and subject to its intelligence agencies.

The Austrian man appealed to the Irish courts (although not before his first application was rejected by the Data Protection Commissioner) and the Irish High Court referred the question to the CJEU. The trial was suspended until the supreme

[46] The European Union is reclaiming thirteen billion euros in back taxes from Apple.
[47] Sylvain Rolland, "Comment l'Europe veut mettre les GAFA au pas," *Libération* (May 28, 2015).
[48] Aff. C-362/14 of October 6, 2015.
[49] The Patriot Act, later the Freedom Act.

jurisdiction had interpreted the rule. The CJEU's task was, based on the analysis of relevant personal data protection standards, to come to a decision about Directive 95/46. Under the terms of this directive, particularly Article 28, every EU member state must establish an authority for protecting personal data, and citizens must have access to appeal procedures with regard to the use and exploitation of their data. It also provides for arrangements to guarantee a certain level of security for the personal data of EU citizens. Because data from Facebook accounts are centrally stored in American territory, the CJEU reexamined Decision 2000/520/EC of July 26, 2000, which deemed the American "Safe Harbor" framework to be adequate to satisfy the requirements of Directive 95/46. The question facing the CJEU was whether Safe Harbor could actually guarantee the implementation of data protection rules that were compatible with European standards. In its judgment of October 6, 2015, the CJEU decided that the United States did not offer sufficient guarantee for the security of the personal data of EU citizens. Consequently, Safe Harbor was declared ineffective under the terms of European confidentiality rules as set out in Directive 95/46. Soon afterwards, fierce negotiations began about a new agreement called "EU-US Privacy Shield." News of the negotiations went public on February 4, 2016. There are still numerous exceptions, particularly in terms of stricter requirements for cooperating with international corruption (FCPA) and personal tax (FATCA) investigations.

In the same spirit, France's National Committee for Information and Liberty (CNIL) and four other European authorities published a joint declaration—that was also an injunction—on the subject of Facebook's intensive use of cookies. It referred to security rules imposed on users of the website with regard to the publication of personal information. In particular, Facebook was criticized by Belgium for having tracked users even outside its own website. Likewise, the "data protection package" of July 8, 2016, designed to provide an efficient framework that would guarantee a high level of data protection within the EU, had to ensure that EU citizens were able to control their personal information in a way that prevented it being misused by "international companies operating on the internet."

It was not a comprehensive or definitive response, and it dealt with the question of the protection of EU citizens' personal data with caution. Nevertheless, it raised real awareness about the way in which private information is used. It was recently backed up by the Court of Appeal in Paris, which declared itself competent to judge in the matter of the publication of a photograph on a Facebook account, dismissing the fact that the social network's terms and conditions of use specify American jurisdiction.[50] So, it is indeed in the digital sphere that Europe has decided to launch its counterattack.

This begging of the question will suffice if we remember the words of former U.S. President Barack Obama in February 2015, spoken in response to accusations of digital espionage. He announced boldly that the United States had created and shared the Internet, and that it therefore owned the information that the Internet merely

[50] TGI Paris, ruling of March 5, 2015, confirmed by the Court of Appeal in Paris on February 12, 2016.

borrowed. The ongoing reform of ICANN[51] reveals the United States' reluctance to relinquish their hold.[52]

And yet, there are still overt actions and goals of liberation to be found. For example:

- Actions taken and sanctions envisaged by the European Union against Manuel Barroso, former President of the European Commission, following his recruitment by the commercial bank Goldman Sachs.[53]
- Tightening of visa requirements between Europe and the United States.
- Adoption by Germany and France of anti-TAFTA positions in September 2016 (which did not, however, represent a fundamental challenge to the mandate given to the European Union).
- Revisiting the idea of a European defense system outside NATO, discussed at the European Summit in Bratislava in September 2016.[54]

The struggle for independence seems to be well and truly underway—unless the result of the recent U.S. presidential election manages to consign the arrogant, defeated neoconservatives to the background on its own.

[51] The organization that manages Internet domain names, itself under the control of the American government.
[52] Benjamin Ferran, "La France critique la mainmise durable des Etats-Unis sur Internet," Le Figaro (March 24, 2016).
[53] Goldman Sachs had manipulated Greece's accounts in order for it to be able to adopt the Euro, which was then itself weakened by Greece.
[54] Following Turkey's decision to leave NATO.