

## Enforcing Global Law: International Arbitration and Informal Regulatory Instruments\*

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**Summary:** This paper starts from the assumption that international arbitration easily fits in with a pluralist conception of global law. Globalization has created new informal instruments of regulation, and arbitration is an efficient tool for enforcing them. First, the paper presents a brief analysis of the most noteworthy international initiatives in the area of transnational legal indicators. It will become clear how these indirect regulatory instruments are contributing to the creation of a new regulatory profile in the area of arbitration. Second, a number of examples will show that both commercial and investment arbitration are receptive to the multiple appearances of legal pluralism in the arbitration arena. Arbitral awards are turning ever more frequently to instruments created and managed by the private sector –i.e., codes of conduct, economic indexes, economic indicators, financial premiums, valuation methods, audits- to resolve the complex disputes arising from international business. Third, sectorial arbitrations are striking examples of how private sector initiatives implement sophisticated private conflict resolution mechanisms. The paper will present a particularly detailed analysis of the international sports sector, in which an interesting symbiosis can be discerned: on the one hand this non-state sector has unilaterally created a large number of new instruments of global regulation –i.e., sports constitutions, charters, statutes, codes- that are resorting to arbitration to increase their independence from the public sector. On the other hand, sports arbitration –essentially, the CAS- is meanwhile significantly contributing to the sector’s maturity by actively participating in the consolidation of *lex sportiva* by means of its awards. Finally, the paper concludes with some reflections and ideas for further discussion.

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International arbitration is in vogue. National jurisdictions and national law frequently fail to comply satisfactorily with the complex requirements generated by international transactions and longer-term investments. In this context, both these fields have proclaimed international arbitration to be the private solution that successfully overcomes the shortcomings of public governance. By way of an example, an international study recently concluded that over three quarters of corporations preferred to use international arbitration rather than transnational litigation to resolve their cross border disputes (PriceWaterhouseCoopers, Queen Mary University of London, School of International Arbitration 2006).<sup>1</sup> One of the many consequences of this is the upward trend shown by the statistics for two key institutions in the arbitration sector, the International Court of Arbitration (ICC) of the International Chamber of Commerce<sup>2</sup> and the International Centre for Settlement of Investment Disputes (ICSID).<sup>3</sup> An adequate understanding of the causes and consequences of this arbitration euphoria requires analysing arbitration in the context of one of the brightest phenomena in the contemporary legal galaxy: global law.

This paper starts from the assumption that international arbitration easily fits in with a pluralist conception of global law, as globalization has created new informal instruments of regulation and it is argued that arbitration is an efficient tool for enforcing them. The paper is divided into four main sections in which the following key ideas are put forward: Firstly, a brief analysis of the most noteworthy international initiatives in the area of

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<sup>1</sup> The study states: “*So why do nine out of ten corporations seek to avoid transnational litigation? The most common explanation is anxiety about litigating under a foreign law before a court far from home, with a lack of familiarity with local court procedures and language. There are also concerns about the lack of confidentiality surrounding proceedings and the time consuming nature and associated costs of pursuing litigation overseas. In addition, some countries may lack an independent or impartial judiciary and, in the worst cases, the system may be corrupt. Finally, even if these issues are successfully navigated, the enforcement of a foreign judgment can prove very difficult*”.

<sup>2</sup>International Chamber of Commerce, *Statistics*, Accessed December 20. <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>.

<sup>3</sup> International Center for Settlement of International Disputes, *Statistics*, Accessed December 20. <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>.

transnational legal indicators will show the growing importance that this sphere is currently according to arbitration. In turn, it will become clear how these indirect regulatory instruments are contributing to the creation of a new regulatory profile in the area of arbitration. Secondly, a number of examples will show that both commercial and investment arbitration are receptive to the multiple appearances of legal pluralism in the arbitration arena. Arbitral awards are turning ever more frequently to instruments created and managed by the private sector –i.e., codes of conduct, economic indexes, economic indicators, financial premiums, valuation methods, audits- to resolve the complex disputes arising from international business. These two typologies of international arbitration, whose existence is backed by plentiful national and international legislation, therefore guarantee new possibilities of enforceability to these non-classical instruments of regulation. Thirdly, there are some sectorial arbitrations that are striking examples of how the private sector initiative has implemented sophisticated private conflict resolution mechanisms. The paper will present a particularly detailed analysis of the international sports sector, in which an interesting symbiosis can be discerned: on the one hand, this non-state sector has unilaterally created a large number of new instruments of global regulation –i.e., sports constitutions, charters, statutes, codes- that are resorting to arbitration to increase their independence from the public sector. On the other hand, sports arbitration –essentially, the CAS- is meanwhile significantly contributing to the sector’s maturity by actively participating in the consolidation of *lex sportiva* by means of its awards. In this third section, arbitration will be presented as a source of legitimacy, which is self-generated by pluralist global law with the aim of decreasing the state’s classical regulatory role in the contemporary normative, monitoring and enforcement scenario. Finally, the paper concludes with some reflections and ideas for further discussion.

## **I. International Arbitration Under the Scrutiny of Informal Regulatory Instruments such as Indicators**

The increasing attention paid by the creators of transnational legal indicators to the arbitration sector seems to confirm the importance of international arbitration in the contemporary global world. These indicators –currently so fashionable in the international arena and yet so frequently questioned for having become *de facto* powerful indirect

regulatory instruments (Cassese 2010)-<sup>4</sup> did not initially take much notice of arbitration. For instance, the *World Governance Indicators* project, used by the World Bank Group to allocate economic resources since 1996 (Restrepo Amariles 2013), includes no express references to ADRs in the “rule of law indicator”<sup>5</sup>. For its part, the *Doing Business* report<sup>6</sup> produced annually since 2003 by the World Bank Group does include some indicators, such as “protecting investors”, “trading across borders”, and “enforcing contracts”, which are clearly linked to the arbitration phenomenon. However, although the 2014 *Enforcing Contracts Survey* requests information about many different issues, only one question includes a brief query about the ADR mechanisms in the country in point<sup>7</sup>.

A different attitude is discernible in the *Rule of Law Index*, an annual *World Justice Project* begun in 2010. This not-for-profit organization, committed to advancing the rule of law around the world, has created a quantitative measurement tool that aims to offer a comprehensive picture of the rule of law in practice. Unlike the more general indexes mentioned previously, which take a predominantly economic approach, the *Rule of Law Index* certainly focuses on legal matters. Perhaps this explains why “civil justice” is one of the nine subjects in the index and why one of the included indicators centres entirely on measuring the accessibility, impartiality, and efficiency of the mediation and arbitration systems that enable parties to resolve civil disputes<sup>8</sup>. The *World Bank Global Indicators Group* has recently gone one step further and carried out a study of foreign direct investment regulation indicators (Lopez Claros 2014). Within the framework of this initiative, more detailed studies of regions like Latin America have been undertaken that include a section specifically devoted to arbitrating and mediating (World Bank, IFC and CAF 2013). The World Bank has also issued

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<sup>4</sup> The following statement made by Cassese is symptomatic in this respect: “Many World Bank “legal” instruments are simply referred to as “policy” documents; yet in many cases these can scarcely be considered less important than statutes passed by national parliaments”.

<sup>5</sup> The World Bank Group, *World Governance Indicators*. Accessed December 20. <http://info.worldbank.org/governance/wgi/index.aspx#home>.

<sup>6</sup> The Doing Business Project. Accessed December 20. <http://www.doingbusiness.org>.

<sup>7</sup> The Doing Business Project. Accessed December 20. <http://arabic.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Methodology/Survey-Instruments/DB14/Enforcing-Contracts-en.pdf>.

<sup>8</sup> The World Justice Project, *Rule of Law Index 2014*. Accessed December 20. <http://worldjusticeproject.org/rule-of-law-index>.

a paper solely focussing on benchmarking commercial arbitration and mediation regimes in a hundred countries (Pouget 2013). The research includes three sets of indicators that measure the strength of ADR laws and institutions, look at the ease of the arbitration process and deal with judicial assistance in recognizing and enforcing foreign arbitration awards. On the basis of the research results the authors proposed various improvements in the ADR sphere (developing an international arbitration regime that differs from domestic arbitration regimes and offers more flexibility, reducing the length of arbitration proceedings, promoting online arbitration, and so on). The research also includes an interesting correlation exercise linking the three sets of indicators with others from more general studies –that is, not solely ADR-focussed. In this context, a strong positive correlation was found between the length of judicial proceedings relating to the exequatur of a foreign arbitration award and the 2013 *Doing Business* “enforcing contract” indicator –the time needed to legally resolve a commercial sales dispute. On the other hand, it has been stressed a negative correlation between the three sets of indicators referred to and the 2009 *MIGA World Investment and Political Risk data*.

In short, these kinds of transnational legal indicators currently play a highly relevant role in the development of legal areas like arbitration, as they involve holding up national legislative reality and the arbitration sector’s practices to a comparative mirror. The ease with which these indicators can be accessed also multiplies the likelihood that the many stakeholders – including states – that participate in the arbitration world will shape their behaviour with reference to the outcomes they wish to see reflected in these models of benchmarking legal systems. This “statistical pressure” has reached the point at which *Doing Business* now offers its users a reform simulator which shows how a national economy’s ranking would change if it were reformed in one of the areas measured by the indicators (Restrepo Amariles 2014, 364 and 366)<sup>9</sup>, and this has led many developing countries to accept national law reforms carried out by external actors from developed countries (Bantekas, Kypraios and Kebreab 2013). This phenomenon is meanwhile creating varied and interesting analyses that also present a quantitative profile. For example, in the investment arbitration sphere the possible effects of Bilateral Investment Treaties (BITs) on the host state’s quality of the governance indicator as measured in several international reports have been analysed (Aranguri 2010). It has been also studied the more general question as to

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<sup>9</sup> The Doing Business Project. Accessed December 20. <http://www.doingbusiness.org/reforms/reform-simulator>.

whether the rise in foreign direct investment generated by legislative reform is an real engine for economic growth and human development in the host countries. (Colen, Maertens and Swinnen 2013).

## **II. The Growing Role of Informal Regulatory Instruments in International Commercial and Investment Arbitral Awards and Provisions**

There is an ongoing debate among scholars and practitioners on the characterization of international arbitration. To focus on commercial arbitration for the present, its private nature may be deduced by analysing some of its defining and generally recognised elements: arbitration is consensual; disputes are resolved by a private third party acting as decision maker; the arbitration process is often administered by private institutions; the applicable procedure rules have also been developed by these private institutions, and in some cases, moreover, the law applied to resolve a dispute is not national law but a non-classical form of law (Muir Watt 2011, 354 and 384). Nonetheless, one important doctrinal sector does highlight the fact that the state still plays a critical role in international arbitration (Whytock, 2010), on the basis that it gives this dispute resolution mechanism some bite. In the areas of rule-making and enforcement of arbitration decisions, the national law chosen by the parties as substantive law for the arbitration, and international treaties such as the New York Convention perform an essential role. National courts may also intervene at key points during the arbitration procedure –in the setting up of the arbitration tribunal, the producing of evidence, the granting of interim relief, and the challenges to awards, among others.

Regardless of the definitive outcome of this debate, an important fact needs to be stated: even if arbitration and other ADR mechanisms such as mediation seem to be gaining ground against both the judicial system of conflict resolution and state intervention, this does not necessarily mean that international arbitration has kept itself pure and immune to non-legal interference. On the contrary, this section aims to show that international arbitration is currently characterized by a high degree of permeability with regard to multidisciplinary. The analyses of abundant commercial and investment arbitration awards and provisions in the following pages will show that frequently neither classical forms of law nor classical lawyers possess the necessary tools to resolve the sophisticated disputes that corporations refer to international arbitration. This private dispute resolution mechanism has therefore adapted

itself to market needs –and has done so with some agility- by accepting the intervention of instruments and mechanisms of non-legal origin, insofar as these have proved efficient and have facilitated the consolidating of the institution of arbitration. In short, modern international arbitration shows clear degrees of intermingling and the awards discussed here assign a highly significant role to codes of conduct, audits, indicators and so forth. This paper argues that these decision-making instruments and mechanisms –ultimately, informal regulatory instruments– “are here to stay”, not only in the content of commercial and investment awards but also at other stages in the resolving of disputes arising from international investment. Opening the door to these instruments and mechanisms in the arbitration sphere entails a show of faith towards what are known as “UNOs” –Unidentified Normative Objects- (Frydman 2013)<sup>10</sup> which, as another author in this special issue states, currently constitute the legal kaleidoscope of globalization (Scamardella).

The point is that international commercial arbitration is a legal sector that is particularly open to innovation and the removal of artificial barriers between different areas of law and theoretical and applied scientific disciplines. Since arbitration awards have to meet the requirements of highly demanding and specialized multinational companies –and also of other demanding actors such as states or the civil society in many cases-, international arbitration is the ideal testing ground for innovative experiences. A clear example of this is the fact that awards containing clear arguments supporting the application of *lex mercatoria* in the resolution of international commercial disputes were already being issued at the end of the 1970s. In *Pabalk Ticaret Limited Sirketi v. Norsolor S.A.* the arbitral tribunal stated: “faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*”. Other subsequent awards such as *Primary Coal Inc. v. Compania Valenciana de Cementos Portland* have also vehemently declared the importance of the *lex mercatoria* in the international commercial sector.<sup>11</sup>

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<sup>10</sup> As Frydman graphically states: “*The weakening of the Leviathans and other dinosaurs of modern law opens an ecological niche to humbler normative creatures previously confined to accessory tasks (...) but ready to seize this opportunity to play in the big league and to compete with the good old legal rules (...) In a non-sovereign environment, like the global society, the struggle for law is in full swing, but there are no central institutions whatsoever in charge of regulating conflicts and allocating rights. In such context, global players as well as their contenders are deemed to adjust their behaviours and their strategies accordingly. Like in the Wild West, they may be tempted to take the law into their own hands*”.

<sup>11</sup> The award states that: “*À défaut de choix du droit applicable par les parties, le litige sera réglé selon les seuls*

This section will now move beyond the relevant empowerment of *lex mercatoria*<sup>12</sup>, to analyze a set of examples that show the growing importance of informal regulatory instruments in the legislative and decision-making sphere of international commercial and investment arbitration.

#### a) Codes of Conduct

In 1982 Professor A. Sanders stated that: “*instruments such as codes of conduct applicable to the activities of transnational corporations might well determine the outcome of international commercial arbitrations despite their formally nonbinding status in international law*” (Alston 1986). Contemporary scholars also claim that “*businesses may even ask the arbitration tribunal to apply Codes of Conduct of Transnational Corporations, including those of corporate social responsibility, to decide a case (...). Arbitral case law, in its turn, may contribute to shaping the scope of corporate social responsibility*” (Benedek, De Feyter and Marrella 2007). Although the starting point is that as most commercial arbitral awards are not published their contents therefore remain secret, this paper analyses some arbitration awards that have been accessed indirectly – due to the fact that one of the parties has applied for leave to appeal to national tribunals. As the following will show, these analyses have led to the conviction that the prophecies referred to are being fulfilled, as a significant array of informal regulatory instruments, such as codes of conduct, are gaining currency in the arbitral response to disputes arising from the current global commercial market.

The Demco arbitration, in which the seller was alleged to have mis-sold pensions to individuals, is a relevant example of the anticipated trend. In deciding on the case the panel

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*usages du commerce international, autrement dénommés lex mercatoria; celle-ci répond à la caractéristique d'être vraiment internationale, ce qui est la seule solution possible à partir du moment où il n'y a pas de volonté commune des parties sur un droit national. Si les principes de cette lex mercatoria ne sont pas codifiés, ils ont été peu à peu dégagés par la pratique et notamment par une pratique arbitrale qui a reçu la sanction des jurisprudences nationales. Ils se sont ainsi trouvés consacrés comme règles de droit. En effet, par nature elles relèvent de la même catégorie que les usages et coutumes nationaux reconnus comme sources de droit aussi bien dans les pays de common law, que dans les pays de tradition romanogermanique. Ces principes peuvent donc se suffire à eux-mêmes et être seuls retenus comme règles de droit les plus appropriées pour trancher le litige”* (no English version available).

<sup>12</sup> *Lex mercatoria* continues to have a significant role in international arbitration. A recent small-scale survey stated that in Eastern Europe, for example, 50% of interviewees always use it, 25% regularly use it and 25% occasionally use it. (Mereminskaya 2014).



attached significant weight to the Code of Conduct of the Life Assurance Unit Trust Regulatory Organisation (LAUTRO), a self-regulating organisation of the sector that controlled the way investments were made by serving intervention notices which monitored its members' businesses. The High Court of Justice case *Demco Investments & Commercial S.A. & Others v. SE Banken Forsakring Holding Aktiebolag* stated that:

*“The Arbitrators set out most of the relevant regulatory framework in which Interlife operated. This consisted of the LAUTRO Rules themselves, a Code of Conduct which appeared as a Schedule to those Rules and Enforcement Bulletins that were issued from time-to-time. LAUTRO members were obliged to comply with the Rules and under Rule 3.4 were obliged to ensure that their representatives complied with the Code of Conduct (...) The Code of Conduct contained a number of principles which could be described as “fair dealing”, “know your customer” and “best advice” or “acting in the customers' best interests”. The Arbitrators referred to these at paragraphs 8.10 – 8.12 of the Award (...) the position in this case is that there was a considerable quantity of material which was available to the Arbitrators to justify the conclusion that mis-selling and breach of the duties set out in the Code of Conduct had taken place (...) The Sellers maintain that the expression “Any Law, Regulation or Order” in Clause 2.01 of the Deed of Indemnity does not extend to a breach of the LAUTRO Rules or Code of Conduct (...) The Arbitrators found that the words “Rules” and “Regulations” are virtually interchangeable and that it is plain that the parties intended to cover liabilities arising from breaches of Regulations applicable to the Company, the principal Regulations being those set out in the LAUTRO Rules. As the Buyer pointed out, it was hard to see what other Regulations the parties had in mind if it were not the LAUTRO Rules which bound any company authorised to sell pensions (...) the Arbitrators also concluded that in a case such as the present which involved a consistent course of conduct whereby Interlife sold pensions in a manner which was in breach of LAUTRO Rules”.*

*Brandeis (Brokers) Ltd v. Herbert Black* is another interesting example of an arbitrator award that was challenged in a UK court and which also granted a major role to the Code of Conduct issued by the Securities and Futures Authority (SFA), another self-regulatory organization, as it was decided that the Code had been truly incorporated into the

contract<sup>13</sup>.

Additionally, various references to codes of conduct with potential impact on international arbitration have been incorporated into international investment law (Bonfanti 2014). The preamble to several Free Trade Agreements signed by Canada and Latin American countries –i.e., Colombia, Peru and Panama-<sup>14</sup> states that the parties are resolved to “encourage *enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized corporate social responsibility standards and principles and pursue best practices*”. Specifying these references (de Luca 2014), the very recent European Union-Canada *Comprehensive and Trade and Economic Agreement (CETA)*<sup>15</sup> contains several express allusions to “*encourag[ing] activities that support corporate social responsibility in accordance with internationally recognized standards such as the OECD Guidelines for Multinational Enterprises and Due Diligence Guidance*”.

#### b) International Standards

As the above examples show, the fact that these new informal instruments are also finding their places at the regulatory level of international investment should be noted. In fact, several Bilateral Agreements on the Promotion and Reciprocal Protection of Investment (BITs) include a provision referring to international standards on bookkeeping and auditing (1992 Sweden-Argentina BIT, 1992 Sweden-Latvia, 1993 Sweden-Indonesia, 1993 Vietnam-

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<sup>13</sup> The award states that: “*The language (of the contract) was similar, except that the contracts with the first and second respondents (made in 1988 and 1989) referred to the Association of Futures Brokers and Dealers (AFBD), whereas the contract with the third respondent (made in 1993) referred to the rules of the SFA. The change resulted from the merger in 1991 of the AFBD with the Securities Association to form the SFA, and it is common ground that thereafter references in the earlier contracts to the AFBD must be read as references to the SFA (...)* The arbitrators referred in the first award to *Ismene Larussa-Chigi v CS First Boston Ltd (unreported, 18 Dec 1977, Thomas J)*. In that case foreign exchange transactions were carried out under a contract which stated that the transactions “*will be governed by a Code of Conduct established by the Bank of England to which we [the brokers] will adhere*”. The judge held that this wording incorporated the Bank of England's code into the contract. The Arbitrators reach essentially the same conclusion in the present case, although each case would depend on its own facts and the precise language used. The wording here is “*subject to...*”. This suggests incorporation as part of the contract but the Arbitrators consider that the matter is made completely clear in the next paragraph where it is stated that in the event of any conflict of the Rules of the SFA and the Terms of Business, the Rules of the SFA shall prevail. The paragraphs read together can, in the Arbitrators' view, only mean that the SFA Rules are part of the contractual terms”.

<sup>14</sup> Canada's Free Trade Agreements. Accessed December 20. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng>.

<sup>15</sup> European Union-Canada *Comprehensive and Trade and Economic Agreement (CETA)*. Accessed December 20. [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

Finland, 1994 Sweden-Vietnam, 1996 Sweden-Albania, 1997 Sweden-Ukraine, 1998 Sweden-South Africa, 1998 South Africa-Mauritius, 1997 Sweden-Laos, 1998 Czech Republic-South Africa, 1998 Sweden-South Africa, 1998 Mauritius-South Africa, 2009 South Africa-Zimbabwe).<sup>16</sup> The provision reads as follows: “*In order to create favourable conditions for assessing the financial position and results of activities related to investments in the territory of one of the Contracting Parties, this Contracting Party shall -without prejudice to its own national requirements for bookkeeping and auditing- permit the investment to be subject also to bookkeeping and auditing according to standards which the investor is subjected to by his national requirements or according to internationally accepted standards (e.g. International Accounting Standards (IAS) drawn up by the International Accounting Standards Committee (IASC)). The result of such accountancy and audit shall be freely transferable*”. The fact that some privately created specialised standards –accounting standards in this case- with a vocation for global application have been incorporated into the texts of a fair number of international treaties will have relevant consequences in the sphere of resolving disputes arising from international investments. Hence, when the BITs mentioned above are invoked in investment arbitrations, their acceptance of International Accounting Standards facilitates the technical –in the sense of non-legal- analyses carried out by tribunals when assessing claims presented by foreign investors. This reference to harmonised standards may also have a positive deterrent effect, making it difficult for the host state to hide behind national parameters and mechanisms with the aim of calling into question the rationale of the investor’s allegations.

Furthermore, in 2005 the Canadian International Institute for Sustainable Development issued the Model of International Agreement on Investment for Sustainable Development, which contained a ground-breaking proposal from a *lege ferenda* perspective. This comprehensive set of recommendations relates investors’ degree of success in dispute settlements in the environmental sphere to their having complied with privately set international standards. Article 14 of the Canadian proposal establishes that companies with over 250 employees or in areas of resource exploitation or high-risk industrial enterprises must have current ISO 14001 certification or an equivalent environmental management standard. Article 18 establishes that if persistent failure to comply with this post-establishment obligation is raised by a host state defendant in a dispute settlement proceeding,

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<sup>16</sup> All available at: Bilateral Investment Treaties. Accessed December 20. <http://investmentpolicyhub.unctad.org/IIA>.

the arbitration tribunal must consider whether this breach, if proven, is materially relevant to the issues in question, and if so, what mitigating or off-setting effects this may have on the claim's merits or on any damages awarded.<sup>17</sup> This takes the power of these privately created international standards to extremes, as it is in fact being proposed that the parameter can have an impact on or even nullify the investor's claim.

### c) Interest and Exchange Rates

From a global law perspective, it is crucial to examine the major role played by the economy and finance in international commercial arbitration today. By way of an example, in some commercial awards (i.e., *CIETAC 2007 and Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, March 2009*) the interest rate applicable to the sum in arrears is determined by applying interest rate indexes such as the London Interbank Offered Rate (Libor) or the Euro Interbank Offered Rate (Euribor), which are indexes set by private bankers associations. The highly complex nature of the commercial disputes that give rise to arbitration procedures has had repercussions on the expertise -increasingly multidisciplinary- of the arbitrators and lawyers who play a part in resolving these cases. Likewise, the fact that the vast majority of claims brought by the parties need to be expressed in terms of quantities has a clear impact on the wording of the resolutions themselves. They generally contain reflections of an economic and financial nature along the following lines: *"In order to determine exact 'domicile' (Serbian) rate for euro, one should not resort to Serbian law, since it regulates and is appropriate for local currency (RSD) rates only and would result in overcompensation if applied to sums denominated in Euro. Rather, it is more appropriate to apply interest and rate which is regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment, as this represents rate on a relatively riskless investment. After examining interest rate figures and indicators on short-term Euro deposits in Serbia, Sole arbitrator finds that the appropriate rate would be 6 percent annually"* (*Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, February 2009*).

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<sup>17</sup>International Institute for Sustainable Development. *Model of International Agreement on Investment for Sustainable Development*. Accessed December 20. [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

Privately created rates have also established a strong foothold in the regulatory sector. In the field of investment arbitration, Article 4.2 of the 1993 Vietnam-Finland Bilateral Investment Treaty<sup>18</sup> (BIT) states that when expropriation is being dealt with: “*Compensation for cases referred to in paragraph (1) of this Article shall amount to the fair market value of the expropriated investment at the time immediately before the expropriation or expropriation decision became publicly known. The compensation shall include interest at the rate of London Interbank Offered Rate (LIBOR) for 3-month deposits in the respective currency from the date of expropriation or loss until the date of payment*”. Article 3. d of the 1992 Sweden-Argentina BIT<sup>19</sup> also includes an explicit reference to an international exchange rate: “*Any transfer referred to in this Agreement shall be effected at the applicable exchange rate in each case. Such exchange rate shall not differ more than marginally from the cross rate of the exchange rates the International Monetary Fund (IMF) would apply on the date the transfer is made if it exchanged the money of the countries concerned for Special Drawing Rights (S.D.R.)*”.

It is clear from all these examples that international arbitration cannot be left solely in the hands of lawyers who are not experts in economics and finance, but that the sector’s future is largely dependent on creating satisfactory responses that reflect a pluralist perspective.<sup>20</sup> Well-argued applications of this type of rate enhances arbitration predictability (Gotanda, 2009) and thus has a harmonising effect. Otherwise, the future of arbitration could be threatened by criticism arising from the financial and business sphere, in the sense that if some awards do not dare to rigorously analyse the dispute’s extralegal aspects, they are simply “*splitting the baby*” (Knull, Jones, Tyler and Deutch, 2007, 49).

#### d) Financial Premiums

Analysing the international investment arbitration field leads even more clearly to

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<sup>18</sup> Bilateral Investment Treaties. <http://investmentpolicyhub.unctad.org/IIA>.

<sup>19</sup> Bilateral Investment Treaties. <http://investmentpolicyhub.unctad.org/IIA>.

<sup>20</sup> A reaction such as that occurring during a cross-examination in the case *Ioannis Kardassopoulos & Ron Fuchs v. The Republic of Georgia* is indicative of the “fear” aroused by economic financial analyses within the framework of an arbitration, but also of the great need for them: “*MR SAUNDERS: Our answer to that is that that doesn't position – Brown & Root is not positioned as a fair market reference point. It is not operating in, I guess, a fair market, it has a particular desire, a particular position, and that takes it from a valuation set of rules, that takes it outside of the process. But again, I'm straying into expert accounting territory*”.

the same conclusion regarding the need to apply in the arbitration sphere various informal regulatory instruments originating in the economic and financial sectors. Many awards in this investment domain are indeed made public, and it is therefore easier to find examples of privately created financial parameters being “translated” into monetary and legal consequences. This is the case with the country risk premium, an investor’s premium measured by private rating agencies, specialist consultancies and statistical databases, which is a percentage premium usually added to the cost of capital in developed countries. To quote the comparative definition provided by the *Guaracachi America, Inc. and Rurelec plc v. The Plurinational State of Bolivia*, the country risk premium is “*the incremental return demanded by investors for an investment in a country or location where the investment is exposed to greater risk than would be the case in a more stable economy, like the U.S.*”. This premium takes into account political changes (Ginsburg, 2013), the macroeconomic consequences of economic policies and environmental risks connected to investing in a specific country – that is, the peculiarities of doing business there (Searby, 2011, 19-20; Chorvat, 2003, 1274).

Several recent awards in which the defendants were Latin American states included express arguments concerning the country risk premium, which are highly illustrative as to the premium’s nature and relevance. In the *Guaracachi* award, the arbitral tribunal stated that:

*“Such “country” or “sovereign risk” premium is typically calculated by looking at the spread implicit in the market yield of sovereign bonds of the country traded in the international financial markets. However, since no such Bolivian bonds existed as of the date of expropriation both parties were again obliged to use a proxy. To calculate it, Compass Lexecon considers it appropriate to construct “an EMBI [Emerging Market Bond Index] proxy in accordance to the Sovereign Rating given to Bolivia by Standard & Poor’s, Fitch Ratings and Moody’s. To construct Bolivia’s EMBI proxy I computed the average EMBI for countries with the same rating as Bolivia”, and settled upon a premium of 7.017%. Econ One accepts this methodology, subject to its views on the 1.5 multiplier to be discussed below. The Tribunal agrees that it is appropriate to calculate country risk—as both parties have done—using an index of emerging market bonds, and shall apply the resulting premium of 7.017%”.*

In the ICSID arbitration case *LG&E Energy Corp. v. Argentina* the country risk premium was also assessed by the arbitration tribunal. The respondent state alleged that the country risk premium had been included in the initial gas distribution tariffs and provided compensation for the dismantling of the tariff regime, and therefore the arbitration process should not grant any compensation. Nevertheless, the tribunal concluded that although the premium was indeed included in the tariff calculation, it had a direct impact on compensation, as the country risk premium did not excuse Argentina from the abrogation of the tariff regime.<sup>21</sup> The Argentinean government actually went a step further in some other international arbitrations, such as *EDF International SA v. Argentine Republic*, and – unsuccessfully – used its high country risk as an argument to justify the fact that in 2001 the country was in a state of need which would require all arbitral claims to be dismissed. Once again, financial instruments whose origins lay outside state legislative power were not only accommodated within the legal-arbitral sphere but were also in principle able to affect the legal resolution of the case.

#### e) Valuation Methods

In the more general context of ascertaining the damages claimed in investment arbitrations,<sup>22</sup> the Discounted Cash Flow (DCF) is a valuation method used to estimate the cash flows that would have continued to be generated if the events or omissions giving rise to arbitration had not occurred. The discount rate used to render future cash flows in present day terms is calculated on the basis of the cost of the capital investment that is the subject of the arbitration –a cost that is determined by focusing on the country risk, among other factors (Searby, 2011, 19). It is common practice for one or both parties in an investment arbitration

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<sup>21</sup> The arbitral award states: “*The tariff regime was an essential feature for enticing foreign investors to invest in the gas industry and an express commitment of the Argentine Government. The tariff regime offered additional conditions than those covered by the country risk premium. In addition, acknowledging Respondent’s arguments, as noted by the Claimants, would result in the absurd situation that high-risk borrowers would be excused from their international responsibility. In view of the foregoing, the Tribunal has decided to adopt a method of calculation that accounts for the principles stated by the Tribunal and at the same time assures that the Claimants are “fully” compensated for the damage incurred as a result of Argentina’s wrongful acts*”.

<sup>22</sup> To illustrate the ins and outs of this complex task: “*In measuring damages, tribunals may be required to address such factors as destruction of market value, lost dividends or royalties and similar future consequences of what may be found to be the unlawful deprivation of business property. In cases concerning capital investments, tribunals may have to look decades into the future and consider uncertainty of future revenues or costs, interest rates, inflation, regulatory changes and other risks. Complex calculations are usually required and expert evidence is invariably involved*”. Accessed December 20. <http://www.jurisconferences.com/2012/damages-in-international-arbitration-october-19-2012/>

dispute to be in favour of applying the DCF method<sup>23</sup> and to provide expert evidence to prove to the arbitrators what, in their opinion, the correct quantification achieved by applying the method would be. As might be imagined, the task of quantification is extremely complex, and in cases such as *CME Czech Republic B.V. v. The Czech Republic* the arbitral award expressly reflected the difficulties experienced by the arbitrators in making decisions about issues of this type, which are eminently financial and based on evaluation methods drawn up by private sector entities: “*The Tribunal is not in the position to be more specific than the parties experts. The gap between the experts’ valuations of roughly USD 210 million in the Tribunal’s eyes can only be closed by a rough assessment, taking into account various considerations of the parties, their Experts and their extensive conflicting pleadings and the Tribunal’s view that the Kagan Reports projections and the Zenith Reports assessments for the market position of Nova and Prima have merit*”. Statements such as this are a fresh example of the importance that needs to be attached to the proper understanding and application of extralegal parameters in the arbitration sphere.

#### f) Audits

The cases mentioned above show how a set of financial evaluation instruments is playing *de facto* a regulatory<sup>24</sup> role in the resolution of disputes arising from international investments.<sup>25</sup> Recent practice in this sector provides some interesting examples of how other

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<sup>23</sup> This occurred, for example, in the award *Joseph Charles Lemire v. Ukraine*: “*The only aspect on which both experts have agreed is that the appropriate methodology to establish the damage in a case like this one is a DCF analysis. This methodology, based on the prediction of a future stream of cash flow, which is then discounted at a given rate, has been acknowledged and frequently applied in the recent practice of investment arbitration. Given this acceptance and the common proposal of both experts, the Tribunal sees no difficulty in using a DCF methodology. The Tribunal will thus adopt the basic philosophy proposed by the experts, but will critically review their assumptions and calculations*”.

<sup>24</sup> By way of a piece of data to think about, the arbitral tribunal in *Alpha Projektholding GmbH v. Ukraine* seems to attach the same relevance to violations of the law as it does to violations of accounting standards: “*On May 25, 2004, representatives from the State Main Control and Revision Office (MCRO) issued an audit of Alpha's relationship with the Hotel that confirmed that “the Investor [Alpha] invested USD \$1,701,620” under the 1999 Joint Activity Agreements but found the payment to Pakova of this amount unlawful under the Ukraine Foreign Investment Law. The MCRO audit report was critical of the JAAs and the Hotel's implementation of these agreements, asserting violations of numerous laws and accounting standards*”.

<sup>25</sup> A further example is provided by the *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* award, in which the following statement was made: “*The 2005 financial statements do mention that a transaction took place in 2003 but without stating any exact date (which would necessarily have to be before June 12, 2003). It might be asked why the Tribunal prefers two out of three audited financial statements, when all are certified as true and approved by the shareholders. The answer lies in the fact that with the exception of the four one page “agreements” already found not to prove the transaction and Mr. Uzan's statement which is contradicted by the two other statements, all other contemporaneous evidence supports the conclusion that it is the 2003/2004*



privately run mechanisms such as audits also play a significant role at other points in the international investment process. This may happen during the negotiations that are usually carried out between the state and the adversely affected investor before any decision to go to an investment arbitration tribunal is made. The independent audits carried out in cases such as *Ioannis Kardassopoulos & Ron Fuchs v. The Republic of Georgia* can be interpreted as political gestures of good will on the part of the host state: “*In any event, on 28 June 2003, President Shevardnadze agreed to an independent audit of the costs incurred by Tramex (company owned by the claimants) and, on 27 October 2003, Tramex commissioned Deloitte Management Consultancy Israel Ltd. (“Deloitte”) to conduct the audit*”. On the other hand, in cases like *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, the non-independent audit imposed and carried out by the host state after the investor had reported problems in the investment’s management appears to have been carried out for the purposes of intimidation: “*On 18 January 2005, six months after Claimants’ request for friendly consultations and one month following the issuance of the 2004 Memo, the Superintendencia de Empresas ordered a corporate audit of NMM. The audit was carried out by employees of the Superintendencia, Ms. Lorena Fernández and Mr. Yury Espinoza. According to the testimony of Lorena Fernández, this audit was directed to establish whether NMM’s shareholders were Chilean nationals. The audit appears to have been ordered at the request of the Ministry of Foreign Affairs*”. This led the arbitration tribunal to consider that the audit was in fact an important part of the country’s strategy for protecting itself against a possible arbitration claim.<sup>26</sup>

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*statements which are accurate, and the 2005 statement, completed just before the Respondent learned for the first time of the existence of the supposed foreign shareholders, is false (...). It is therefore impossible for the Arbitral Tribunal to accept the Claimant’s allegation that Cementownia purchased the bearer shares before June 12, 2003. The financial statements produced by the Claimant rather show that Cementownia and Kemal Uzan attempted in 2005 to fabricate the transaction in order to protect the Uzan family’s economic interests and to gain access to international jurisdiction”.*

<sup>26</sup> This led the arbitral tribunal to state in its provisional measures decision that: “*although the Tribunal has every respect for Bolivia’s sovereign right to prosecute crimes committed within its territory, the evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants because they had initiated this arbitration. Indeed, the Querrela Criminal expressly states that the alleged irregularities in Claimants’ corporate documentation were detected in consideration of (“en atención a”) the Request for Arbitration filed by Claimants against Bolivia. Lorena Fernández, one of the authors of Informe 001/2005, testified that the corporate audit was made at the request of the Ministry of Foreign Affairs in the context of an arbitration proceeding and was aimed at establishing whether the shareholders in NMM were Chilean nationals. Indeed, the very content of Informe 001/2005 suggests that the underlying motivation for the audit was to serve Bolivia in the defense of this arbitration claim, as it contained specific recommendations for such defense. The Tribunal cannot fail to note that these actions were taken after an inter-ministerial committee specifically recommended in the 2004 Memo that Bolivia should try to find flaws in Claimants’ mining concessions as a defense strategy for the ICSID arbitration. Seen jointly with the 2004 Memo, the corporate*

Likewise, the host state's decision that a public body should carry out an audit in the course of a foreign investment project in its country -even before the threat of arbitration brought by the investor arises- has become an increasingly important element in several investment arbitrations. In *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, the investor stated that the audit performed by the National Customs and Revenue Authority (*SUNAT*) constituted a breach of the non-discrimination guarantee: “*Claimant submits that SUNAT's audit and final assessment of DEI Egenor (i.e., Duke Energy's investment) was discriminatory on the basis of nationality. Indeed, Claimant asserts that SUNAT's assessments were discriminatory in intention, character and effect. Claimant submits that the evidence it has put forward demonstrates that the Government of Peru, facing an immense political storm after the fall of the Fujimori administration, singled out foreign investors that were continuing to avail themselves of the Merger Revaluation Benefits under their LSAs (...) Respondent denies that SUNAT's audit of DEI Egenor was politically motivated, and has put forward several witnesses from SUNAT who attest to the objectivity of the agency and the audit process that was undertaken against Egenor*”. Similarly, in *L.E.S.I.S.p.A. and ASTALDI S.p.A. v République Algérienne Démocratique et Populaire* the claimant relied on the state audit –unsuccessfully in this case– to assert that there had been a violation of the fair and equitable treatment standard contained in the BIT.<sup>27</sup> In this area of international investment arbitration, modern arbitral tribunals are therefore considered to be acting as real law-makers. Thanks to many elements –some of them economic and financial-, they are specifying the very generic legal terminology that makes up the BITs (Schill 2011; De Brabandere 2012).

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*audit and the criminal proceedings appear to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration.”*

<sup>27</sup> The arbitral award affirms: “*En réponse à la demande d'audit de la part de la Défenderesse, les Demanderesses ont précisé qu'elles n'étaient pas «[...] hostiles à un audit des comptes du projet. Il pourrait d'ailleurs s'étendre à la détermination de l'indemnisation relative au manque à gagner. [...] » Toutefois, en date du 25 octobre 2002, les Demanderesses ont exigé que des auditeurs soient des professionnels internationalement réputés et d'une impartialité reconnue. Selon les Demanderesses, il est exclu que l'ANB procède elle-même à l'audit de leurs comptes (...). Lors de la réunion du 27 novembre 2002, le Directeur de l'ANB a réitéré sa demande de permettre à une équipe agréée par les deux Parties l'accès aux comptes du Groupement afin d'estimer les postes d'indemnisation. Le 12 décembre 2002, le Groupement a répondu que « [...] nous ne sommes pas non plus rassurés par les demandes réitérées de l'ANB de lui ouvrir les comptes du Groupement, car nous craignons qu'elles ne visent qu'à gagner du temps ». L'ANB a de nouveau constaté dans sa lettre du 15 janvier 2003 que « [...] la seule démarche constructive [...] est un audit des comptes du projet ». Les Demanderesses ont répondu par le dépôt de la requête d'arbitrage le 3 février 2003”. (no English version available).*

### g) Credit Risk Ratings

There is a further interesting example of how financial analyses undertaken by private companies can be highly relevant at points during an international investment other than the time at which the award is issued: if a defendant state does not comply with an investment award imposing a monetary sanction, this will have a negative impact on the country's credit risk rating. This is because private credit rating agencies usually analyze criteria such as the state's payment capacity and its willingness to repay the debt when carrying out their sovereign risk rating exercises. The global publicity given to data provided by agencies such as Moody's, Standard & Poor's and Fitch can mean that states with high sovereign ratings may find it difficult to access private capital markets (Viñuales and Bentolila 2012). Thus, an award in which the exact quantity of the compensation owing to the investor has been calculated by taking into account financial parameters designed by private agencies –e.g. the country risk premium- will be again “reprocessed” by the same private agencies. Due to its genuine global power (Lewkowicz 2013), these agencies will contribute to the international finance markets' sanctioning of the state, which also means indirectly prejudicing the state with respect to which decisions it should take in the future. This means that the legal and financial imperativeness of investment awards is being strengthened by private credit-rating agencies. The referred connection has led to several developing countries to seriously question the legitimacy of a dispute resolution system in the investment field that ultimately places the credibility of sovereign states in the hands of private entities (Fach 2010).

### h) Economic and Financial Indicators

It is clear from all the above that regulatory instruments that are deeply rooted in market and financial dynamics play a leading role in the resolution of disputes arising from international investments. One noteworthy example of a "frontier arbitral award" - in the sense of awards at and beyond the frontiers of disciplinary boundaries –is *the Continental Casualty Company v. The Argentine Republic award*, during which the tribunal not only provided detailed macroeconomic data about Argentina-<sup>28</sup> making reference, for example, to

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<sup>28</sup> The award states that: “Argentina's crisis of 2001-2002 has been described both as “one of the worst economic crises in its history” and “among the most severe of recent economic crises” worldwide. It resulted in a massive default of public debt both domestic and international, the latter involving U.S. \$141 billion. “The

economic data supplied by sources such as the International Monetary Fund<sup>29</sup>, but also adopting as its own several statements made by the parties based on labour market indicators<sup>30</sup> and the World Bank's World Development Indicators<sup>31</sup>.

In conclusion, current complex economic and financial circumstances have dethroned national state law as the monopolistic solution to international conflicts. New informal regulatory instruments – e.g., codes of conduct, economic indexes, economic indicators, economic premiums, valuation methods, auditing, etc. - are becoming increasingly important in the process of resolving international disputes through international commercial or investment arbitration.

### **III. The Two-Way Relationship Between Private Legal Orders and their Sectorial International Arbitration**

Although state intervention in “classical” international commercial arbitration is currently an irrefutable reality, this section aims to show that there are nevertheless various important areas where public involvement in arbitration has been significantly reduced and now plays a merely formal backstage role. The existence of modern regulatory instruments

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*immediate macroeconomic consequences of the crisis were severe. Real GDP fell by about 10% in 2002, bringing the cumulative decline since 1998 to almost 20%. Inflation peaked at a monthly rate of about 10% in April 2002, driven by liquidity provisions from the central bank to banks experiencing deposit withdrawals, but then declined, averaging around 40% for the year as a whole. More generally the crisis was characterized by severe deflation, a decline in domestic prices as a consequence of the peso overvaluation and the deterioration of the competitiveness of the economy. The stock index of Buenos Aires lost more than 60% from 1998 to 2002. More important than any of these economic indicators, the crisis led to substantial social and personal hardship, including the youngest and most vulnerable members of the populations: the unemployment rate rose to above 20% in 2002; and per capita expenses fell by about 74%. The poverty level increased to 54.3% of the urban population of the country and the indigence level reached 24.7%. Between October 1998 and October 2002, the poverty level was doubled, whereas the indigence level increased 358%”.*

<sup>29</sup> The award affirms that: “As described by the International Monetary Fund in 2004: *The Convertibility Law, which pegged the Argentine currency to the U.S. dollar in April 1991, was a response to Argentina's dire economic situation at the beginning of the 1990s (...)*”.

<sup>30</sup> It is stated that: “*The poverty level increased to 54.3% of the urban population of the country and the indigence level reached 24.7%. Between October 1998 and October 2002, the poverty level was doubled, whereas the indigence level increased 358%, most of the increase having taken place from May 2001 on. (Argentina's Counter-Memorial, para. 78-79 based on published labour market indicators)*”.

<sup>31</sup> The award considers that: “*In general, foreign direct investment inflows were sustained after the convertibility, representing more than 23% of GDP from 1995 to 2000 with a peak of 8.46% in the year 1999*” (See Claimant's doc. C-392 drawn from the World Bank's World Development Indicators, various years”).

that aspire to be independent and are contributing to the expansion of international arbitration and other ADR mechanisms is an intriguing two-way phenomenon. The other side of the coin is the highly relevant role played by these non-judicial resolution mechanisms in the framework of informal regulatory systems because they actively contribute to their consolidation.

The first part of this statement is not difficult to illustrate. There are multiple examples of this growing trend, which, fostered by highly diverse stakeholders - international associations, companies, banks, investors, and NGOs - has created non-governmental global regulations that use ADR mechanisms in specific and very diverse fields. Four of these initiatives will be briefly mentioned here: first, article 5.3 of the Code of Conduct drawn up by the Roundtable on Sustainable Palm Oil (an association made up of various organizations whose objective is to develop and implement global standards for sustainable palm oil) contains a reference to an RSPO Grievance Procedure.<sup>32</sup> This complaints system aims to fulfil the criteria for non-judicial grievance mechanisms proposed by Professor. J. Ruggie in his UN “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”.<sup>33</sup> Taking into account the nature of each complaint against the RSPO or its members, this non-state-based RSPO mechanism offers different measures, such as a mediation channel –Dispute Settlement Facility- and a complaints tribunal.<sup>34</sup> Secondly, the International Federation of Consulting Engineers (FIDIC)<sup>35</sup> has drafted standard contract terms applicable to international construction projects. This privately created legal regime has been globally accepted by the construction sector, becoming a “*lex mercatoria constructionis*” (Wielsch 2012, 1075). The FIDIC established an internal dispute resolution mechanism – Dispute Adjudication Boards; should a DAB decision

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<sup>32</sup> Roundtable on Sustainable Palm Oil (RSPO). *Complaints System*. Accessed December 20. [http://www.rspo.org/en/complaints\\_system](http://www.rspo.org/en/complaints_system).

<sup>33</sup> United Nations. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*. Accessed December 20. <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

<sup>34</sup> Roundtable on Sustainable Palm Oil (RSPO). *Complaints System*. Accessed December 20. [http://www.rspo.org/en/process\\_flow](http://www.rspo.org/en/process_flow).

<sup>35</sup> International Federation of Consulting Engineers. Accessed December 20. <http://www.fidic.org>.

not be executed voluntarily (Seppälä 2012)<sup>36</sup>, the FIDIC system resorts to external arbitration<sup>37</sup> (Hök 2012). Thirdly, the International Swaps and Derivatives Association (ISDA), an international trade association, created the ISDA Master Agreement, a standardised contract aiming to make over-the-counter derivatives markets safe and efficient.<sup>38</sup> In 2013 the association released six alternative model arbitration clauses for use with its 1992 and 2002 Master Agreements. This is something of a novelty in comparison to the option previously encouraged by ISDA -litigation in the United Kingdom or New York courts.<sup>39</sup>

Finally, trade association arbitration is a specialized dispute resolution mechanism used by trade associations like the American Spice Trade Association<sup>40</sup> which has the following main features (Drahozal, 2009): arbitrators are specialized members of the same industrial sector; cases are usually resolved by applying codified industry trade rules instead of national law and decisions are sometimes enforced by extralegal mechanisms that affect the company's reputation, such as publicity or expulsion from the Association (Van Erp, 2008). A clear example of how modern institutions can be effective despite lacking the classical coercive power characteristic of public authorities (von Bogdandy and Venzke 2012) is provided by the rules for making a defaulter's non-compliance public introduced by the Grain and Feed Trade Association (GAFTA): *"In the event of any party to an arbitration or an appeal held under these Rules neglecting or refusing to carry out or abide by a final award of the tribunal or board of appeal made under these Rules, the Council of GAFTA may post on the GAFTA Notice Board, Web-site, and/or circulate amongst Members in any way thought fit notification to that effect. The parties to any such arbitration or appeal shall be*

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<sup>36</sup> Sub-clause 20.6 of FIDIC's standard contract terms: *"Unless settled amicably, any dispute in respect of which the Dispute Adjudication Board's decision (if any) has not become final and binding shall be finally settled by international arbitration"*.

<sup>37</sup> Therefore, *"FICID is able to develop a truly autonomous transnational normative order, whose dependency on state law is limited to the enforcement of arbitration clauses and the exequatur of arbitral awards"* (Wielsch 2012, 1084).

<sup>38</sup> International Swaps and Derivatives Association. Accessed December 20. <http://www2.isda.org>.

<sup>39</sup> <http://www.allenoverly.com/publications/en-gb/Pages/ISDA-DRAFTS-MODEL-ARBITRATION-CLAUSES-FOR-USE-WITH-MASTER-AGREEMENTS.aspx> and <http://hsf-arbitrationnotes.com/2013/04/18/isda-issues-model-arbitration-clauses-for-use-with-master-agreements/>

<sup>40</sup> American Spice Trade Association (ASTA), *Guide to Arbitration*. Accessed December 20. [http://www.astaspice.org/files/public/The\\_ASTA\\_Guide\\_to\\_Arbitration.pdf](http://www.astaspice.org/files/public/The_ASTA_Guide_to_Arbitration.pdf).

*deemed to have consented to the Council taking such action as aforesaid*".<sup>41</sup> All the above has the effect of reinforcing the assertion that transnational private regulations (Cafaggi, 2010) are helping to assure the future of arbitration. A recent study in fact claims that arbitration's very judicialization is a factor that could cast a shadow over its future; that is, the fear that its progressive harmonization with litigation could also mean costs and delays in proceedings (Queen Mary University of London, School of International Arbitration 2013) and that arbitration may thus lose its appeal (Renner 2014).

The second part of this section's initial statement –arbitration contributes to filling in the gaps in informal instruments of regulation- is more difficult to back up in sufficient detail because the lack of publicity in many arbitration sectors greatly hinders the task of finding examples. There is, however, one area in which there is real evidence of the fact that a highly sophisticated and almost totally independent system of global governance –in the sense of being outside the sphere of state and public authority interference- has been successfully established, which in turn benefits from the feedback provided by its own arbitration mechanism. Strange though it might seem at first glance, this sector is not part of the commercial or financial sphere; it is, in fact, the sports world.

#### a) International Sports Arbitration

To understand how the system operates, it is necessary to start from the fact that the international sports sphere is made up of a series of important international organisations of a private nature and composition. The International Olympic Committee (IOC), supreme authority of the Olympic movement, is an international non-governmental, not-for-profit organisation. It has an unlimited duration in the form of an association with legal person status<sup>42</sup> and its members are natural persons. Meanwhile, International Federations (IFs) such as the Fédération Internationale de Football Association (FIFA) are also constituted as private organisations<sup>43</sup> and their members are private national associations. There are also other

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<sup>41</sup> Provision 22.1 of the 2014 Arbitration Rules, No. 125. Grain and Feed Trade Association (GAFTA). *Arbitration Rules*. Accessed December 20. <http://www.gafta.com>.

<sup>42</sup> Article 15 of the 2013 Olympic Charter. Accessed December 20. [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf).

<sup>43</sup> Article 1 of the 2014 FIFA statutes: "*The Fédération Internationale de Football Association (FIFA) is an association registered in the Commercial Register in accordance with art. 60 ff. of the Swiss Civil Code*". Accessed December 20. <http://www.fifa.com/aboutfifa/organisation/statutes.html>.

organisations in the international sports area like the World Anti-Doping Agency (WADA), a Swiss private law foundation which is not only made up of and funded by private sports bodies but also by state governments throughout the world.<sup>44</sup> All these bodies exercise a quasi-legislative function and they draw up their own rules, which regulate their aims and operations to the last detail. In this sense, the rules created by the IOC (Olympic Charter) and IFs (their respective statutes or constitutions) are considered by commentators to be a genuine form of global law, as they are privately created, globally applied and able to produce direct effects on individuals. The texts drafted by WADA (five International Standards and the World Anti-Doping Code) are defined as hybrid public-private norms because of the agency's mixed composition (Casini 2012, 439-440). In any event, the WADA Code's objective of being de-localized law is clearly manifested in its introduction: the Code presents itself as a manifestation of global legal pluralism, emphasising its different nature and functions vis-à-vis national regulations.<sup>45</sup>

A highly relevant detail here is that all the rules referred to above contain a series of precepts (article 61.2 of the 2013 Olympic Charter,<sup>46</sup> 64.3 of the 2014 FIFA statutes,<sup>47</sup> 74-78 of the 2013 UCI Constitution,<sup>48</sup> 15 of the 2013 IAAF Constitution,<sup>49</sup> 13 of the 2015 World

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<sup>44</sup> WADA. Accessed December 20. <https://www.wada-ama.org/en/who-we-are> and <https://www.wada-ama.org/en/who-we-are/governance>.

<sup>45</sup> Part 1 of the WADA Code. Introduction: *“These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport”*. Accessed December 20. <https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf>.

<sup>46</sup> Article 61.2 of the 2013 Olympic Charter: *“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration”*. Accessed December 20. [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf).

<sup>47</sup> Article 64.3 of the 2014 Fédération Internationale de Football Association (FIFA) statutes: *“Decisions pronounced by the FIFA Appeal Committee shall be irrevocable and binding on all the parties concerned. This provision is subject to appeals lodged with the Court of Arbitration for Sport (CAS)”*. Accessed December 20. <http://www.fifa.com/aboutfifa/organisation/statutes.html>.

<sup>48</sup> 2013 Union Cycliste Internationale (UCI) Constitution: Article 74: *“The Court of Arbitration for Sport in Lausanne, Switzerland, is the sole competent authority to deal with and judge appeals, in cases stipulated by the rules established by the Management Committee, against sporting, disciplinary and administrative decisions taken in accordance with UCI rules”*. Article 75 of the same Constitution: *“The Court of Arbitration for Sport in Lausanne, Switzerland, is the sole competent authority, with the exclusion of state courts, to deal with and judge disputes between UCI bodies, including continental confederations, and disputes between Federations”*. Article



Anti Doping Code,<sup>50</sup> etc.), which refer to a sole private authority to resolve sports disputes in a binding and final way: the Court of Arbitration for Sport (CAS). This institution's origins lie in the idea to set up an arbitral jurisdiction devoted to resolving sport-related disputes, which arose in the 1980s. The CAS Statute was accordingly approved in 1984 and in 1994 the International Council of Arbitration for Sport (ICAS) was created, whose main task is to safeguard the independence of the CAS and the parties' rights. The Code of Sports-related Arbitration has governed the organisation and arbitration procedures administered by the CAS since then.<sup>51</sup> Along with its functions of issuing non-binding advisory decisions and operating *in situ* at the Olympic Games through an *ad hoc* division, this permanent arbitration structure mainly intervenes: "*whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)*".<sup>52</sup> The broad terms in which the nature of arbitrable disputes is defined is an additional factor that justifies the quantitative importance of CAS, which has granted almost 3000 awards since it was created.<sup>53</sup>

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76: "*The Court of Arbitration for Sport makes a ruling in the last instance*". Article 77: "*Proceedings with the Court of Arbitration for Sport are governed by UCI rules and for the rest, by the Code of arbitration for sport*". Article 78: "*In the absence of a choice of applicable law by the parties, the Court of Arbitration for Sport will apply Swiss law*". Accessed December 20. <http://www.uci.ch/inside-uci/rules-and-regulations/constitution/>

<sup>49</sup> Article 15 of the 2013 International Association of Athletics Federations (IAAF) Constitution: "*All disputes arising under this Constitution shall, in accordance with its provisions, be subject to an appeal to the Court of Arbitration for Sport in Lausanne (CAS). 2. The CAS appeal shall be in accordance with the rules of CAS currently in force, provided always that the CAS Panel shall be bound to apply the Articles of this Constitution and the appellant shall file its statement of appeal within sixty days of the date of communication in writing of the decision that is to be appealed. 3. The decision of CAS shall be final and binding on the parties and no right of appeal will lie from the CAS decision*". Accessed December 20. <http://www.iaaf.org/about-iaaf/documents/constitution>.

<sup>50</sup> Article 13.1 of the 2015 World Anti Doping Code: "*Decisions Subject to Appeal-Decisions made under the Code or rules adopted pursuant to the Code may be appealed as set forth below in Articles 13.2 through 13.4*". Article 13.2.1: "*Appeals Involving International-Level Athletes. In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court*". Accessed December 20. <https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf>.

<sup>51</sup> History of the CAS. Accessed December 20. <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0/>

<sup>52</sup> Rule 27.1 of the 2013 Code of sports-related arbitration. Accessed December 20. <http://www.tas-cas.org/rules>.

<sup>53</sup> CAS statistics. Accessed December 20. <http://www.tas-cas.org/d2wfiles/document/437/5048/0/stat2012.pdf>.

A further example of the high degree of self-sufficiency enjoyed by this global system is the fact that its awards, which can be judicially recognized and enforced according to the 1958 New York Convention, can only be challenged before the Swiss Federal Court. In judicial practice national courts strictly apply the list of defences in Article V of the New York Convention and authorise the enforcement of foreign arbitral awards in the vast majority of cases (Mitten 2009). In the case of *Slaney v. The International Amateur Athletic Federation*, the US court therefore ordered the enforcement of the award made by the IAAF arbitration panel, which determined that the athlete had committed a doping offence, after concluding that “*none of the New York Convention defenses towards enforcement of foreign arbitration awards applied to Slaney's situation (...) we are confident that requiring an athlete to prove by clear and convincing evidence that her elevated ratio [prohibited testosterone] was due to pathological or physiological factors does not invoke a violation of United States public policy as federal case law has required in order for a court to refuse to enforce a foreign arbitral award (...) for the purposes of this appeal, we note that both the United States and Monaco are signatories to the [New York] Convention, such that the United States is bound to enforce arbitral awards validly rendered in that country*”. Even in cases such as *Gatlin v. U.S. Anti-Doping Agency*, in which the U.S. Court expressly “*takes exception to the decisions made by Defendants and the panels sitting in arbitration over this matter, and indeed finds their actions to be arbitrary and capricious*”, the court decided that: “*the Court does not find these wrongs to rise to the level of moral repugnance as is required under the law for the Court to consider piercing the veil of the jurisdictional issue. It appears, as Defendants indicate, that Plaintiff's remaining avenue for relief lies with the Swiss Supreme Court, which may in its discretion elect to review the case*”.<sup>54</sup> In the same vein, the Swiss Supreme Court's monopoly to set aside CAS awards (Rigozzi and Hasler 2013; Rigozzi, 2010) – which various athletes have unsuccessfully challenged in their national courts<sup>55</sup> – has so far been translated into a limited admission of the grounds for annulment contained in Article 190.2 of the 1987 Federal Statute on Private International Law.<sup>56</sup> This

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<sup>54</sup> In spite of the favourable decision on the exequatur, the US judge made highly critical comments regarding the current CAS sports arbitration system: “*Nonetheless, the result of this determination is quite troubling because Mr. Gatlin is being wronged, and the United States Courts have no power to right the wrong perpetrated upon one of its citizens*”). This point of view is also shared by American authors (Weston 2009).

<sup>55</sup> *Landis v. Usada*, Petition to Vacate Arbitration Award (C.D. California 2008).

<sup>56</sup> Swiss Federal Statute on Private International Law. Accessed December 20. [https://www.swissarbitration.org/sa/download/IPRG\\_english.pdf](https://www.swissarbitration.org/sa/download/IPRG_english.pdf).

“hands-off approach” is a factor that further reinforces the perception of a thorough-going private self-regulatory mechanism.

When the settling of international sporting disputes is analyzed, there are many scholars who agree that a *lex sportiva* exists in the sports sphere, and that this is applied to resolve international sporting disputes. This *lex sportiva*, which has been compared with *lex mercatoria* (Kolev 2012), is characterised by being private and autonomous, global and stateless (Foster 2012; Casini 2012; Lindahl 2012; Mitten and Opie 2010). Although the CAS itself has sometimes been reticent regarding the solidity of an alleged *lex sportiva*, as in the example of the *CAS Advisory Opinion 2005/C/976 & 986*: “*the Panel is not prepared to take refuge in such uncertain concepts as that of a “lex sportiva”, as has been advocated by various authors. The exact content and the boundaries of the concept of a lex sportiva are still far too vague and uncertain to enable it to be used to determine the specific rights and obligations of sports associations towards athletes*”, there are nevertheless recent CAS awards, such as the *CAS 2008/O/1455*, that do acknowledge its existence: “*the Panel wishes again to make clear that it shares the Respondent’s preference for equal treatment and it believes that the requirement of a level playing field is a lex sportiva principle to be respected by all sports governing bodies and protected by the CAS*”. The acceptance of the binding force and operability of *lex sportiva* became especially relevant in the *CAS 2002/O/373* award, in which the allegation made by both parties with regard to prior CAS awards led the arbitration tribunal to consider that the former had exercised a choice of law in favour of *lex sportiva*:

*“As a result, the parties have based their arguments throughout the proceedings, i.e. in their pre-hearing written submissions and in their oral submissions, on the provisions of the Olympic Charter and the Olympic Movement Antidoping Code as well as on CAS jurisprudence relating to doping cases. The Panel considers that by doing this the parties have made a corresponding choice of rules. Consequently, the Panel will decide the dispute on such basis. CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed part of an emerging “lex sportiva”. Since CAS jurisprudence is largely based on a variety of sports regulations, the parties’ reliance on CAS precedents*

*in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations” (CAS 2002/O/373).*

As the *CAS 2008/A/1545* award highlights, the point is that although “*in CAS jurisprudence there is no principle of binding precedent (stare decisis or collateral estoppel)*”, the practical reality in this arbitral sector is that: “*although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect*”. The importance of arbitration awards in the consolidation of *lex sportiva* can clearly be seen in the official version of the World Anti-Doping Code, which includes commentaries on its articles that explicitly refer to CAS decisions. For example, WADA explains the personal duty of all athletes to ensure that no prohibited substance enters their bodies referred to in 2.1 of the Code by referring to CAS arbitration awards in this area: “*An anti-doping rule violation is committed under this Article without regard to an athlete’s fault. This rule has been referred to in various CAS decisions as “strict liability”. An athlete’s fault is taken into consideration in determining the consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS*”.<sup>57</sup> As some CAS awards such as *AEK Athens v. UEFA* indicate, this is not only a *lex sportiva* that reinforces the role of sectorial arbitration but also a truly arbitrator-made *lex sportiva*: “*Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of lex mercatoria for sports or, so to speak, a lex ludica – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national «public policy» («ordre public») provision applicable to a given case*”.

In short, one of the most relevant features of many sectorial arbitrations is their power to intervene directly in the shaping of their respective private legal order; the same order that had previously decided to incorporate ADR mechanisms as a weapon in the consolidation of its longed-for coming of age vis-à-vis state power. Proactive arbitration awards such as these both create consistency within the self-created legal order and strengthen the legal order itself.

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<sup>57</sup> WADA. *World Anti-Doping Code*. Accessed December 20. <https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf>.

#### **IV. Conclusions**

If the classical Roman aphorism *ubi societas, ibi ius* is to retain its true meaning in contemporary society, the term *ius* will have to transcend its strict identification with positive law. It is for this reason that Aulo Cornelio Celso's definition *ius est ars boni et aequi* is far more appropriate for understanding not only the origins of informal regulatory instruments but also the reason why they have fuelled the institution of international arbitration. In short, a pluralist conception of global law is nothing other than the logical consequence of the diversity that prevails in our global society.

Although it may make many jurists uneasy to hear that even law created via the most sophisticated democratic channels is frequently unable to be good and equitable, reality shows that it is the shortcomings of official channels that have prompted private actors to adopt an eminently pro-active role in the pursuit of the appropriate management of affairs and resolving of problems that affect them (Teubner 1996). The fact that traders unite in their struggle to defend differentiating factors that legitimise their creation of consensus solution mechanisms is simply one of the many faces of what is known as private regulatory governance. There are currently many interest groups that wish to maximise their autonomy quotas and actively pursue this end, developing instruments governed by sector utilitarianism. This global governance and the plural global law through which it is manifested are kaleidoscopes in constant construction, in which the barriers between the public and the private were eroded some time ago, under the wing of arbitration awards. With private authorities backing it, international arbitration has become the spearhead of these movements, and this may lead to the idea that, in the improbable scenario of arbitration "dying of success", the state would not recover its power in the adjudicatory sphere. Arbitration has intervened very actively in the creation of a global law, and while some of its superficial characteristics may have altered, its essence will persist in the medium and long term.

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