

Patterns of Interaction in Transnational Dispute Resolution: Horizontal, Vertical and Transversal

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Abstract:

This paper addresses two areas largely understudied by scholars of transnational governance. To start with I am interested in analyzing structural patterns in the interaction of different sites of governance in contemporary transnational affairs and their normative implications. While the proliferation of transnational rule-systems is increasingly well studied and the institutional density of transnational governance is no longer disputed our empirical and analytical knowledge about the actual patterns of interaction between competing and complementary rule systems is still an emerging field. And we have even less structured information on the policy and normative implication that may derive from patterns of interaction between different contributions to transnational governance over time.

Secondly, my interest in patterns of transnational governance relates less to the norm-setting aspect which so far has emerged as the dominant field of studies. Rather I focus on the resolution of disputes in socio-economic affairs. While by now we do have quite some knowledge about the emergence of standards, norms and rules in the triangle between states, firms and civil society organizations our knowledge about the ways in which conflicts and disputes are settled in transnational governance lags significantly behind.

In the present cases of dispute resolution in the areas of commerce and sports we are confronted with two quite different structural settings (commerce: decentral; sports: central). In both cases a focus on patterns of interaction between public and private institutions accounts not only for the respective structures, but also is necessary to better understand the respective policy implication.

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Nota Bene: The state of this paper is a compromise between two principles of the academic profession. Firstly, deliver when you've promised to do so; secondly, don't bother others with not properly developed material.
Comments most welcome.

1 Introduction

This paper addresses two areas largely understudied by scholars of transnational governance. To start with I am interested in analyzing structural patterns in the interaction of different sites of governance in contemporary transnational affairs and their normative implications. While the proliferation of transnational rule-systems is increasingly well studied and the institutional density of transnational governance is no longer disputed (Abbott, Green, & Keohane, 2012), our empirical and analytical knowledge about the actual patterns of interaction between competing and complementary rule systems is still an emerging field (see however Abbott & Snidal, 2009a; Alter & Meunier, 2006a; König-Archibugi & Zürn, 2006; Oberthür & Gehring, 2003, 2006). And we have even less statures information on the policy and normative implication that may derive from patterns of interaction between different contributions to transnational governance over time.

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In order to place different assertions for jurisdiction and their respective interactions into the broader literature on contemporary governance, the next section distinguishes between horizontal, vertical and cross-cutting or transversal relationships of actors. Horizontal patterns relate to state-state relations and relationships between international regimes. In the vertical category, one can classify, for instance, the relationships between the national level and the international level. The third and least examined category relates to a transversal dimension that is the interplay between national, transnational and international assertions of jurisdiction including the contribution of non-state actors.

The third part of the paper presents some empirical insights into different cases that associate with the transversal level. I don't think that "the continuing exclusivity of the state" thesis" nor the "islands of transnational governance" thesis are appropriate starting points for an analysis of a very large portion of transnational governance today (Gilpin 2001; Ikenberry 2003; Cutler et al. 1999; Stone Sweet 2002). Rather, I subscribe to the view that state-based and private-based solutions serving the same or similar ends may co-exist and co-evolve. As a consequence, the interest in structural and normative aspects deriving from multiple linkages between public and private activities and of dynamic processes in complex governance arrangements guides my research interest. The emphasis on private dispute settlement mechanisms is not only meant to close a gap in the literature on transnational governance

schemes, but also to provide substance to the analysis of structural aspects in the dynamics of transnational governance and their policy and normative implication.

In the present cases of dispute resolution in the areas of commerce and sports we are confronted with two quite different structural settings (commerce: decentral; sports: central). In both cases a focus on patterns of interaction between public and private institutions accounts not only for the respective structures, but also is necessary to better understand the respective policy implication.

2 The Complexities of Transnational Governance

Today, two broad features of international governance are largely undisputed. Firstly, it is common sense that we live in a world of multi-multilateralism. Secondly, it is also common sense that states are no longer the only parties that are of relevance in international affairs. Rather, they have to share the international governance not only with international organizations but also with a large variety of private actors, including inter alia multinational companies, business association and non-governmental organizations. As a consequence, the international system's horizontal (relations between states), vertical (hierarchical) and functional dimensions are moving all at once (Keohane & Nye, 2000).

Despite enormous scholarly efforts in coping with the transformation of the political, economic and social patterns of interaction, there is anything but consensus on how to deal with still-fluid, new governance arrangements that are more often than not "pervaded with uncertainty" (Rosenau, 1997). Largely acknowledged, however, is the observation there is a diffusion of the capacity to regulate the behavior of socio-economic actors.

Abbott and Snidal provide for a comprehensive differentiation of regulatory processes that distinguishes five stages: agenda-setting, negotiation of standards, implementation, monitoring and enforcement (Abbott & Snidal, 2009a: 46). In this framework, states, firms and non-governmental organization engage and interact in complex transnational regulatory standard-setting processes. Although their concept of a governance triangle allows for mapping and contextualizing the huge plethora of transnational regulatory standards, I opt for a different approach here for reasons of reducing complexity, focus and coherence in a simple paper.

My guideline refers to the concept of jurisdiction and its distinction between the capacity to prescribe, i.e. to apply a community's norms to a dispute; to adjudicate, i.e. to subject persons or things to legal process; and to enforce, i.e. to induce or compel compliance in whatever result is reached (Berman, 2002: 318). In particular, I focus on the dimension of adjudication and the resolution of disputes as the dimension that has gained much less attention in studies of transnational governance. With this focus, I will recruit on Keohane and Nye's three dimensions of the international system and the review the existing literature by distinguishing between horizontal, vertical and transversal (functional) constellations in governance arrangement. This distinction follows very much the observation made by Alter and Meunier who state that nested or overlapping politics appear in nearly every story of multilateralism

(Alter & Meunier, 2009). Indeed, we may present international politics in terms of coexisting claims of jurisdiction that are arranged into nested, overlapping and/or parallel patterns.¹

2.1 Horizontal

In the category of horizontal interactions, it is necessary to distinguish between state-state interactions and interactions between different international actors. This section begins with state-state interactions and ends with an analysis of interactions between regimes.

State-State

The first and certainly the most traditional concept of horizontal international interaction focusses on states as main actors. Still today a pertinent cause of conflict between states relates to conflicting claims over territory. While physical ways of dealing with border disputes and competition for contested and shared resources still exist, states have established institutions for a peaceful resolution of respective conflicts. The most prominent ones are the Permanent Court of Arbitration and its successor under the UN Charter, the Permanent Court of International Justice. With their respective case law both have established a number of principles that guide the resolution of territorial conflicts: treaty provisions, recognized historical boundaries and evidence of effective control (The Carter Center, 2010: iii).

However, with globalization and its impetus toward a singular, integrated global society rather than a clustering of internationalized societies (Zürn, 2002) nominal equal sovereignty as the freedom from interference by another state does no longer reflect contemporary practices. The increasing economic and societal trends towards de-nationalization have increasingly brought established national-territorial rules into conflict with those of other states. States have established cooperative and unilateral mechanisms to deal with competing jurisdictional claims.

To be clear, for the purpose of this paper, I am not interested in conflicting claims for a prescribing behavior. States have indeed been quite creative in this respect and there is more out there than more power backed cases to claim competence is the extraterritorial application of domestic rules systems (Stern, 2000).² For instance, cooperative approach is the mechanism of mutual recognition, i.e. the recognition of standards of products and production processes of a foreign state (Nicolaidis & Shaffer, 2005). Another case would be private international law that is crucial for commercial transactions. At its core, private international law is comprised of issues of jurisdiction, choice of law, and the recognition and enforcement

¹ See for instance the high profile conference on "Nested and Overlapping Regimes" (Princeton, February 24, 2006; http://www.princeton.edu/~smeunier/conference_nesting.htm [last visited April 5, 2006]) and the special issue of *Perspectives on Politics* 2009, vol. 7 (1). Also (Aggarwal, 2005) @ <http://www.princeton.edu/~smeunier/Aggarwal%20memo.pdf> [last visited March 10, 2013]

² To be clear, of the three dimensions of jurisdiction, only the jurisdiction to prescribe and the jurisdiction to sanction can be extraterritorial, whereas jurisdiction of one state to enforce rules in the territory of another violates international law.

of foreign judgments. In methodological terms the concept of private international law centers on attempts to specify 'rules of collisions' or 'conflict rules' in order to 'localize' a legal relationship that touches on more than one national legal order (Reimann, 1995; Stone, 1995).

Much more at the center of my interest are more recent studies on that not only point to the increasing relevance of international courts and tribunals (Romano, 2007), but either address the choice of states to include dispute settlement procedures into international agreements or point to different models played by courts. Concerning the latter, Alter distinguishes multiple roles that international courts may assume, acting in areas such as enforcement, administrative review, constitutional review or dispute settlement (Alter, 2013). While her interest was not in why and under what conditions international courts take a specific role, her analysis provide for some interesting insights. While sometimes may well strengthen state sovereignty against both international organizations and private actors, the story has a flip slip side too. International courts may also act against the interest of states and, depending on the respective judgments, have a negative impact on domestic sovereignty (Alter, 2008).

Also intriguing are the insights provided by Koremenos and Betz on the design of dispute settlement procedures in international agreements. They analyze different issue areas (security, economics, environment and human rights) with respect to the reference to different forms of dispute settlement (no mechanism in the agreement, informal mediation, arbitration and adjudication). There are two major observations. The first relates to the problem type and state that enforcement and commitment problems make dispute mechanisms more likely. The second refers to the degree of (factual) uncertainty and states that there is no necessity for formalized dispute resolution as information exchange provide for a sufficient degree of accommodating diverging interest (Koremenos & Betz, 2013: 380ff).

Regime Complexes

Still within the horizontal dimension, we may locate large portions of the more recent debate on the implications of a proliferation of international organizations and regimes. So far, the increasing institutional density and its range from integrated regimes at one end to a scattered or fragmented compilation of institutional arrangements is better mapped than analytically explained (Keohane & Victor, 2011; Raustiala, 2013). Indeed, the rather unstructured growth horizontal relationships among disaggregated international institutions has spurred a research rich agenda on institutional interactions, incompatibilities, regime interplay, linkages, overlaps or interconnections overlap (e.g. Alter & Meunier, 2006a, 2006b; Fischer-Lescano & Teubner, 2004; Laurence R Helfer, 2004; Leebron, 2002; Oberthür & Gehring, 2003, 2006; Raustiala & Victor, 2004; Ruloff, 1999). Although we are far from a sustained state of knowledge, Alter and Meunier's contribution on nested or overlapping politics stands out as it helps to structure the debate.

Referring to governance arrangements that are horizontal or *overlapping* characterize settings in which multiple institutions have authority over an issue, but agreements are not mutually exclusive or subsidiary to another (Alter & Meunier, 2009: 15). Generally, horizontal arrangements are issue-specific, restricted to functionally discrete jurisdictions ("task-specific jurisdictions" Hooghe and Marks 2003: 241). The absence of a system-wide design makes overlapping claims more likely. Contradictions between rules do not per se mean that one rule

is a violation of the other. Conflicts at the boundaries of two or more overlapping arrangements may be solved in one of two ways. Parties to the dispute may agree on conflict rules or on the delegation of the competence of dispute resolution to a third party. In contrast to this top-down approach that introduces hierarchical elements into overlapping arrangements, conflicts may also be solved in a bottom-up fashion through negotiations and on-going practice (Raustiala and Victor 2004).

The existence of overlapping claims may also spur dynamics such as forum shopping or regime shifting (cf. for the interface of human rights and intellectual properties (Laurence R Helfer, 1999, 2004; Sell, 2008). The overall implications of regime overlaps or complexes are debated, with interpretation including the optimistic hope of a global harmonization of law or fears of its fragmentation (c.f. Alter & Meunier, 2009; Fischer-Lescano & Teubner, 2004). What is interesting, however, is the broad support for the finding advanced by Raustiala and Victor who argue that where there are partially overlapping commitments, co-evolution tends to occur at the "joints" between regimes (Raustiala & Victor, 2004). The emphasis on a dynamic rather than a static understanding of regime complexes is indeed widely shared (see e.g. (Abbott, Green, et al., 2012; Aggarwal, 2005). However, most studies in this context relate to the emergence and interactions of different rules and norms rather than to the focus of this study, i.e. the resolution of disputes.

2.2 Vertical

The situation is different for the study of vertical relationships in international affairs. Vertical or *nested* relationships refer to situations "where regional or issue-specific international institutions are themselves part of multilateral frameworks that involve more states or multiple issues" (Karen J. Alter & Meunier, 2006a: 363). In analytical terms, nested relationships would imply what Ostrom has coined as polycentric governance characterized by an institutional and cultural framework that provides the overarching system of rules (Aligica & Tarko, 2011): 18. Put differently, in nested rule systems, all rules are nested in another set of rules that defines how another set of rules can be changed (Ostrom, 1990: 51) Nested rule systems also share most properties of what Lisbeth Hooghe and Garry Marks have coined as the "general purpose jurisdictions" of multilevel governance. They bundle decision-making and implementation competences into a limited number of territorial levels. As such, "jurisdictions form part of a systemwide plan: They are mutually exclusive at each territorial level, and the units at each level are perfectly nested within those at the next higher level" (Hooghe & Marks, 2003: 241). Nested structures or general purpose jurisdictions imply hierarchical relationships as their "pyramidal structure... lends itself to hierarchical direction" typically with a "single court system with ultimate authority to adjudicate among contending jurisdictions" (ibid.: 236). Although at the international level it is not always clear who has the final authority to resolve conflicts, this work maintains hierarchy as a property of nested relationships.

In empirical terms, the hierarchical pattern can be traced in the establishment of third party institutions endowed with the competence to interpret norms and to rule in case of conflict.

This pattern has become more prominent over the past decades (Romano, 2007). Apart from the European Court of Justice and the European Court of Human Rights, the Dispute Resolution Panel of the World Trade Organization is again one of the most prominent and best researched institutions (Hoekman & Kostecki, 2001; Jackson, 2000a, 2000b). With international courts and tribunals flourishing (Shany, 2003), the delegation of authority to a third party for solving conflicts has become an important feature in the discussion of the legalization of international politics (see the contributions Goldstein, Kahler, Keohane, & Slaughter, 2001). Breaking the spell of international relations' basic assumption of an anarchic international system that lacks a superior authority beyond state level, the institutionalization of hierarchy in the form of international courts is certainly an important feature of institutional change.

In this respect, states agree not only to cooperate internationally in order to maintain their operational sovereignty. In addition, the competence-competence is also delegated to an institution beyond the nation state. The term competence-competence involves, on the one hand, the competence to determine its own jurisdiction, and, on the other hand, the ultimate authority to interpret the constitutive principles of a community. In the European Union it were the judgments of the European Court of Justice that decisively contributed to rendering a setting of multiple regimes into a system with a norm hierarchy.

The emergence of hierarchical power dynamics that incorporate the national and the international levels as well has spurred a lively debate on constitutional analogies in the international realm.³ Here, too, we come across the two positions mentioned in the context of the horizontal dimension. Some point to the observation of a rising tension between the proliferation of international courts and tribunals and the concurrence of jurisdiction that could lead to fragmentation of international law due to the lack of hierarchy and coordination (Lavranos, 2005). In contrast, others use the same premise to refer to the possible constitutionalization of international law. A case in point is the constitutionalization of human rights protection in the European Union that can be read against the competing claims of domestic supreme courts, the European Court of Justice and the European Courts of Human Rights (Schimmelfenning, 2006). Yet another case refers to the contribution to a more or less robust rule of law system by the Anden Tribunal of Justice (Helfer, Alter, & Guertzovich, 2009).

2.3 Transversal

Neither nesting nor overlapping, however, completely captures the transversal or transnational dimension. What we may see in these cases is a *parallelism* between a specific segment of a general purpose jurisdiction and the specific purpose of a single issue jurisdiction that serves

³ See for competing jurisdictional claims of courts and tribunals also (Shany, 2003)

the same end.⁴ Also, one might imagine the coexistence of an issue-specific international institution and efforts of private actors aimed at addressing the same end.

The transversal or transnational dimension finally casts aside the state-centric blinders. It allows for incorporating the booming knowledge on private transnational regulatory regimes and on patterns of interaction between states and private regulatory activities. By so doing, it also enables us to incorporate competing claims for authority in terms of prescription or dispute settlement in different setting. It is indeed one of the most daunting challenges for the analysis of international politics today to cope analytically with the coexistence of different standards and assertions for authoritative governance, they may involve public and private assertions of jurisdiction referring to the national, international or transnational levels, they may be supporting or enabling or competitive even within the same issue area; and, finally, they may spur quite different dynamics as they may contribute to either a rising or a lowering of regulatory standards.

By way of illustration of the complex dynamics we can take the efforts to foster sustainable forestry. Constrained by the liberal international trade regime to impose taxes on non-sustainable grown timber, the Austrian government substantially supported the private Forest Stewardship Council standard. This society-based Forest Stewardship Council had to compete with various industry-led initiatives (the Sustainable Forestry Initiative, SFI, in the USA and the Forest Management standard in the United States of America and Canada respectively). Over time, a slow convergence with state regulatory and management programs was observed in this overall governance arrangement concerning standardization, certification and enforcement on sustainable forestry – although the level standard to which the different systems converged were lower than the original FSC standard (Abbott & Snidal, 2009a; Bartley, 2003; Meidinger, 2007).

Meidinger introduced the concept of "competitive supragovernmental regulation" to describe a "novel and expanding mode of governance in which supragovernmental regulatory programs develop competing standards and implementation mechanism" (Meidinger, 2008). Yet another one refers to the concept of orchestration, i.e. strategic efforts of international organizations to incorporate intermediary actors (e.g. NGOs) on a voluntary basis, by providing them with ideational and material support with the objective to address target actors in pursuit of IGO governance goals (Abbott, Genschel, Snidal, & Zangl, 2012). And finally, the concept of a governance triangle provides additional analytical cut as it takes into account not only the contributions of states, firms and non-governmental organization to transnational governance processes (Abbott & Snidal, 2009b).

The case of sustainable forestry is certainly a prominent but one example and there is an increasing number of case studies that either addresses a diverse area of issues including accounting (Botzem, 2012), carbon emissions (Green, 2011), security (Deitelhoff & Wolf, 2012), finance (Halliday & Carruthers, 2009) or fisheries (Gulbrandsen, 2010) or focusses on

⁴ By linking the horizontal and the vertical dimension, we broaden the concept of parallelism as it was introduced by Abbott and Snidal that essentially refers to the coexistence of different private governance schemes (Abbott and Snidal 2006).

analytical themes such as legitimacy or the democratic quality of transnational regulation (Black, 2008; Meidinger, 2008).

To briefly sum up central aspects of the above considerations I would like to highlight a number of points. Firstly, when talking about international or transnational governance, we need to account for the full range of complex interactions between public and private transnational regulatory schemes. Secondly, of the various dimensions of contemporary governance in the triangle of states/international organizations, firms and societal organization, the resolution of disputes is certainly the one that has been least analyzed. Thirdly, rather than being static, complex regulatory structures are highly dynamic and patterns of interactions may spur dynamics of co-evolution between different governance contributions. Fourthly, this holds also with respect to structural features of governance arrangements. Rather than taking overlapping, nested or parallel structures as being given at any point in time we may pay attention also to transformative dynamics in structural terms. Finally, we should not assume that these dynamics are contingent on factors such as history, technology, consumer mobilization etc.. Rather we may well pay attention to strategic moves and purposeful actions of parties involved in the process.

With this set of observations in mind, we may now move to a number of cases and focus on the empirical illustration of the interplay between different sites and levels concerned with the resolution of disputes. The focus is structural on the patterns of interaction between different governance contributions in the transversal realm. The two cases are commercial arbitration and dispute resolution in the area of sport.

3 Private Modes of Dispute Settlement: (No) Islands of Transnational Governance

3.1 Commercial Arbitration⁵

Any cross-border economic contract faces the problem that sanctioning of opportunistic behavior suffers from a constitutional uncertainty of transnational trade, i.e. the limited protection of territorial systems of property rights. Given shortcoming that is inherent in systems of territorial-based public ordering, the private resolution of disputes between merchants had played an important role for centuries. The 20th century, in particular since the 1970s, has experienced a similar development. As international trade has continued to expand, commercial arbitration has become the universally accepted method for addressing commercial disputes. Transnational commercial arbitration allows for contracting parties to choose to resolve any disputes that may emerge by reference to a private arbitral tribunal rather than through litigation in public courts. With all qualifications related to efforts to quantify decentralized interactions, estimates are that about 90 per cent of all cross-border

⁵ This section builds on (Lehmkuhl, 2006, 2011)

contracts contain an arbitration clause, even reaching 100% of cases in some industries such as engineering (Bernstein, Tackaberry, Marriott, & Wood, 1998).

The decentral provision of dispute resolution services finds expression in the existence of a large number of locations and arbitrator. While traditionally arbitration is associated with the arbitration court of the International Chamber of Commerce, arbitration has become a booming industry, with the number of market participants increasing significantly as old organizations have adapted and new organizations have emerged in reaction to the new demand (see the following table).

Transnational Dispute Resolution: Cases Received 1992-2010⁶

	'92	'93	'95	'96	2000	'04	'06	'07	'08	'09	'10
CIETAC	267	486	902	778	543	850*	981*	1118	1230	1482	1352
AAA	204	207	180	226	510	614	586	621	703	836	888
ICC	337	352	427	433	541	561*	593*	599	663	817	793
HKIAC	185	139	184	197	298	280	394	448	602	649	624
LCIA	21	29	49	37	81*	87*	133	137	213	232	237
SIAC	7	15	37	25	83	129	119	70	71	114	140
Stockholm	44	78	70	75	73	50	141	84	176	215	197

CIETAC China International Economic and Trade Arbitration Commission

AAA American Arbitration Association

ICC International Chamber of Commerce

HKIAC Hong Kong International Arbitration Centre

LCIA London Court of International Arbitration

SIAC Singapore International Arbitration Centre

STOCKHOLM Arbitration Institute of the Stockholm Chamber of Commerce

The traditional advantages of arbitration compared to court litigation are the procedural flexibilities in the choice of location and arbitrators, the expertise of arbitrators in a respective area, the confidentiality, time- and cost-effectiveness. However, some of the advantages have been put at risk for a number of reasons, incl. changes in the traditional culture or the publication of awards in academic journals (Dezalay & Garth, 1996, 2010). While this indicates already the necessity to put commercial arbitration into the broader framework of its socio-economic environment, I would focus on often overlooked structural linkages between the private template to resolve commercial disputes and its public environment.

For our analysis we can distinguish four dimensions at the interface between transnational commercial arbitration and mandatory systems of law. Four dimensions can be identified: arbitrability, procedure, substance and enforcement. The first dimension to be considered

⁶ Source: <http://www.hkiac.org/index.php/en/hkiac-statistics/5> [last visited 201303-15]. It is important to qualify some of the data with respect to the actual services provided. For instance, the The HKIAC handled 624 dispute resolution matters in 2010. These include 291 arbitration matters, 107 domain name disputes, and 226 mediation disputes. Of the 291 arbitration matters, 175 were international and 116 were domestic. Of the total, 16 cases were fully administered by the HKIAC in accordance with its rules. Of the total, 28% involved construction disputes, 55% involved commercial disputes and 17% involved maritime disputes.

refers to the question of what might become subject to an arbitral tribunal. Although there is a certain variation in what different states conceive as *arbitrable* or not, a common core of subject-matters that have traditionally been excluded from arbitration include matrimonial status, bankruptcy, security laws, intellectual property rights or antitrust matters. The second dimension refers to the *procedural* law governing the process of transnational dispute settlement. Unless differently agreed by the parties, an arbitration is governed by the law of the place in which it is held. The most controversial discussion on the autonomy of transnational arbitration revolves around the third dimension, that is, the question regarding which rules govern the *substance* of the dispute. Especially in the political science literature, the substantive dimension as a strong case for the liberation of transnational commercial arbitration from constraints of national provisions. It serves to prove the emergence or existence of non-national norms and of a stateless arrangement to resolve private trade disputes (A. Claire Cutler, 1995; Mattli, 2001). Finally, the fourth interface between transnational arbitration and national law refers to the *recognition and enforcement* of the arbitral award. In order to foster purpose of arbitration is to arrive at a final and binding decision, states have signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958. The New York Convention significantly restricts the capability of national courts to annul or set aside a foreign arbitral award. Being accepted by 146 states (as of 2012) the Convention contributes to the observation that arbitral awards rendered in a foreign country are more likely to be accepted and enforced domestically than are decisions of foreign courts.

The deeper we delve into the actual reality of transnational commercial arbitration, the less convincing are accounts that stick to the idea of an increasing detachment of arbitration from national control, or more precisely, from the reach of national legislation and control of the judiciary (A Claire Cutler, 2003: 180; Stone Sweet, 2002: 336pp). Rather, there are different and often contradicting dynamics at work at all four interfaces between the private and public realm. I will just mention some aspects.

On the one hand, arbitration has become a growth industry, with arbitral centers, law firms and individual lawyers have a common interest in achieving an increasing acceptance of arbitration as a mode to settle transnational disputes. In their scramble for a share in the arbitration business, most states have revised their arbitration laws. By that, they have contributed to an extension of the autonomy of the parties to choose the provision governing their disputes and to a narrowing of the scope of review of arbitral awards. What is more, municipal courts may be called in to support the conduct of an arbitration proceeding, for example with respect to interim relief measures. If, for instance, a party violates its prior agreement and refuses to arbitrate, it may be forced to stick to the prior agreement by a court, which by request of an arbitral tribunal threatens to seize some assets from the respective party.⁷

⁷ Interim measures may relate to protection to preserve the subject matter of the dispute or other supportive means discovery of documents, interviews and the giving of evidence by affidavits.

On the other hand, there are trends that point exactly into the other direction. For instance, Dezalay and Garth were the first to describe a change of culture in and a juridification of arbitration. Their explanation for this trend was a 'high-jacking' of arbitration by US American law firms, i.e. the tendency toward more and more adversarial and legalistic procedures resulting from parties' lawyers that seek every advantage possible for their client (Dezalay & Garth, 1996). Furthermore, that fact that municipal courts may be called in as a threat to a recalcitrant party and to grant legal effect to the arbitrator's decision. This example may provide support to the supposition that arbitration proceeds in the shadow of judicial power (Park, 2005): 904. Put differently, transnational commercial arbitration only exists with the acquiescence of the 'sleeping watchdogs' who might wake up at any time, i.e. courts may alter the interpretations of laws in ways that undermine the use of arbitration (Benson, 1998): 284).

The dynamic relationship between private dispute resolution by arbitration and litigation on courts may play out in a completely different way. For instance municipal courts manage may overcome their relative disadvantages compared to arbitration and may manage to build a reputation of being competent in specific issue areas and, thus, rendered themselves into an attractive alternative to transnational arbitration. A case in point is the regional court (*Oberlandgericht*) in Dusseldorf in Germany has gained a reputation of skillfully resolving disputes involving intellectual property rights. This reputation has rendered the court into an alternative to arbitration for the pharmaceutical industry.

A final aspect to be addressed relates to the question on the normative implications of the existence of public and private sites to resolve commercial disputes and respective dynamics in their interactions. My cut into this question refers to the concept of public policy. Violations of public policies have long been a ground for refusing both the recognition and enforcement of foreign judgments and awards. Although the New York Convention limits the grounds for refusing foreign arbitral awards, the concept remains vague and there are variations from state to state. Although it seems that a narrow definition of what constitutes a legitimate ground for rejecting a arbitral award has gained certain predominance (Committee-on-International-Arbitration, 2000), there is ample evidence that the national public policy argument may be venue to repoliticize arbitration. For instance, a review of judicial interference in a couple of courts in the USA determined that decisions based on the national public policy argument have further reaching implications, since they bear a strain of parochialism and protectionism (Donahey 1997). In a different setting, the Hong Kong Court of Final Appeal held that courts may want to examine the jurisprudence of courts in other countries with respect to the enforcing of arbitral awards in case awards protected by the New York Convention did not meet their respective public policy standards (Committee-on-International-Arbitration, 2000: 3502pp).

What we may take from these considerations is a strong case for the dynamics in the interaction between public and private modes of dispute resolution. These dynamics reveal that the tendency towards a "transnational liftoff" may be countered by "national points of touchdown," for instance, in form of parochial attitudes in court review of cross-border conflict resolution (Wai, 2002).

3.2 Dispute Settlement in Sports

With the sport industry contributing about three to six per cent to the total world trade, sport has become more than just a game (McAuliffe, Rigozzi, & Kaufmann-Kohler, 2013). Their the increasing economic relevance make sports related issues also a major source of legal controversies, including disputes about transmission right or violation of doping provisions. Interestingly, the structures dealing with these disputes differ significantly from that of commercial arbitration. As we have seen, commercial arbitration takes place in a context of decentralized arbitration service providers and, apart from national courts, there is no superior review or appeal mechanism. In contrast, over the past decade in the area of sports disputes the decentralized sites of disputes resolution have become part of a system in which the Court of Arbitration for Sports (CAS) more and more acts as ultimate authority.

With a focus on the context of the CAS we can sketch the structure of the international system of sports as being composed of three parallel orders: the Olympic Movement, the variety of sports, and the anti-doping system. The orders are based on contractual arrangements between sports associations at the national and international level and that assign a quasi or de facto monopoly of authority to organizations at the international level. Let's briefly address the three structures in turn (see for the following (Mazzucco & Findlay, 2010)).

To start with the *Olympic Movement*, we may present the Olympic Charter as the main instrument that provides the International Olympic Committee with a supreme position with respect to the primary constituents of the Olympic Movement, that is international and national sport federations, national Olympic committees, organizing committees of the Olympic games, and individuals participating in the Olympic games. Safeguarded by the Charter, the Olympic Movement is shielded from influences of external and in particular public interventions.

Secondly, parallel to the structure of the Olympic Movement there is a system in which *international federations* assume supreme authority. With some few, though prominent exception such as boxing, the organization of sports characterizes a monopolistic structure in which international associations have de facto monopolistic and hierarchical powers over both their national member federations and individual persons. On a contractual basis the superiority of the operational and management rules of international federations as expressed in their statutes and regulations is guaranteed; including the threat of exclusion from the federation for national federation or from specific sport events for individuals.

The third element of the international sport system is the anti-doping system. At the heart of the system is the World Anti-Doping Agency (WADA) that has established itself as a central actor in the fight against the use of performance enhancing substances (Wolf, 2012). As a private entity under Swiss law, the WADA builds much of the leverage in its anti-doping activities on the World Anti-Doping Code. The code directly binds all its signatories, that is the International and National Olympic Committees, international federations and national anti-doping agencies; and also indirectly and national federations and individual athletes through the hierarchical and contractual nature of sport (Mazzucco & Findlay, 2010).

In each of the three areas sport we find an explicit culture of private dispute resolution in form of sport-specific arbitration tribunals. In this milieu, the international Court of Arbitration for Sport (CAS) in Lausanne plays an outstanding role as it settles disputes related to the IOC, WADA and most international federations.⁸ Its awards are final and binding on the parties, and given the seat of all CAS arbitrations is in Lausanne, its awards may on be reviewed and vacated by the Swiss Federal Tribunal.

Indeed, the Swiss Federal Tribunal played an important role in the history of the CAS (Mitten, 2009). Prior to the installment of the CAS by the International Olympic Committee in 1983, there was no recognized independent dispute resolution body. And even after its installment, there was a great skepticism on the neutrality of a body that was so closely linked to the IOC. The pertinent perception that the CAS lacked independence ultimately led to a judicial challenge to the validity of its decisions before the Swiss Federal Court in 1982. In its decision the highest Swiss court criticized the proximity between the CAS and the IOC and questioned its status as a proper arbitral body. In 1994, the IOC improved the international perception of the CAS's independence and impartiality by creating the International Council of Arbitration for Sport as a means to control the CAS while at the same time shielding it in its function and operation from direct involvement of the IOC. Over time, the further steps towards independents in structural terms and in terms of finance had been made so that the Swiss Federal Court stated in its *Lazuntina* judgement in 2003 that the CAS is no longer a vassal of the IOC (Blackshaw, Siekmann, & Soek, 2006; Kane, 2003).⁹

In organizational terms, three functions may be distinguished. Firstly, in the *ordinary arbitration division*, the CAS is a court of first instance that adjudicates sport-related disputes that are directly and voluntarily brought for resolution. Secondly, it provides *ad hoc arbitration* on site at the Olympic Games, Commonwealth Games and the European Football Championships to deal with disputes that arise during the games directly and within 24 hours. Thirdly, there is an *appeals arbitration division*. This is perhaps most interesting because in this function the CAS acts as a supreme court for final-instance decisions taken by all international and national federations and national Olympic committees that have submitted to its jurisdiction. This function includes also exclusive jurisdiction over doping-related disputes, regardless the actual recognition of CAS jurisdiction by an international federation of national Olympic committee. In this respect the CAS's role as an international regulator is most evident (Mazzucco & Findlay, 2010).

The anti-doping cases take me back to main interest on the patterns of interactions. So far the following aspect have between mentioned: a) the granting of private self-regulatory competences for all sports-related affairs including the resolution of private disputes by national laws; b) de facto monopolistic regulatory structures in the majority of sports—including the Olympic Movement; c) the successful challenge of the dominance of the IOC in

⁸ Actually, most international federations allow for an appeal of their own decisions to the CAS; and even prominent exceptions from the general rule such as the Formula One do so in the mandated realm of the WADA Anti-Doping Code.

⁹ Danilova and Lazuntina v IOC and FIS (2003) 3 Digest of CAS Awards 2001-2003 649, 688

dispute resolution before the Swiss Federal Court, d) a gradual increase of the acceptance of the CAS as the court of appeal in many sports (from 1 case in 1986 to 365 cases in 2011); and e) the exclusive status as appeal tribunal in the area of anti-doping issues.

With respect to the latter, the CAS experienced *de facto* a delegation by national policy makers. By signing the International Convention Against Doping in Sport states have waived the opportunity to enact alternative anti-doping provisions and, rather opted for the WADA Code as a harmonized international approach. It has been argued that “this institutional mandate that has provided a sense of legitimacy to the authority of arbitrators to frame the outer limits of regulatory discretion among sport bodies by intervening in the substance” (Findlay & Mazzucco, 2010): 31.

But this is not the only shift in relative importance between the public national and the private transnational level. Similar to the first case, arbitral awards in sports benefit also from the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Actually there is an interesting difference in the way in which some courts exercise their judicial review. Both the Swiss Federal Court and courts in the United States of America in their decisions acknowledge that judicial review in sports matters should not be driven by motives of nationalism and ethnocentrism. In contrast, the European Court of Justice took a different stance and claimed that in case of incompatibility with European competition provision, judicial review may not only relate to procedural aspects but also to the merits of the arbitration award (Mitten, 2009: 64ff).

A final comment relates to the question on the normative implication of the emergence and operation of a strong transnational body resolving disputes in sports. There is some evidence to the observation that the interaction between domestic courts at regional and federal level, national and international sports federations and the international Court of Arbitration for Sport have contributed to the spread of universal legal principles. Mazzucco and Findlay state that there has been a significant contribution by the CAS “to ensure that decisions made by sport bodies meet a minimum standard of fairness” and that it has “invalidated decisions made by sport bodies that were unreasonable, procedurally unfair, made in bad faith, made without clear authority, or made without transparent and objective criteria.” Overall, CAS interventions have “forced sport bodies to adopt decision-making practices that are more respectful of athletes’ procedural rights” (Mazzucco & Findlay, 2010: 19).

In this respect, the pull by the CAS towards better protection of athlete’s rights went hand in hand with the push by domestic courts into the direction. The higher the economic stakes of individual athletes have become in their sport, the more often they went to domestic courts against their sports association in case they were excluded from the participation in sport events. Domestic courts have become increasingly sensitive to failures of sport associations to be attentive to fundamental procedural rights of individuals (Lehmkuhl 2004).

4 Conclusion

The previous considerations confirmed the starting point of this article that a focus of pattern of dispute resolution is a worthwhile enterprise. This holds not only with respect to the way in which overlapping or nested constellations in the realm of public actors are dealt with. Rather, conceptual reflections and empirical cases make the transversal or transnational dimension particularly interesting. As has been shown both static descriptions and one-sided normative assumptions on the negative implications of the rise of private authority proved wrong. What the two cases in particular have shown is, firstly, that patterns of governance are highly dynamic also in the area of dispute resolution. Secondly, the implications of the interaction between public and private contributions to the settlement of transnational disputes are far from being necessarily negative. In particular in the area of sports this is apparent. Backed by public support, the private transnational body managed to assume significant leverage to induce norm change in domestic institutions that have for the best part of their existence fenced off any interventions by domestic authorities. More analytical reflection and future research may address the examination of framework conditions for developments of this kind.

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